

Orbital Enterprises Vs. Collector of Customs

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Calcutta

Decided On : Jun-10-1987

Reported in : (1988)(15)LC211Tri(Kol.)kata

Appellant : Orbital Enterprises

Respondent : Collector of Customs

Judgement :

2. Shri Saraf also submitted a written note about his oral submissions which was taken on record along with other documents submitted by him.

3. Shri Jain representing the department submitted that he relies on the Board's order and the contents that the Board's finding is correct.

It was his submission that the Board has held the Collector's finding regarding Indian origin of the goods as correct as the Collector had based his finding on the opinion of the NAFED Agmark authorities. It was his submission that the Collector was justified in placing reliance on the opinion of these organisations. He would, therefore, request that the Board's order may be upheld.4. The learned barrister reiterated that the Board's order and the Collector's order may be set aside as the action was illegal ab initio and the Collector had no power to stop export and the goods were not liable to confiscation and they were not liable to any fine or penalty.

He emphasised that they had followed the prescribed law and procedure and the stopping of the consignment was an illegal and malafide act.

The Board in its findings had not discussed or evaluated the so-called evidence relied upon by the Collector Board's reliance upon the Collector's order was misplaced and its finding on the point of country of origin was wrong. The Collector himself was wrong in relying on the opinion of NAFED & Agmark authorities. The person who gave the opinion was not expert and his opinion was of no evidentiary value.

5. Moreover, the Collector had not acted as per his own best judgement or discretion but had taken action & passed the impugned order at the behest of some higher authorities. The order was, therefore, malafide.

It was indeed an instance of abdication of jurisdiction by the Collector. His order was, therefore, not proper order.

6. They have suffered for nearly nine years from 1971 onwards for no fault of their own and a lot of harassment and financial loss and difficulties have been caused to them. He would pray that in view of their submissions their appeal may be accepted and allowed.

7. These five appeals have been heard together since the same questions of law and facts are involved. This order will govern all of them.

8. It appears that original revision applications under Section 131 of the Customs Act were filed before the Secretary to the Govt. of India.

They have since been transferred to this Tribunal on its creation in 1982. They have been heard here as appeals.

9. The present cases relate to the export of several consignments of turmeric by the appellants who are businessmen and citizens of Nepal, to Singapore on export licence obtained from his Majesty's Govt. of Nepal in transit through India.

10. It is the case of the appellants that these goods were of Nepalese origin and they had complied with all the formalities as laid down in the Treaty of Transit and

Protocol and Memorandum of March, 1978 between the Govt. of India and His Majesty's Govt. of Nepal.

11. The consignments in question reached Indian border at Jogbani where they were checked and examined by the Land Customs authorities who were satisfied that the goods were of Nepalese origin and the appellants had complied with all the necessary formalities as laid down in the above mentioned Treaty between the two Govts. Accordingly, the Land Customs authorities allowed the goods to travel to Khidderpore Dock for onward journey to Singapore.

12. At Khidderpore Dock, Calcutta, the Customs authorities seized the goods alleging them to be of Indian origin. They issued show-cause notices and relied on the report of National Agricultural Cooperative Marketing Federation of India Ltd. known as NAFED. They also issued supplementary show-cause notices stating that Nepal was not in a position to export the quantity of turmeric seized at Khidderpore Dock and in this connection they relied on an extract of a purported booklet "What Nepal offers" issued by the Trade Promotion Centre, Kathmandu and also the extracts of the statements from the Border Examiner, Land Customs at Indo-Nepal Border.

13. During the course of hearing various points were taken by both the sides. On behalf of the appellants, the brief notes of the arguments were also submitted. In view of the respective submissions by the parties I proceed to examine them in detail.

14. The first point on behalf of the appellants is that when the goods in question had reached Jogbani the Land Customs authorities posted there had certified that the goods were of Nepalese origin and there was proper compliance with the formalities laid down in the Treaty between the two countries.

In this connection they have drawn my attention to the Customs Transit Declaration (Export) placed at page 31 of the paper book with respect to 155 bags. There is an endorsement made in it by the Chief Customs Officer, Customs Office, Biratnagar, Govt. of Nepal to the effect that necessary checks have been made in terms of the provisions of the export procedure of the Treaty of Trade & Transit

between the two Govts. and the goods certified therein were allowed to move to Calcutta port duly sealed. There is also an endorsement of the Border Examiner, Land Customs, Jogbani on it. In it the description of the goods shows that 155 bags of Nepal origin turmeric were packed in double gunny bags. In any view of the matter it has now been disputed that the Border Examiner of the Customs department posted at Indo-Nepal Border had examined the goods in question and had cleared the same for their onward journey to Khidderpore Dock.

15. Shri Saraf, the learned advocate appearing on behalf of the appellants has submitted that this situation is in their favour, inasmuch as the goods in question were found to be of Nepalese origin on proper check and verification by the competent officers of Indian Customs.

16. Shri Saraf has also drawn my attention to a letter dated 15/16-11-1978 from Shri J. Varghese, Branch Manager, NAFED to the Asstt. Collector, Customs, Nepal Unit, Custom House, Calcutta. It may be mentioned here that the Asstt. Collector, Customs, had requested Shri Varghese to examine the sample of turmeric sent to him to find out whether they were of Indian or Nepalese origin. In his report he had stated that: "In fact it is very difficult to give a firm opinion about the origin of turmeric on the basis of samples, so far as in the border area of Nepal and India, the same variety of turmeric is being grown." However, he has referred to the report of the Agmark authorities according to which, out of 33 samples sent, 14 of them distinctly resembled Indian variety; whereas 19 of them could be said to be of Indian or Nepalese origin. He has further added that the laboratory tests will not help in determining the origin of the turmeric in these cases, so we have to rely largely on visual examination. The report of the Agmark authorities is also annexed along with this letter which states that out of the 33 samples, 14 resembled established Indian variety and 29 did not resemble important Indian varieties. The next line in this report, however, is very important which may be quoted below: ". . . But it may not be said whether these are products of India or Nepal since same local varieties of turmeric are also cultivated along the bordering regions of Indo-Nepal border and the products of both the countries may resemble each other. . . ." 17. The appellants also relied on the reports of the Border Examiner, L.C. Station, Nepalgunj & Raxaul in which they had stated that they

had no reason or anything otherwise to believe that these consignments of turmeric were not of Nepalese origin. It may be stated here that while whatever has been stated by the Border Examiners may or may not be correct, but the appellants have contended that at least the department has not challenged their reports.

Shri Saraf has submitted that from all these it would appear that since Nepal and India are bordering countries and since the same stretch of land extends between the two countries on both sides of the boundary in which turmeric is grown, it is not only difficult but almost impossible to state, so far as the turmeric grown on this stretch of land is concerned, whether it is of Indian or Nepalese origin.

18. In this connection my attention has been drawn to the case of Padam Kumar v. Addl. Collector of Customs (AIR 1972 SC P. 542). This was a case of export of Masurdal from Nepal to other countries through Calcutta. It was held by the Customs authorities that the Masurdal in question was of Indian origin. It was, however, held by the Hon'ble Supreme Court that there was absolutely no basis for any such conclusion by the adjudicating officer, since the witnesses examined frankly conceded that it was not possible for them to say distinctly that the dal in question was of Indian origin. They further deposed that they were unable to distinguish between Indian Dal and the Nepalese Dal. Shri Saraf has submitted that the facts of this case are similar to the facts of the present cases - and, therefore, it would be to presumptuous to say that the goods in question were of Indian origin and not of Nepalese origin.

19. Shri Saraf the learned advocate has submitted that in the order-in-adjudication, the learned Collector has relied heavily on the evidence given by Shri Varghese treating him to be an expert on the subject. So far as his report as also the report of the Agmark authorities are concerned, I have already discussed them in detail.

From those discussions it appears that there was no material to prove conclusively that the samples of the turmeric sent to those authorities were of Indian origin. So far the evidence of Shri Varghese is concerned the first objection raised against it is that he cannot be treated to be an expert by any stretch of imagination.

20. My attention has been drawn to the fact that as per Section 45 of the Evidence Act, the opinion of the Expert is a relevant fact and can be taken into consideration. In the present cases the question to be determined is whether the turmeric in question was of Indian or Nepalese origin. In the course of first evidence Shri Varghese stated that he is an ordinary M.A. and does not possess any special skill or qualification so far as the scientific examination of the turmeric to ascertain its place of origin is concerned. He has further stated that he is giving his opinion on the basis of his experience. It has been submitted by Shri Saraf that in this view of the matter he cannot be treated to be an expert, because in that case anybody who has some experience can always claim to be an expert. Even in his report dt.

16-11-1978 itself he has frankly admitted that no firm opinion about the origin of the turmeric on the basis of the sample can be given. In his cross-examination it appears that Shri Varghese had admitted that he did not do the analysis of the samples personally. He has, further admitted that he does not maintain special records of his examination.

As a matter of fact, the basic analysis is done by the assistant to put it up before him on which he gives a look and gives his conclusion.

From this method it appears that there was no scientific analysis of the sample done by Shri Varghese and, therefore, his opinion can hardly be of any help. So far as his assistants who are said to have analysed the turmeric are concerned, they have not been examined and their names have not been disclosed. Shri Varghese has admitted that he had gone to Nepal 10 years ago but there is no record to show that or the fact that he had occasion to see Nepalese turmeric. From all these it would appear that Shri Varghese cannot be said to be an expert within the meaning of the Section 45 of the Evidence Act and that this opinion, if at all, is not based on his own scientific examination of the samples.

Hence, any such opinion cannot inspire confidence. It is well known that in the eyes of law an expert is one who has acquired specialised knowledge, skill or experience in any branch of science, trade or profession.

21. Moreover, Shri Varghese has not given any scientific data to come to the conclusion that the turmeric in question was of Indian origin.

As a matter of fact, he has admitted in his report that the same was not put to any chemical examination since according to him the laboratory test will not help in determining the origin. In any view of the matter, as observed by the Supreme Court (AIR 1959 SC 488), the Court can refuse to place its reliance on the opinion of an expert which is unsupported by any reason.

22. So far as the Agmark authorities are concerned, it appears that nobody was produced on behalf of the Department from this organisation for his evidence and cross-examination. I have already discussed the report dt. 13-11-1978 of Sr. Marketing Officer of this organisation in which he has candidly stated that it cannot be said whether the samples of turmeric sent to him are products of India or Nepal, since in the bordering region of Indo-Nepal border same local varieties of turmeric are cultivated and they resemble each other." In view of this report of the Agmark authorities and in absence of the examination or cross-examination of anybody from that organisation it is very difficult to conclude on the basis of any such report that the turmeric in question was of Indian origin and not of Nepalese origin.

23. In the order-in-original a reference has been made to booklet titled as "What Nepal offers". It has, however, been submitted by Shri Saraf that this booklet relates to the availability of the turmeric during the year 1973-74 and on its basis the figures of production or consumption of the turmeric for the years 1978-79 cannot be worked out.

He has, further, submitted that there is a report of the National Planning Commission for the year 1976-77 which will show that in Nepal 3046 hectares of land was under turmeric cultivation and the total value of the turmeric produced was Rs. 53,308,000/-. From the order-in-original passed by the learned Collector Customs, Calcutta it appears that this point was taken up for consideration as its page 3.

However, relying on the booklet, "What Nepal Offers" the learned Collector has concluded that the annual production of turmeric in Nepal was only 200 MT. Therefore, he has concluded that the turmeric said to be exported by the appellants could not be of Nepalese origin.

24. In this connection it may be mentioned that it will be too spacious to rely on any such data to reach the conclusion that since Nepal was producing only 200 MT of turmeric in a particular year, the consignments in question were turmeric of Indian origin. Shri Saraf has submitted that as against it he is placing reliance on the report of the National Planning Commission for the year 1976-77 published in November 78. According to which the turmeric was being grown in Nepal over 3046 Hec. of land and calculating its value at Rs. 3.47 per Kg.

for the total quantity of 15,362 MT, would be Rs. 53,309,000/-. From these discussions it would appear that the Department has not been able to show that the goods were of Indian origin and not of Nepalese origin. The report of the National Planning Commission for the year 1976-77 was also shown to the learned adjudicating officer. It was pointed out by Shri Saraf, the learned advocate, that the similar question with respect to Masurdal came up for consideration before the Hon'ble Supreme Court in the case mentioned above (AIR 1972 SC P. 542).

Under the circumstances it was submitted that it has not been properly proved by the department that the turmeric in question was of Indian origin and not of Nepalese origin.

25. It was submitted that the main point involved in the present appeals is whether the turmeric exported from Nepal by the appellants in transit through India were of Indian origin and whether the same has been conclusively proved to be so by the Customs authority. It was further submitted that the next point for consideration would be whether the appellants were entitled to export the said goods under the Treaty between the two Govts. On behalf of the appellants it was further submitted that the order of the Collector has also the order of the Board are illegal ab initio and, therefore, they may be set aside.

It was further submitted that, as a matter of fact, the Collector had no power to stop export of the goods since they were covered under the Treaty between the two countries. It was pointed out to me that, as a matter of fact, the goods were being exported from Nepal to a third country and it was only passing through India in terms of the Treaty.

The appellants have further submitted that they have followed the necessary procedure prescribed by law and the action of the Customs authorities stopping the consignments was illegal and malafide.

26. In this connection my attention was also invited to the order passed by the learned Member, Central Board of Excise and Customs. From this order it would appear that the appellants' prayer by giving an opportunity of personal hearing and the request for adjournment were turned down. It further appears that the learned Member has simply repeated the facts stated in the order passed by the learned Collector by observing as follows: "Going by the evidence discussed in the Collector's orders it is not possible to hold that his finding that the goods are of Indian origin was not based on adequate evidence." 27. It has been submitted that no specific and definite finding was given by the learned Member of the Board. There has been no proper discussion about the merits of the case of the appellants. His order appears to be perfunctory. While he set aside the order of confiscation of the goods and imposition of penalty, he rejected the appeals.

28. In reply Shri Jain, the learned J.D.R. has submitted that he relies on the Board's order and its contents. According to him the Board's findings are correct. It was his submission that the Board held the Collector's findings regarding Indian origin of the goods as correct as the Collector has based his findings on the opinion of the NAFED and Agmark authorities. It was submission that the Collector was justified in placing his reliance on the opinion of these organisations.

29. The learned Banister reiterated that the Board's and the Collector's order may be set aside as the action was illegal, ab initio and the Collector had no power to stop export and the goods were not liable to confiscation and they were not liable to pay any fine or penalty. He emphasised that they had followed the prescribed law and procedure and the stopping of the consignment was an illegal and

malafide act. The Board in its findings had not discussed or evaluated the so-called evidence relied upon by the Collector. Board's reliance upon the Collector's order was mis-placed and its findings on the point of country of origin was wrong. The Collector himself was wrong in relying on the opinion of NAFED & Agmark authorities. The person who gave the opinion was not expert and his opinion was of no evidentiary value.

30. Moreover, the Collector had not acted as per his own best judgement or discretion but had taken action and passed the impugned order at the behest of some higher authorities. The order was, therefore, malafide.

It was indeed an instance of abdication of jurisdiction by the Collector. His order was, therefore, not a proper order.

31. They have suffered for nearly nine years from 1971 onwards for no fault of their own and a lot of harassment and financial loss and difficulties have been caused to them. He would pray that in view of their submissions their appeals may be accepted and allowed.

32. I have discussed in detail the opinion of these organisations and I have already recorded that they do not inspire confidence. From these discussions it becomes perfectly clear to me that the department has not been able to show that the turmeric in question were of Indian origin and not of Nepalese origin. Under these circumstances, the Customs authorities in Calcutta were not authorised to seize and confiscate the same, inasmuch as, their transit through India was as per the terms of the Treaty between the two countries. In this view of the matter the appellants were entitled to export the said goods according to the terms of the aforesaid Treaty and I hold accordingly.

33. From the discussions made above it becomes clear that the orders passed by the Board affirming the order of the Collector cannot be sustained. The order of the learned Member, Central Board of Excise & Customs, New Delhi and the decision of the Collector in not allowing the export of the goods because of the ban on export of turmeric is set aside and these appeals are allowed.

Initially the matter was heard on 18-7-1985 and Order No.453/Cal-1985-3569 was passed by the Bench [Consisting of learned Member (Judicial) Shri Harish Chandra and myself] on 30-8-1985. This order disposed of the preliminary objection regarding competence of the Tribunal to hear the appeal and the maintainability of the appeal petition before this authority.

Subsequently, the matter was further heard on 10-2-1986 and order dated 20-2-1986 was passed by the Bench (consisting of learned Member (Judicial), Shri B. Prasad and myself.

"The above-captioned parties had filed 5 (five) Revision applications to the Secretary, Government of India, Ministry of Finance, Department of Revenue, New Delhi being aggrieved from Order No. 979-A to 985-A of 1980 passed by Member of Central Board of Excise & Customs dated 24th April, 1980. After coming into the existence of the Tribunal the said Revision Applications stand transferred to the Tribunal under Section - 131B of the Customs Act, 1962 to be disposed of as appeals.

35. At the outset of the hearing Shri A.K. Chatterjee, the Learned J.D.R. has raised a preliminary objection that this Tribunal is not competent to hear the appeal and the appeal is not maintainable. He has referred to the definition of the Adjudicating Authority as given under sub-section (1) of Section 2 of the Customs Act, 1962. The learned J.D.R. has referred to old Section 128 (before amendment) and has argued that the remedies available are under the erstwhile section to the appellants. The Ld. J.D.R. has argued that the Collector of Customs had no authority to order to stop the export of the goods under Customs Act. He has referred to Page 74 of the Paper-Book which is the operative part of the Order passed by the Collector of Customs relates to (i) the imposition of penalty and confiscation of goods under C.A.'62 and (ii) stoppage of the export of the goods. The Ld. J D.R. has also referred to the provisions of Section 129A of the Customs Act which vests the aggrieved person the right to file an appeal before the Tribunal. Shri Chatterjee, J.D.R., during the course of his arguments also argued that the goods for export were of Indian Origin and were going to be exported in the guise of goods of Nepalese Origin which could not be permitted to be

exported. He has also stated that the decision was taken at the highest level of the Government and the Collector of Customs had acted as an agent. If at all the appellants were aggrieved from the Order passed by the Collector of Customs, there are other remedies which could have been availed by the appellants viz.

suit in a civil court for damages or an appropriate writ petition. Shri Chatterjee also argued that the order as to the imposition of penalty and confiscation of goods is under the Customs Act, 1962 and the order with reference to the Indo-Nepal Treaty is an executive or an administrative Act apart from the authority vested with the Collector under the Customs Act. Shri Chatterjee also referred to the Board's Order and pleaded that the Board had set aside the order as to the confiscation of goods as well as the imposition of penalty under the Customs Act and had confirmed the Collector's Order with reference to the Indo-Nepal Treaty and, therefore, the only point left is with reference to the stoppage of goods in terms of Indo-Nepal Treaty. Shri Chatterjee reiterated that the Appellate Tribunal is not empowered to hear the appeal on this point. During the course of arguments Member (Judicial) had brought to the notice of both the Parties the judgement of West Regional Bench, Bombay-I in the case of Mahindra and Mahindra v. Collector of Central Excise, Bombay-I - reported in 1988 (33) E.L.T 517 (Tribunal). The Ld. J.D.R. stated that the judgement of the West Regional Bench is not binding on the East Regional Bench and this Bench can always differ. Shri Chatterjee also argued that this Court should not go to the dictionary meaning of the word 'adjudication' and should go strictly with the definition as given in the Customs Act, 1962.

Member (Technical) wanted to know from the J.D.R. whether he has got anything to say with reference to Show Cause Notice and Section 11 of the Customs Act, 1962. In reply, Shri Chatterjee, the Ld. J.D.R. stated that the Show Cause Notice relates to the Indo-Nepal Treaty and Section 113(d) of the Customs Act, 1962. Shri Chatterjee lastly stated that the residue left after the Board's Order is not appealable before the Tribunal. The learned Technical Member asked the Ld. J.D.R. whether he can show any authority to the effect that the portions of an order could be delinked. To this query, Shri Chatterjee replied that the Board had delinked the two portions of the Collector's Order at its own level. It was the

submission of Shri Chatterjee that the Board had set aside the confiscation order of the goods and the penalty. What remained is merely the stoppage of the goods for export without any confiscation or any offence under Section 113 as well as 114 of the Act. This, by itself, cannot be deemed to be a decision under the Act so as to enable anyone to file an appeal before the Tribunal within the provision of Section 129A of the Customs Act, 1962 with special reference to the definition of 'Adjudicating Authority' provided under Section 2, Sub-Sec. (1) of the Customs Act, 1962.

36. In reply, Shri S.L. Saraf, the Ld. Barrister argued that the Ld.

J.D.R.'s arguments should be recorded. The Ld. Barrister has argued that the J.D.R. was trying to say that there are two portions of the adjudicating order and of the two portion one portion can be heard in appeal whereas the other portion of the order cannot be heard in appeal. The Ld. Barrister has also requested for recording the argument of the J.D.R. that the decision of the Collector in stopping the export of the goods is not a decision under the provisions of the Customs Act, 1962 and the Collector had no authority to stop the export of the goods under the Customs Act, 1962. The Ld. Barrister had also argued that if the contention of the J.D.R. is correct than the order passed by the Collector of Customs is ab initio illegal, void and bad in law. The Ld.

Barrister argued that the Collector of Customs could have referred to the provisions of the Indo-Nepal Treaty under the Customs Act. By virtue of Sec. 11(H) of Customs Act, 1962 the Collector had powers to act under the Customs Act with reference to the procedural provisions in the Indo-Nepal Treaty. The Ld. Barrister stated that the appellants had filed an appeal under erstwhile Section 128 of the Customs Act and being aggrieved from the order passed by the Board the appellant had filed a Revision Application under Section 131 of the Customs Act to the Central Government which has been transferred to the Tribunal and is a matter of appeal before this Court, He referred to the provisions of Sec.129A and the definition of adjudicating authority as given in Sec. 2 of the Customs Act. He also argued that the Indo-Nepal Treaty does not give powers to the Collector of Customs to adjudicate and merely provides for facilitation of goods in transit and

as such, he had powers to stop the export of goods under Sec. 11(H). However, the present stoppage is illegal. The Ld. Barrister has also argued that the Collector of Customs cannot act beyond the provisions of Customs Act, 1962 or any other Act under which the powers were vested in him and the Ld. J.D.R. has not shown any authority to the effect that the two portions of an order in such cases. The Ld. Barrister has referred to the judgement of *Mahindra & Mahindra v. Collector of Central Excise, Bombay-I* reported in 1988 (33) E.L.T. 517 (Tri.). The Ld. Barrister has also argued that the Board has set aside the confiscation of the goods and the imposition of penalty but has not decided whether the goods were of Nepalese Origin. The Ld. Barrister has again stated that the Ld. J.D.R.'s argument to the effect that the Collector of Customs was acting as an agent of the highest authority i.e. the Minister, should also be recorded and this will mean nonapplication of mind by the Collector and abdication of his jurisdiction. The Ld. Barrister has referred to Page - 74 of the Paper-Book. He has referred to the Indo-Nepal Treaty. He has referred that the Collector of Customs had acted or purported to have acted under the Provisions of Customs Act, 1962 and as such the Appellate Authority has got the jurisdiction to hear the appeal. He has referred to Page 26 of the Indo-Nepal Treaty.

37. In reply, Shri A.K. Chatterjee, the Ld. J.D.R. agreed with the arguments of Shri Saraf to the extent that the Collector had powers to stop the goods for export. He, however, emphasised that only the confiscation and imposition of penalty were under the Customs Act.

Stoppage was with reference to the Indo-Nepal Treaty. Shri Chatterjee reiterated that the Board had set aside the order passed by the Collector in respect of confiscation and penalty and what remains is the stoppage of goods under the Treaty which, by itself, cannot be a subject matter of appeal.

38. Shri Saraf, the Ld. Barrister in clarification has stated that the Ld. J.D.R. is not correct in saying that the Collector has the power to stop the goods from exporting. If such goods, after compliance with the prescribed procedures, come for exportation, the Collector has no such power. The Collector's Order is, therefore, illegal and arbitrary.

39. It is observed from a perusal of the Show Cause Notice dated 3-2-1979 and supplementary Show Cause Notice dated 6-4-1979 that action was initiated by the Customs in view of the alleged violation of the terms of the Treaty of transit which automatically resulted in simultaneous infringement of restrictions under the Indian Laws attracting thereby the relevant provisions of the Customs Act, 1962.

This is apparent from the Show Cause Notice as a whole and becomes abundantly clear, particularly, from the following paragraphs:- "Since, it appears that there has been failure on the part of the exporters to comply with the procedure prescribed at para 2 of the Export Procedure as laid down in the Memorandum portion of the Protocol to the Treaty of Transit the subject export goods in transit appear to-have become liable to be subjected to restrictions, and other action under Indian Customs Laws." "Further, it appears from the above that the exporters have attempted to export the subject goods contrary to the prohibitions laid down in the provisions of the Treaty of Transit and in article-III of the Agreement of Co-operation between HMG of Nepal and Government of India, since as per the Export Procedure as laid down in the Memorandum portions of the Protocol to the Treaty of Transit the origin of the Export goods has to be of Nepalese Origin and other than of Indian Origin, and since Article-III of the Agreement of Co-operation lays down that subject to such exceptions as may be mutually agreed upon each contracting party shall prohibit and co-operate with other to prevent re-export from its territory to third countries of goods imported from the other contracting party, thereby making the goods liable to confiscation under Section 113(d) of Indian Customs Act of 1962. The subject goods are also liable to confiscation under Section 113(i) since there has been mis-declaration on the part of the exporter in respect of the country of origin of the goods. Further it appears that the exporters are also liable to penal action under Section 114 of the Customs Act of 1962 for attempting to export the goods contrary to prohibition as mentioned earlier." "In view of the facts and circumstances of the case as explained above, the exporters, M/s. Orbital Enterprises, Birgunj are directed to show cause to Collector of Customs, Customs House, Calcutta within 10 days thereof as to why the transit facilities in respect of the subject export consignments should not be refused in terms of the provisions of Article-II, VI and VIII of the Treaty of Transit between HMG of Nepal and the Government of India and why the

goods should not be confiscated under Section 113(d) and 113(i) of the Customs Act, 1962 and penalty should not be imposed on the exporters under the Customs Act, 1962." 40. In other words, this show cause notice is a notice under the Customs Act to show cause to the Collector of Customs as to why the proposed action should not be taken against them under the Customs Act.

The articles of the Indo-Nepal Treaty of Transit and the Agreement of Co-operation have essentially come into picture as an integral part of the facts and circumstances of the case; And the stoppage of export and confiscation and penalty were the consequences of the situation as perceived by the Customs Authorities in view of the laws in force in India. The Order-in-Original is a one single composite order covering various aspects of the case including the infringement of Treaty and the Article of the Agreement and (consequentially) the provisions of the Indian Laws. At the Board's level also what has apparently happened is that the Hon'ble Board has upheld the basic finding of the Collector regarding the offending nature of the goods with reference to the alleged violations involved but has set aside the confiscation and the penalty for reason mentioned in the Order-in-Appeal. There is nothing unusual in it inasmuch as in many cases Appellate Authorities confirm or modify a part of the findings or the operative part of the order and set aside the rest; that does not amount to splitting or delinking of the issues nor does it render one part of the order appellable and another part non-appellable.

41. Furthermore, the jurisdiction cannot be exercised in a piecemeal manner and once a Show Cause Notice has been issued or appeal has been admitted the Adjudicating/Appellate Authority exercises jurisdiction in respect of all the aspects which are mentioned in the notice or are subject matter of the proceedings before it. The Customs Authorities are competent to take cognizance of provisions of various International Treaties in terms of Section 11(2)(r) read with other relevant provisions of the Customs Act including Sections 113 and 114 thereof.

Therefore, reference to the Treaty of Transit and the Agreement of Co-operation in the Show Cause Notice or the Order-in-Original or the Order-in-Appeal does not alter or change the nature of proceedings which were initiated under the Customs

Act, nor does it mean that the part of the proceedings were executive in character and only a part in the nature of adjudication proceedings under the Customs Act. In any eventuality once the Collector had invoked the Customs Act and has acted or has purported to act with reference to the provisions of the said Act and issued a notice under that Act and passed an Order-in-Original with reference to the relevant provisions of the said Act it cannot be said that the proceedings were not adjudication proceedings under the Customs Act. It is worth noting that in the preamble to the Order-in-Original it has been indicated that appeal against the said order lies to the Central Board of Excise & Customs and the provisions of Section 129 of the Customs Act, 1962 are attracted and again the preamble to the Board's order rightly points out that a Revision Application could be filed against the order under Section 131 of the Customs Act. Obviously, the learned Collector and the Hon'ble Board are referring to the proceedings as a whole and their respective orders as a whole.

42. The so-called delinking or splitting of the order into executive and non-executive parts appears to me to be imaginary having no basis in fact or in law.

43. Since the Show Cause Notice was issued under the Customs Act with reference to the facts and circumstances as a whole (including the Nepal-India Treaty of Transit and Agreement of Co-operation and the Order-in-Original was passed under the Customs Act and the Order-in-Appeal was also passed with reference to the aforesaid order under the Customs Act and the Revision Petition was filed with reference to the Order-in-Appeal passed under the Customs Act and the said Revision Petition has been transferred to the Tribunal in terms of Section 131B of the Customs Act and is before us as a deemed appeal under the Customs Act, it is obviously clear that the Tribunal is required to look into the facts and circumstances as a whole and to hear the submission of both sides with reference to the Order-in-Original and Order-in-Appeal as a whole under the Customs Act.

As already mentioned the jurisdiction cannot be exercised in a piecemeal manner and prima facie there is nothing to show that the stoppage of export of goods was beyond the power or the authority of the Collector of Customs under the Customs Act; whether such stoppage was right or wrong, justified or unjustified and whether

the order was legal or illegal, are points which touch upon the merits of the case.

Therefore, they shall be dealt with appropriately after hearing both the sides on the merits of the case.

44. The appeal is maintainable and the Appellate Tribunal is competent to hear the same in terms of the powers vested in it by virtue of Sections 129A & 129B (read with Section 131B) of the Customs Act, 1962.

45. Order dated 20-2-1986. "At the outset, Shri Chatterjee, the learned J.D.R., submitted with the leave of the Court that first and foremost it is required to be decided whether the Central Government was competent to decide this matter in terms of the provisions of Section 131B(2) and whether it was, therefore, a case of incorrect administrative transfer of the case to the Tribunal. During the course of last hearing, it was argued by the department before the Tribunal that the appeal was not maintainable on the ground that the Board having set aside the confiscation, fine and penalty, the appellants could not have any grievance and, therefore, the appeal was not maintainable. The Tribunal heard the matter at length and after considering submissions of both the sides passed on Order No.453/Cal/1985-3569 dated 30-8-1985. In this order, the Tribunal has held, for the reasons mentioned therein, that the appeal was maintainable and the Appellate Tribunal is competent to hear the same.

It was, however, his contention that the main points urged before the Tribunal by the Department during the course of earlier proceedings was with reference mainly to the question of maintainability in terms of executive versus quasi-judicial action of the Collector and whether any grievance survived after the Board had passed the Order-in-Appeal.

Therefore, the Tribunal has passed the order mainly with reference to these aspects. Now that the Tribunal had held that the appeal is maintainable, a question arises as to which was the proper forum before which the appellant should make his submissions and which was the proper authority to hear and decide the matter on merits. It was his contention that in terms of the provisions of Section 131B(2), the Tribunal was competent to hear and decide only those

transferred matters in which either the duty or fine or penalty was more than 10,000 rupees. In the instant case, neither any duty, nor any fine, nor any penalty is involved. Therefore, it was his contention that the jurisdiction to hear and decide the cases on merits continued to rest with the Central Govt. It was, therefore, his submission that the cases may be transferred to the Central Government.

The learned Barrister Shri Saraf pleaded that this Tribunal has already passed an order with reference to the jurisdiction conferred on it in terms of Sections 129A & 129B read with Section 131B. This is apparent from the first paragraph as well as the last paragraph and the operative part of the order. Therefore, once this issue has been decided, it cannot be reopened and the Tribunal was bound to proceed further in the matter in terms of its own order.

It was his submission that it was open to the other side to have raised this point and urge it during the course of previous hearing, but they, having chosen not to raise this issue, cannot now come up with the plea of non-existence of jurisdiction and agitate it after an order on this aspect has already been passed and issued. If the other side is allowed to indulge in this fashion, there will be no end to proceedings. His client has already been put to much inconvenience and expenditure and is already feeling harassed. He would further suffer in this process.

It was his contention that it was open to the other side either to accept the order as it is or if they are aggrieved to take recourse to such other course of actions as may be available to them in law. But they cannot raise this point like this and he would urge that he may be heard and the matter decided.

Shri Chatterjee stated that jurisdiction cannot be either assumed or conferred. Jurisdiction is a question of law and even if the point was not raised by either of the parties, it was open to the Bench to consider it suo motu. In any eventuality, if the jurisdiction was not there with the Tribunal, any order passed by it would be a nullity and further proceedings would serve no purpose.

He urged that the order of the Tribunal dated 30th August, 1985 cited by him was an order which mainly decided the question of maintainability and this context

should be borne in mind.

They have no grievance against the order and are in fact satisfied in this respect, but once it has been held that an appeal could be preferred under the circumstances of the case a question arises as to which is the proper or correct forum competent to deal with the matter.

It is in view of this position that he has raised the point of transferring the case to the Central Government and requested that this point may be decided.

In fact, he would go to the extent of saying that in the case of *Sudesh Rattan Mahajan v. Collector of Central Excise & Customs, Chandigarh*, the point which was decided was that if either penalty or duty or fine - any one was less than Rs. 10,000/- the Central Government continued to be the proper authority. Here, the situation is that there is no duty, no fine and no penalty involved and, therefore, all the more so, the jurisdiction continues to vest with the Central Government. It was also his submission that in fact, even without reference to the case of *Sudesh Rattan Mahajan*, it can be said that the jurisdiction continues with Central Government in terms of the language of Section 131B(2).

Shri Saraf pleaded that the maintainability is only an aspect of jurisdiction and, therefore, if the other side thought that it is the Government and not the Tribunal which was the proper authority, they should have taken up this aspect first and then sought the orders of the competent authority on the issue of maintainability.

Although no duty, fine and penalty are involved, as rightly held by this Bench in its order dated 30-8-1985, a grievance still persists and an appeal lies to this Tribunal. In fact, the appellant has suffered a huge loss of about Rs. 40 lakhs approximately (involving an amount of not less than five to seven lakhs of rupees in each of the Appeals viz.

(1) CD-203/80, (2) CD-204/80 (3) CD-205/80, (4) CD-206/80 & (5) CD-207/80 - in which identical issues are involved). The goods are still in the custody of the Department and have already become dust and worthless. It was also his submission that proviso to Section 131B(2) does not apply in such circumstances.

In view of the above position, he would urge that since the Tribunal has already passed an order specifically on the point of jurisdiction and referred to Section 129A and B as well as Section 131B and the Tribunal is bound by its own orders, he should, therefore, be allowed to proceed further and he heard on merits and the case may be disposed of.

We observe that this Tribunal has already passed an order (No.453/Cal-1985-3569 dated 30-8-1985) on the point of jurisdiction.

Therefore, as rightly pointed out by the learned barrister Shri Saraf, the matter cannot be re-opened by the department and this court cannot review its own order. However in view of the submissions made by the learned JDR on behalf of the department, we consider it necessary to clarify that - (1) There is no reason to presume that all aspects of the matter were not duly considered by the Tribunal when it has been clearly mentioned in the operative part of the aforesaid order that "The appeal is maintainable and the Appellate Tribunal is competent to hear the same in terms of the powers vested in it by virtue of Sections 129A & 129B (read with Section 131B) of the Customs Act, 1962." (2) To lay at rest all doubts we may mention that proviso to Section 131B(2) does not cover or provide for the type of situation which has arisen in the instant appeals.

As neither absolute confiscation of goods is involved nor the dispute relates to duty or fine or penalty, therefore, neither clause (a) nor clause (b), nor clause (c) of the proviso to Section 131B (2) applies.

Hence, these cases are governed by the main body of Section 131B(2), which states that every proceeding which is pending immediately before the appointed day before the Central Govt. under Section 131 as it is stood immediately before that day and any matter arising out of or connected with such proceeding and which is so pending, shall stand transferred on that day to the Appellate Tribunal and the Appellate Tribunal may proceed with such proceedings on matter from that stage at which it was on that day as if such proceeding or matter was an appeal filed before it.

As these are admittedly proceedings which were pending before the Government of India on the appointed day and were transferred to the Tribunal in terms of Section 131B(2), as cited above, the Tribunal was quite competent to hear and decide the matter, as already held in our order No. 453/Cal/1985-3569 dated 30-8-1985 mentioned above.

Copies of this clarification may be provided to both the sides and the cases may be listed for hearing on 18th March, 1986." 46. Thereafter, the matter was heard and considered on merits on 24-2-1987.

The learned Member (Judicial), Shri B. Prasad has passed his order dated 10-6-1987.

47. Brief stated, it is the appellants' case that they were citizens of Nepal, engaged in export business, who had purchased the Turmeric in Nepal with a view to export to Singapore. They had obtained export licenes from H.M.G. of Nepal and produced the goods as well as the relevant documents before the Nepalese Customs who had found the same in order and endorsed the documents accordingly.

Thereafter, they had produced the goods and the documents before the Indian Customs at Indo-Nepal border and sought permisson to transit the goods across Indian territory in terms of Nepal-India Treaty of Transit (1978). The Indian border officers had examined the goods and the documents and found them in order and allowed the goods to be transported to Calcutta as per the C.T.D. in question.

At Calcutta, the Customs had found the seals of the wagons intact.

However, when they requested permission to ship the goods, the Calcutta Customs withheld the permission and after a gap of several months, served them with the show-cause notices in question.

We may pause here for a moment to note that these bare facts are not in dispute.

The dispute started with the withholding of the shipment permission and subsequent issue of the show-cause notices.

Briefly speaking (shorn of technicalities) the show-cause notices essentially allege mis-declaration of country of origin and consequential violation of the terms of the Treaty as also the Indian Export Policy and the Export (Control) Order.

These notices ask the appellants to show cause why the permission to transit the goods should not be refused and why penal action should not be taken. The appellants have pleaded basically, that the above action of the Calcutta Customs was without jurisdiction and contrary to the provisions of the Treaty. It was also illegal, unfair and improper.

The appellants have contended that they have declared the country of origin correctly and duly followed the procedure prescribed in the Treaty (including the Protocol to the Treaty and Agreement of Cooperation and as such the action of the Indian Customs was not justified.

They have also brought to our notice that after issue of the show-cause notices initially they were granted hearing(s) and the hearing(s) had been concluded, but instead of the order prayed for they got the supplementary show-cause notices.

The department on the other hand has basically contended that the Turmeric in question was of Indian origin which has been initially exported to Nepal and was now being re-exported in the garb of Nepal Cargo and, therefore, the department's action was justified.

48. Before we proceed further with the matter we may pause here and examine the show-cause notices in question.

A perusal of these notices reveals what they mention as also what they fail to mention.

(3) Propose that transit facilities may be refused in terms of the Treaty.

(5) Invoke Section 113 of the Customs Act, '62 for violation of Export (Control) Orders; (6) Propose confiscation of goods under section 113(d) for violation of Export (Control) Orders; (7) Propose imposition of penalty under Section 114 of the Customs Act, '62, for attempt to export the goods improperly.

The supplementary show-cause notices (repeat the points (1), (2), (3), (4) and (7) mentioned above and modify the charges by (1) invoking Section 113(d) on different grounds namely attempt to export the goods contrary to the terms of the Treaty and the Agreement of Cooperation (instead of E.T.C. orders), (2) invoking Section 113(i) [(in addition to 113(d)] on the ground of mis-declaration).

Furthermore, while initial show-cause notices were based mainly on the report of NAFED Manager, the supplementary show-cause notices refer, in addition, to a booklet "What Nepal Offers" and the statement of border examiners and cross-examination of the NAFED Manager and the border examiners.

Thus, the basis of the charges was sought to be expanded and the charges themselves were amended.

49. Now coming to the apparent omissions in the show-cause notices (both original and supplementary), it is observed that: (1) they do no mention or refer to any source or authority under the Customs Act, '62 (or allied laws) by which or under which cognizance of violation of the Treaty or the Agreement of Cooperation could be taken by the Indian Customs.

That is to say, they do not mention any basic provision of Customs Act, '62 (whether substantive or procedural) for violation of which penal provisions could be invoked and the show-cause notices could be issued.

In fact, no such section, rule or notification has been cited at all.

(2) they do no mention or refer to any particular or specific provision of the Export Policy or Export (Control) Order. Thus for example - (i) No section, chapter or statement is mentioned; Nay, not even a word is quoted or cited (even the year is not mentioned); That is to say, there is no reference to any schedule, part of schedule, item or sub-item of any E.T.C. Order(s) even year is not mentioned).

(iii) There is no mention of any public notice or notification, if any, issued under the E.T.C. Policy/Order'; (i) measures, if any, taken to impose prohibition(s) or restriction(s) (if any) in pursuance of Article II and VIII of Treaty; (ii) goods in respect of which prohibition(s) or restriction(s) (if any) were imposed and notified

to the public in pursuance of the aforesaid Articles (II & VIII); (4) They do not mention or refer to action, if any taken by the Govt. of India and the Govt. of Nepal in pursuance of the Articles of Cooperation.

(5) They do not mention how the Calcutta Customs is vested with the jurisdiction to deal with the matter in the proposed manner either in terms of the Treaty and the Agreement or in terms of the Customs Act, '62 and allied laws.

(6) They do not refer to the basis of initial action of withholding the permission to ship the goods.

(1) Regarding jurisdiction of Indian Customs as such in general and that of the Calcutta Customs, in particular (i) under the Treaty, (ii) under the Customs Act and the allied laws.

(2) Since, admittedly, the goods and the documents had been examined by the proper officers of the Indian Customs at the Indo-Nepal Border and the goods had been cleared for transport through the Indian Territory and the Calcutta Customs had found the seals intact and tallied the copies of C.T.Ds, a question arises as to how the Calcutta Customs got the idea that the proper procedure was not followed and on what basis the initial permission to ship the goods was withheld at that time? That is, what was the information, if any, available to the Calcutta Customs at the time of withholding of the shipment and on whose orders the permission was actually withheld initially? (3) the legal status of the goods pending shipment after permission had been withheld i.e. whether initial action of the Customs resulting in non-shipment amounted to detention or seizure of the goods? (4) Whether the proceedings before the Collector after the issue of the initial/original show-cause notices had remained incomplete/inconclusive or they had been duly concluded at that time.

(5) Since the supplementary show-cause notices were issued after the hearings, a question arises as to whether it was proper to do so? 50. Before examining the matter with reference to the above questions and observations it may be useful to go through the relevant portions of the Nepal-India Treaty of Transit (1978) and the Agreement of Cooperation.

The contracting Parties shall accord to 'traffic in transit' freedom of transit across their respective territories through routes mutually agreed upon. No distinction shall be made which is based on flag of vessels, the places of origin, departure, entry, exit, destination, ownership of goods or vessels.

(a) Each Contracting Party shall have the right to take all indispensable measures to ensure that such freedom, accorded by it on its territory does not in any way infringe its legitimate interests of any kind.

(b) Nothing in this Treaty shall prevent either Contracting Party from taking any measure which may be necessary for the protection of its essential security interests.

The term "traffic in transit" means the passage of goods including unaccompanied baggage across the territory of a Contracting Party when the passage is a portion of a complete journey which begins or terminates within the territory of the other Contracting Party. The transshipment, warehousing, breaking bulk and change in the mode of transport of such goods as well as the assembly, dis-assembly or re-assembly or machinery and bulky goods shall not render the passage of goods outside the definition of "traffic in transit" provided any such operation is undertaken solely for the convenience of transportation. Nothing in this Article shall be construed as imposing an obligation on either Contracting Party to establish or permit the establishment of permanent facilities on its territory for such assembly, dis-assembly, or re-assembly.

Traffic in transit shall be subject to the procedure laid down in the Protocol hereto annexed and as modified by mutual agreement.

Except in cases of failure to comply with the procedure prescribed, such traffic in transit shall not be subject to avoidable delays or restrictions.

Notwithstanding the foregoing provisions, either Contracting Party may maintain or introduce such measures or restrictions as are necessary for the purpose of: (iv) safeguarding the implementation of laws relating to the import and export of gold and silver bullion; and (v) safeguarding such other interests as may be mutually

agreed upon. "(Emphasis provided). (In force from 25-3-1978).

In pursuance of and subject to the provision of the Protocol to the Treaty of Transit His Majesty's Govt. of Nepal and the Govt. of India agree that the following detailed procedure shall apply to traffic in transit.

When goods from Nepal are cleared from Nepalese Customs custody for export to third countries in transit through India, the exporter or his agent (hereinafter referred to as the exporter) shall be required to observe the following procedure at the corresponding Indian Border Customs Post: 1. The Senior-most officer in charge of the Nepalese Customs Office at the border shall furnish the following certificate on the Customs Transit Declaration:- "I have verified that the goods specified in this declaration and of the quantity and value specified herein have been permitted to be exported by His Majesty's Govt. of Nepal under licence No. . . .

Dated . . .".

2. The exporter shall prepare the Customs Transit Declaration in quadruplicate and shall present it to the Indian Customs Officer at the Customs Post through which the goods are to enter India. The Customs Transit Declaration shall contain the following particulars: "I/We declare that the goods entered herein are not of Indian origin, are for export from Nepal to countries other than India and shall not be diverted enroute to India or retained in India" "I/We declare that all the entries made above are true and correct to the best of my/our knowledge and belief." 3. The Indian Customs officer at the point of entry into India shall make such examination of packages and the contents as may be necessary to check whether: (i) the goods are in accordance with the Customs Transit Declaration; (ii) the goods are such as have been specified by the Govt. of India as being liable to pilferage enroute having regard to the duty and restrictions, if any to which they are liable on import into India; (iii) they are of origin as declared in the Customs Declaration Form.

4. After the necessary checks, the Indian Customs officer at the border shall endorse all the copies of the Customs Transit Declaration. He shall hand over the

original to the exporter and will send the duplicate and triplicate by post to the Collector of Customs, Calcutta. The quadruplicate shall be retained by him.

5. The goods specified in sub-paragraph (ii) of paragraph 3 above shall be transported from the Indian Customs border post to Calcutta port in closed railway wagons or in pilfer-proof containers (to be provided by the exporter) which can be securely locked. The containers of wagons, as the case may be shall be locked and duly sealed after the examination by the border Customs Officer.

6. Where the goods cannot be sent in closed wagons and have to be transported in open wagons or flats, detailed description particulars and specifications thereof shall be recorded in the Customs Transit Declaration.

7. After verification as contemplated in preceding paragraphs has been completed by the Indian Customs Official at the border, he shall endorse all the copies of the declaration and where sealing has been done, give necessary indication thereof on the relevant Customs Transit Declaration and allow the movement of goods to Calcutta Port. He shall hand over the original copy of the Declaration to the exporter and send the duplicate and triplicate by post to the Collector of Customs Calcutta and retain the quadruplicate copy with him.

10. On arrival of the goods at Calcutta Port, the exporter shall present the original copy of the Customs Transit Declaration duly endorsed by the Customs House with the Duplicate and triplicate received by it from the border. In case of goods which have moved under seals and locks, the Customs House shall check the seals and locks and where there is suspicion that they have been tampered with, will examine the goods to identify them with the corresponding Customs Transit Declaration. After the verification as contemplated in this paragraph is completed by the Customs House, it shall permit the export of the goods and will in case of goods specified in sub-para (ii) of para 3 ensure that these are duly shipped. After the goods have been shipped, the Customs House shall endorse all the copies of the Customs Transit Declaration, hand over the original to the exporter and send the triplicate copy to the Indian Customs Border Office and retain the duplicate." Agreement of Co-operation between His Majesty's Govt. of Nepal and the Govt. of India.

The Contracting Parties agree to cooperate effectively with each other, to prevent infringement and circumvention of laws, rules and regulations of either country in regard to matters relating to Customs, foreign exchange and foreign trade and shall for this purpose assist each other in such matters as consultation, enquiries and exchange of information with regard to matters concerning such infringement or circumvention.

Subject to such exceptions as may be mutually agreed upon, each contracting party shall prohibit and cooperate with other to prevent: (a) re-export from its territory to third countries of goods imported from the other Contracting Party and products which contain materials imported from the other Contracting Party exceeding 50 per cent of the ex-factory value of such products; (b) re-exports to the territory of the other Contracting party of goods imported from third countries and of products which contain imports from third countries exceeding 50 per cent of the ex-factory value of such goods." 50. A plain reading of the above provision of the Treaty clearly indicates that certain measure may be taken in pursuance of the Treaty and the Agreement and therefore, it was for the department to show what measures were actually since taken in pursuance of the Treaty and the Agreement and how they were sought to be violated or circumvented. Absence of reference to any measure(s) in the show-cause notices renders them vague, to say the least. We will discuss the consequences as we proceed further.

Further as the show-cause notices have referred to violation of Foreign Trade Policy of India and the Export (Control) Order, it will be useful to look at the pattern of policy, procedure and orders, and note relevant portions thereof.

51. As per the Hand Book of Import-Export Procedures 1978-79 (Chapter I) the import and export policy is announced for each financial year by means of public notices in the Gazette of India Extraordinary [vide para 4(1)].

Changes/amendments in the Import or Export Policy that become necessary from time to time are separately notified by means of Public notices. [Vide para 4(2)].

Export Control covers only the items included in the Schedule to the Export (Control) Order 1977. (Vide para 3).

(b) falling within the purview of clause 15 of the Export (Control) Order, 1977; or
(c) covered by an Open General Licence included in the Export Policy, 1978-79
Part 'B' - Items export of which is allowed on merits or subject to ceiling or other
conditions to be specified from time to time.

52. The Export Policy included, inter alia, a policy statement regarding licensing
policy of the items listed in the Schedule & Annexure and an explanatory note to
the Policy Statement.

This shows that allegations regarding violation of Export Policy and or Export
(Control) Order must in the ordinary course include reference to the relevant part
of the Schedule and the item number and the policy during the relevant period to
be meaningful.

Significance of my observations regarding non-mention of these particulars in the
show-cause notices thus becomes apparent. I will touch upon the legal
consequences of this omission as we proceed further. We may first examine at
this stage the order-in-original passed by the Collector.

53. A perusal of the order of the Collector dated 30-7-1979 shows inter alia that he
had in the . . . - (1) observed that there has been no seizure of goods under
Section 110(i) of the Customs Act, 1962; (2) examined the date of the production,
consumption and export of turmeric from Nepal and analysed the contents of the
book-let "What Nepal Offers" and Publication of Nepal Planning Commission and
the data of Export of Turmeric from India to Nepal.

(4) (i) Noted that samples had been examined by NAFED and NAFED had also
sought the help of the Directorate of Marketing and Inspection, Govt. of India,
Calcutta, who agmark the spices.

(7) Observed that the 'Masur dal' case of Padam Kumar Agarwal v. Addl. Collector
of Customs & Others reported in AIR SC 1972 was distinguishable from the
present case.

". . . In the present case reliance was placed on both direct and circumstantial
evidence while framing charges against the exporters and although the

circumstantial evidence does not conclusively prove anything, the direct evidence in the form of Report from NAFED, Calcutta regarding the country of origin substantiated by the circumstantial evidence leads to a definite conclusion regarding the country of origin of the subject consignment. . . ." ". . . I find that the subject consignments are of Indian origin in view of my findings above." (Emphasis provided).

"In view of my findings as stated in the foregoing paragraphs, I hold that the exporters have violated the provisions of Para 2 of the Export Procedure as laid down in the Memorandum Portion of the Protocol to the Treaty of Transit, Article-II, V, VI and VIII of the Treaty of Transit between the HMG of Nepal and the Govt. of India and Article-III of the Agreement of Co-operation between the HMG of Nepal and the Govt. of India. I, therefore, order that the transit facilities in respect of the subject consignments be refused in terms of the provisions of Article-II, VI and VIII of the Treaty of Transit between the HMG of Nepal and the Govt. of India and shipment be disallowed. I further order that the goods be confiscated under Sections 113(d) and 113(i) of the Customs Act, 1962."

The Collector gave the appellants an option to redeem the goods on payment of a fine. He also imposed a penalty on the appellants under Section 114 of the Customs Act, 1962, "for attempting to export the goods contrary to the provision as mentioned earlier an act of commission/omission which rendered the goods liable to confiscation under Section 113 of the Customs Act, 1962." A perusal of the findings and the operative portion of the Collector's order thus shows that the Collector has not even touched upon the major issues and problems noted by us and has not dealt with the questions which obviously called for answers.

54. We will examine the matter further as we proceed. We may first look at the Board's order and see what the Board has done in this regard.

"The Board has carefully considered the facts and the submissions made in the memorandum of the appeal. The Board does not find it necessary to wait for a hearing at a later date. The Collector of Customs did not allow the export of the consignments of Turmeric, as at that time there was an export ban. This was applied to the consignments under reference which were claimed to be of

Nepalese origin, on the basis of the evidence discussed in the Collector's order refuting the claims of Nepalese origin and holding that the goods are of Indian origin. The appellants have cited different other materials in support of their contention that the goods are of Nepalese origin.

Going by the evidence discussed in the Collector's orders it is not possible to hold that his finding that the goods are of Indian origin was not based on adequate evidence. He had relied on different export authorities who had opined that the goods were having Indian Characteristics as distinct from goods of Nepalese origin. At the same time he had cited evidence of export of Turmeric from India to Nepal, thus, establishing the point that Indian Turmeric was available in Nepal. However, under the Treaty of Trade and Transit only goods of Nepalese origin were entitled to free passage and to that extent the ban on export was inapplicable for goods of Nepalese origin. The fact that the present consignments had come from Nepal has not also been disputed.

The High Court Judgment cited in the appeal is not applicable to this case as that judgment applied to consignments which had been decided to be released on the basis of NAFED opinion on the origin of the goods.

Taking all the evidence into consideration the Board is inclined to uphold the Collector's findings that the goods were not of Nepalese origin and, therefore, not entitled to free passage because of the ban on export prevalent at that time. However, in the fact of clear evidence of importation of goods from Nepal and in the absence of any evidence that the exporters had knowingly arranged for the export of goods of Indian origin as Nepalese origin, there is no justification for penalty on exporters nor any case for confiscation of the goods. In view of this, while upholding the decision of the Collector in not allowing the export because of the ban on export of turmeric, the orders confiscating the goods and imposing penalty on the exporters are set aside. The appeals are otherwise rejected." (emphasis supplied).

55. At the face of it, the above order appears to be rather sketchy and vague. It does not disclose any serious effort to weigh the evidence or examine the law.

If anything, it only shows that, apparently, the Board has also not pondered upon or considered the fundamental questions involved in these cases. It has, indeed, not even discussed the cases in details and has not touched upon any of the major problems noted by us. We will examine the implications and the consequences of such an order as we proceed further.

Since the show-cause notices and the Collector's order refer to certain sections of the Customs Act, it is necessary to refer to these sections and it will be useful and convenient to reproduce the relevant portions thereof which are as follows: "Section 113: Confiscation of goods attempted to be improperly exported, etc. - The following goods shall be liable to confiscation: (d) any goods attempted to be exported or brought with the limits of any Customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force; (i) any dutiable or prohibited goods (or goods entered for exportation under claim for draw-back) which do not correspond in any material particular with the entry made under this Act or in the case of baggage with the declaration made under Sec. 77 respect thereof; Any person who in relation to any goods does or omits to do any act which act or omission would render such goods liable to confiscation under Section 113, or abets the doing or omission of such an act, shall be liable,- (i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding five times the value of the goods or one thousand rupees, whichever, is greater; (ii) in the case of dutiable goods, other than prohibited goods, to a penalty not exceeding five times the duty sought to be evaded on such goods or one thousand rupees whichever is greater;" "(14) "Dutiable goods" means any goods which are chargeable to duty and on which duty has not been paid; (19) "Export goods" means any goods which are to be taken out of India to a place outside India; (33) "Prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported or have been complied with; (.

. .) ("Goods in Transit" have not been defined in Customs Act, Section 2, but 'traffic in transit' has been defined in the Indo-Nepal Treaty).

56. While referring to the Customs Act,'it may be useful to look at the scheme of the Act and the relevant provisions relating to the goods in transit and the goods which are subject matter of any Treaty, as in the instant case, the goods are admittedly 'goods in transit' which were being transported under the provisions of the Indo-Nepal Treaty of Transit across the Indian Territory.

In this connection we find that the Customs Act includes a Chapter on Goods in Transit' namely Chapter VIII covering Sections 52 to 56.

However, a perusal of this Chapter shows that it does not deal with or refer to those goods in transit which are transported across a portion of the country in terms of international treaties.

The learned counsel has referred to Chapter IVB & Section 11(H).

However, this Chapter applies only to specified goods which are notified in the Gazette and it is nobody's case that the goods in question before us are such specified goods. Therefore, Chapter IV-B and Section 11(H) are not relevant.

This leaves us with Section 11. This section is a unique provision of the Customs Act, 1962 which links this Act with various laws and treaties etc. governing the allied areas. It is in the nature of an enabling provision by which the legislature has empowered the Govt. to utilise the Customs machinery for any of the purposes mentioned therein.

It is, however, a discretionary provision and the Govt. may utilise this mechanism, if and when necessary and to the extent deemed proper by issue of appropriate notification(s).

For better appreciation we may go through the relevant portion which reads as follows :- (1) If the Central Govt. is satisfied that it is necessary so to do for any of the purposes specified in sub-section (2), it may, by notification in the official gazette, prohibit either absolutely or subject to such conditions (to be fulfilled

before or after clearance) as may be specified in the notification the import or export of goods of any specified description.

(r) Implementation of any treaty, agreement, convention with any country.

A plain reading of this provision shows that the Indian Customs officers come into picture in the field of implementation of any Treaty or Agreement or Convention with any country, provided a notification is issued in terms of Section 11(1). As such upon issue of a notification under this section, and then and then only violation of the allied law(s), treaty and agreement, etc. automatically becomes a violation of Customs Act and proper officers of Customs can exercise the powers vested in them under the Customs Act in respect of the stated purposes as well (and not otherwise).

In other words, unless such a notification is issued the Customs officers cannot and do not come into picture and cannot apply the Customs Act and the authority vested thereunder in the allied areas.

This is very important. In the instant cases although Indo-Nepal Treaty has been invoked and penal provisions of the Customs Act were sought to be utilised, neither the show-cause notices nor the Collector's order refer to Section 11 or any notification issued under Section 11(1) read with Section 11(2) the only provisions available under the Customs Act by which a Collector of Customs could have assumed jurisdiction to take cognizance of violation of Treaty and to act as an adjudicating authority in this area. It may also be noted in this connection that the Treaty by itself does not provide any mechanism for adjudication of disputes and does not refer to the Customs Act although it assigns a rate to the Indian Customs. The implications and consequences of this situation will be taken into account as we proceed further.

It is with reference to the above context that the submissions of both the sides are required to be considered. It may be . . . that the appellants, main contentions are that they had complied with all the formalities prescribed under the Indo-Nepal Treaty and had given a correct declaration. They had repeatedly asserted - (i) That both Nepalese Customs as well as Indian Customs authorities at the Indo-Nepal

border had found their goods and documents in order, that is, in accordance with their declaration and the Nepalese Govt. licence and the requirements of the Indo-Nepal Treaty and, therefore, the border authorities had allowed the goods to be transitted through the Indian territory; That the Collector, Customs, had also found the locks of the wagon in tact and had tallied the Originals, duplicates and Triplicates of C.T.Ds.

Therefore, when they requested for shipment order the Customs should have allowed them to place the goods on board.

(ii) That the Collector of Customs, Calcutta, had no authority to detain or seize the goods and to refuse shipment and that the Collector of Customs, Calcutta, was not justified in placing reliance on the opinion of the NAFED authorities and Agmark authorities and the book-let, "What Nepal Offers".

(iii) That the Manager, NAFED, was not an expert and his opinion was not reliable as it does not disclose any basis or criteria. As such in view of the Supreme Court judgement reported in AIR 1959(SC) 488 the Collector should not have relied on. He should not have given his finding on the basis of such report and the Board should not have confirmed it.

(iv) That Turmeric was grown on both sides of the border and it was not possible to distinguish between the Indian Turmeric and the Nepalese Turmeric and even the NAFED had admitted as much.

(v) That they had purchased the Turmeric in Nepal and it was meant for export to third countries.

(vi) That the burden of proving that it was of Indian origin was on Customs and the Customs have not been able to discharge this burden.

(vii) It was also their contention that the Collector had abdicated his functions in acting on the orders of some higher authorities and had not applied his own mind.

(ix) It was also their contention that the Board was not justified in rejecting their request for adjournment and in passing an ex parte order.

(x) That the conduct of the learned Member of the Board was not proper and the Ld. Member of the Board did not examine the matter in details and passed the order with a closed and pre-determined mind.

(xii) That the Board should have taken into account the judgement of the Calcutta High Court in the case of Dhanraj Chhajar and the Judgement of the Supreme Court in the case of Padam Kumar Agarwal (AIR 1972 (SC) 542).

(xiii) That the Board erred in not relying on the certificate of origin.

(xiv) That the Board had erred in relying on the opinion of the Collector that there was any direct or circumstantial evidence that the esubject consignments were not of Nepalese origin.

(xv) That the subject consignments had arrived in the month of July 1978, and the Customs authorities had waited for three months to draw the samples and to send the same to NAFED and had, thereafter, waited more than three months for issuance of the show-cause notices. This very fact itself shows that the Customs authorities acted arbitrarily, maliciously and without any materials.

(xvi) That it was incorrect on the part of the Board to say that the Ld. Collector had relied on different export authorities, inasmuch as there were not many expert authorities to be produced before the Collector.

(xvii) That the NAFED Manager had admitted that it was difficult for any person to say whether the goods were of Nepalese or Indian origin.

(xviii) That the Board had erred in not taking into account this vital admission.

(xix) That the learned Member of the Board was completely perverse and biased in passing the order, inasmuch as he did not go into the details and merits of the case.

(xx) That the Board having come to the finding that the case was not a fit case for confiscation of the goods or imposition of penalty, should have recorded the finding that the goods, in fact, were of Nepalese origin and they had a right to export the said goods.

(xxi) That the Customs authorities at the Indo-Nepal border having permitted the entry of the said goods into India for transit as goods of Nepalese origin after making due enquiry, the goods were estopped or debarred from legitimately raising the question regarding origin of the goods at Calcutta.

(xxii) That there was no material before the Ld. Collector and the Ld. Member of the Board to prove that the Turmeric which was alleged to have been exported from India was being re-exported from Nepal as goods of Nepalese origin.

(xxiii) That the goods in question were the same very goods which had been exported from India to Nepal and as such the finding of the Ld. Collector and the Ld. Member of the Board was based on mere guess, surmises and conjectures.

(xxiv) That none of the border examiners had in their evidence or written statements before the Ld. Collector stated that the goods were not of Nepalese origin.

(xxv) That the opinion of the NAFED Manager was no evidence. It was not worthy of being relied upon as it did not disclose any basis or criteria relied upon.

(xxvi) That the Ld. Collector and the Board had made a mistake in accepting the said Manager, NAFED, as an expert.

(xxvii) That the Customs authorities erred in relying upon the report of the Agmark authorities inasmuch as it was never a part or basis of the show-cause notices.

(xxviii) That the border examiners had also admitted that it was not possible for anybody to distinguish whether the goods were of Indian origin or Nepalese origin.

(xxix) That the impugned order is based on surmises and conjectures and irrelevant and extraneous considerations and is perverse.

(xxxi) That the order of the Board and the order of the Collector should be set aside and such order should be passed as will afford the appellants relief and they may be able to get release of the Turmeric.

57. During the course of hearing before the Tribunal the learned counsel for the appellants had reiterated the above points and emphasised, particularly, their contention that the opinion of the NAFED Manager had no evidentiary value. The learned counsel had also requested the Bench to take note of the learned Junior Departmental Representative's statement that the action in this case was taken at the instance of some higher authorities and the Collector had merely acted as an agent and emphasised that this shows that the order of the Collector was bad in law. The counsel had also requested the Bench to take note of the Junior Departmental Representative's statement that Collector had no authority to stop export of such goods under the Customs Act, 1962.

The learned counsel had also drawn attention to the fact that the commodity being Turmeric the goods have, after so many years, already become dust and a material of no commercial value and a waste material.

The Departmental Representatives had, on the other hand, merely drawn our attention to the operative portions of the orders of the Collector of Customs and the Board and stated that they relied upon the same. The learned Departmental Representatives had emphasised that the Board had upheld the Collector's finding relating to Indian origin of the goods as correct, as the Collector had based his finding on the opinion of the NAFED and Agmark authorities. It was their submission that the Collector was justified in placing reliance on the opinion of these organisations. The Departmental Representatives had pleaded that the orders may be upheld. The learned counsel for the appellants had, in reply, reiterated that the Board's order and the Collector's order may be set aside as the action was illegal ab initio and the Collector had no power to stop export and the goods were not liable to confiscation and they were not liable to any fine or penalty. He had emphasised that they had followed the prescribed law and procedure and the stopping of the consignment was an illegal and mala fide act. The Board in its findings had not discussed or evaluated the so-called evidence relied upon by the Collector. Board's reliance upon the Collector's order was misplaced and its findings on the point of country of origin was wrong. The Collector himself was wrong in relying on the opinion of NAFED and Agmark authorities. The person who gave the opinion was not expert and his opinion was of no

evidentiary value.

Moreover, the Collector had not acted as per his own best judgement or discretion but had taken action and passed the impugned order at the behest of some higher authorities. The order was, therefore, mala fide.

It was indeed an instance of abdication of jurisdiction by the Collector. His order was, therefore, not a proper order.

They have suffered for nearly nine years from 1971 onwards for no fault of their own and a lot of harassment and financial loss and difficulties have been caused to them. The learned counsel had prayed that in view of their submissions, their appeal may be accepted and allowed.

58. As already noted, the show-cause notices (both original and supplementary) were defective and vague.

59. The failure to specify the relevant provisions of the law renders them meaningless. Indeed, they do not amount to proper show-cause notices.

60. As the notices themselves were invalid, proceedings based on them were bad in law and liable to be set aside on this ground alone.

61. I have also noted yet another unusual feature - that of issue of the so-called supplementary show-cause notices after hearing.

62. Normally, once a show-cause notice is issued and hearing is granted, necessary order is passed by the adjudicating authority. The reasons for departure from this established procedure are not clear and have not been explained by the Department.

63. The learned counsel for the appellants has, on the other hand, drawn our attention to the letters addressed to the Collector which indicate that they had concluded the submissions and prayed for orders.

64. It is evident that, at this stage, the so-called supplementary notices could be issued only at the instance of the Collector.

Therefore, in view of the above noted request, of the appellants, in particular, it was, in my opinion, necessary on the part of the Collector to indicate clearly as to why he could not pass any order at that stage and why he thought it necessary to allow issue of the supplementary show-cause notices.

65. It is noteworthy that the supplementary show-cause notices seek to expand the basis of the charges to modify them. Therefore, it was all the more necessary so to do.

66. Further, as already noticed, after arrival of the goods in the docks the letship order was withheld by the Customs. The nett result was that the goods could not be shipped and remained under the Customs control, and the appellants were no longer free to handle or use the goods as they pleased. In other words, the goods were, in fact, detained.

67. The fact that a detention memo was not served or the goods were not formally seized does not alter this basic position.

68. Having said that I may also mention that the Treaty undoubtedly requires the Customs Officers to ensure that the prescribed procedure is duly followed, and, therefore, the detention of the goods for verification of facts or removal of doubts was understandable. In fact, the power to detain is inherent or implied in the power to check and verify. But detention (and such prolonged detention at that) without indicating either the reasons or the authority at that time was neither fair nor proper.

69. Further, as already noticed, in so far as Articles II, VI and VIII of the Treaty and Article III of the Agreement of Cooperation cited in the show-cause notices as also in the Collector's orders are concerned, they require certain measures to be taken in pursuance of the provisions of the said Articles.

70. The Hon'ble Supreme Court had also occasion to make similar observations in the famous Masur dal case - Padam Kumar Agarwal v. Addl. Collector of Customs, Calcutta (AIR 1972 SC 542). The Supreme Court had noted in this case the department could not show measures, if any, taken in pursuance of the Treaty.

71. I also notice that in the present cases as well the department has not produced any material whatsoever indicating that persons concerned had been put on notice regarding prohibition or restriction, if any, considered necessary for the purpose of safeguarding the legitimate interests of the two countries referred to in the aforesaid Articles of the Treaty and the Agreement. In other words, as in the Masurdal case so in the present cases the department has not been able to show measures, if any taken in this respect and therefore the ratio of the Masurdal case applies.

72. As already noticed both the Nepalese and the Indian border Customs had found the goods and documents in order in terms of the aforesaid Treaty and Agreement.

73. But even if some violation came to notice after clearance at the border a question arises whether the Collector of Customs, Calcutta, had any jurisdiction to reopen the matter? In this connection, it is noteworthy that the procedure under the Treaty prescribes different duties for the border Customs and for the Port Customs and the duty of checking the country of origin has been assigned specifically to the former (border Customs) and not to the latter. Furthermore, undoubtedly, Indo-Nepal border falls within the jurisdiction of the Collector of Customs, (Prev.), Patna and not under the Collector of Customs, Calcutta. Therefore, obviously it was necessary for Calcutta Customs to see and to show whether cause of action had arisen within their jurisdiction and they had the necessary authority to take the proposed action under the Treaty and the law. But neither the show cause notices nor the order of the Collector give any indication as to how had the Calcutta customs or for that matters Indian Customs had the jurisdiction in the matter and how the Collector of Customs, Calcutta, had taken upon himself to adjudicate the cases.

74. In this connection, as already noticed, the Customs Act, 1962, authorises the Customs officers to take action under a Treaty or Agreement provided a Notification is issued under Section 11(1) of the Customs Act, and the department has not shown that any such Notification has been issued under the said section in respect of the Nepal-India Treaty of Transit (1978) and Agreement of Cooperation.

Absence of such a Notification means absence of a linkage mechanism connecting the Treaty with the Act so essential to enable the Customs officers to take action under the law. The consequence is a lacuna which appears to have gone unnoticed and could only be covered by issue of a proper notification by the Govt. of India under Section 11(1) read with Section 11(2)(r). Till this was not done, I am afraid, the Customs Act could not come into play and provisions of the Customs Act could not be invoked even in cases of proven violation of the terms of the Treaty or the Agreement of Cooperation. Therefore, in the instant cases, Sections 113(d) and 113(i) and 114 of the Customs Act, '62, were not available to the Customs for taking action against the appellants even if the violation of the Treaty was established.

75. In the instant cases actually there is no positive proof of violation of the Treaty and the Agreement, as there is no positive proof that the country of origin was India and the goods were the very same goods which were initially exported from India to Nepal. (and in this respect also these cases are similar to masurdal case) (AIR 1972 SC 542).

76. Generalisations and surmises on the basis of production, consumption and export date are of no avail and the Collector was right in concluding that the so called circumstantial evidence does not conclusively prove anything. This is yet another point of similarity between these cases and the aforesaid Masurdal case. Therefore, it is not clear as to on what basis the Collector has distinguished the aforesaid case and failed to apply the ratio thereof.

77. We have also noticed that the Collector has mainly relied on the opinion of the NAFED Manager. However, the same is of no evidentiary value as it was not wellfounded. As rightly pointed out by the learned counsel, it neither indicated any rational basis nor amounted to a firm opinion and therefore, was not worthy of being relied upon.

78. This point has already been discussed at length by the learned member (Judicial) and I entirely agree with his opinion that neither the NAFED Manager could be considered as an expert nor his opinion had any evidentiary value. In fact, I consider that since it had been admitted even by the NAFED Manager (as

well as Agmark authority) that same varieties of Turmeric are grown on both the sides of the border and it was not possible to give a firm opinion about origin due to resemblance. Therefore, the learned Collector and the learned Board should have accepted the appellants' plea, particularly when it was backed by the declaration of origin duly countersigned by the Nepalese Customs and the Indian border Customs and should have given consequential benefit to them.

79. I also observe that the learned counsel for the appellants had rightly mentioned that these cases were similar to the case of M/s.

Dhan-Raj Chhajur (134 of 1979) decided by the Calcutta High Court (dated 10-7-1979) Annexure - J and the case of Padam Kumar Agarwal v. Addl. Collector of Customs, Calcutta (Masurdal case) (AIR 1972 SC 542) decided by the Hon'ble Supreme Court and, therefore the ratio of these two judgements was required to be applied and the appellants' contention should have, in the normal course, found acceptance with the Collector and the Board.

80. Further, as already noticed, the charge regarding violation of Export Policy and the Export (Control) Order was very vague and specific particulars so essential to render the charge meaningful were conspicuous by their absence. But I am all the more surprised to find that, as a matter of fact the charge in this respect was, strictly speaking, incorrect, inasmuch as the export of Turmeric from India was actually not prohibited or banned under the Export (Control) Order, 1977 and the Export Policy for the period April, 1978 to March 1979.

This is evident from a perusal of the Export Policy which shows that Turmeric does not figure in Part A of the Schedule-I which is a list of items, the export of which is not normally allowed. On the contrary, it figures as item No. 18(iii) in Part B of Schedule-I of the Policy (Page 85).

81. And as already noticed, the export of items mentioned in Part-B is allowed on merits. In other words, it is not banned or prohibited, but permissible subject to fulfilment of certain conditions and, in fact, as per the statement of policy, the export of Allepcy finger Turmeric was allowed within limited ceiling in 1978-79 (page 15). Therefore, strictly speaking, the Customs officers were incorrect in

stating that the export of turmeric was banned/prohibited under Export (Control) Order during the relevant period.

[This point is largely of academic interest (in view of our findings).

However, it may be worthwhile to note that turmeric is botanically a species of *Curcuma* called *Curcuma Longa* or *Curcuma Domestica*. The Rhizomes which are short and thick constitute turmeric of commerce. It is cultivated by sowing live (raw) rhizomes which act as propagules.

The finger-like yellow pieces normally found in the market are off-shoots of rhizomes made marketable by processing, which consists of cooking, crying and polishing the figures.

(Source: 'Wealth of India' Council of Scientific and Industrial Research, New Delhi-1960) 82. In other words, Turmeric or 'Haldi' as commonly known, is a processed product (whether in the form of fingers or powder) whereas the so-called Turmeric 'seeds' are actually live propagules (raw rhizomes).

83. The policy Statement (1978-79) relating to item 18(iii) Part-B Schedule-I to the Export (Control) Order, 1977 disallows export of Turmeric 'seeds' whereas it allows export of Turmeric 'fingers' withing limited ceiling. Other products of *Curcuma Longa* are not mentioned at all i.e. were freely allowed.

84. However, it may be mentioned 'en passant' that export of Turmeric of Indian origin was subject to compliance with provisions of other allied laws such as Agricultural Produce (Grading and Marking) Act and Rules read with Section 11 of Customs Act, 1962 but the department has not made out any case in this respect.]

85. Moreover, in the instant cases, the goods were actually being taken out of Nepal to a place outside Nepal and India was only acting as a conduit or channel providing passage for Nepalese traffic to third countries under an international treaty and, therefore, a question arises whether Indian Export Policy and Indian Export Control Order could govern such foreign traffic in transit? The answer lies in the Articles of Nepal-India Treaty and the provisions of law already discussed before, But the department has, strangely, not chosen to activate or invoke the

relevant provisions(s). As already noticed, no section of the Imports and Exports (Control) Act, 1947 (as amended) or any other specific provision of law has been cited. In the instant cases, the department has not been able to prove the Indian origin of the goods. But even if it had, there was only one course open to the authorities that is to take recourse to the coupling mechanism between Imports and Exports (Control) Act and the Customs Act, 1962 provided by Section 3(2) of the Imports & Exports (Control) Act, 1947 and Section 11 of the Customs Act, 1962. But they have not done so. Furthermore, even this linkage would have been useful only, if a notification had been issued under Section 11(1) read with 11(2)(r) of Customs Act, 1962, and was relied upon. However, the department has refrained from utilising these provisions. This ties up neatly with our earlier observations regarding want of measures under the Treaty (and the Agreement) and the Customs Act (1962).

86. Neither the Collector nor the Board have examined these aspects and consequentially have erred in passing the impugned order.

87. Thus, I find that the department has not been able to establish any of the charges mentioned in the show-cause notices. It has not been able to show the violation of any of the terms of the Nepal-Indian Treaty of Transit (1978) or the Agreement of Cooperation or the Export Procedure prescribed in the memorandum to the Treaty of Transit.

88. It has not been able to establish violation of any provision of the Customs Act or the allied laws.

89. It has not even been able to show that the Collector of Customs, Calcutta had the jurisdiction to pass the impugned order in the circumstances of these cases.

90. The learned Junior Departmental Representative, on the other hand, has disclosed in the open court that the action in the instant cases was taken by the Collector at the instance of some higher authority and the Collector had merely acted as an agent. This statement coupled with glaring defects in the show-cause notices, the unusual features of the procedure followed as also the fact that the authorities below have not examined all the relevant aspects of the matter, gives

an edge to the assertion of the appellants' counsel that the department's action was motivated by extraneous considerations. The Board has, in fact not dealt with the matter with any degree of thoroughness; and I consider that the appellants' grievance was fully justified on this score.

Hence, looking to the facts and circumstances of the cases as a whole, I consider that the proceedings were ab initio bad in law and the orders of the Collector of Customs and the Board were incorrect, unfair and improper; as such, they were liable to be set aside.

91. Accordingly, I quash the show-cause notices and the order of the Collector of Customs, Calcutta and the order of the Central Board of Excise & Customs, Delhi.

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