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Court : Delhi

Decided On : Oct-05-1972

Reported in : ILR1973Delhi433

Judge : T.V.R. Tatachari and; R.N. Aggarwal, JJ.

Acts : Import & Export (Control) Act, 1947 - Sections 3(1); [Constitution of India](#) - Article 14

Appeal No. : Civil Writ Appeal No. 501 of 1971

Appellant : Jayantilal Kuberdas Katakia and ors.

Respondent : The Union of India

Advocate for Pet/Ap. : A.K. Sen,; E.C. Aggarwal,; S.P. Aggarwal,;

Judgement :

T.V.R. Tatachari, J.

(1) This Writ Petition has been filed by five petitioners, viz. (1) Jayantilal Kuberdas Katakia, (2) Tryambaklal Kumberdas Katakia, (3) Nagindas Kuberdas Katakia, (4) Mukundrai Kuberdas Katakia, and (5) M/s. Madhu Warp-Knit Industries. The respondents to the Writ Petition are (1) The Union of India through, the Secretary, Ministry of Foreign Trade, and (2) The State Trading Corporation of India Ltd. through its Chairman.

(2) Petitioners 1 to 3 started a registered partnership firm, M/s. Madhusudan Gordhandas & Co. (hereinafter referred to as the 'main firm'), as a proprietary concern. Between 1955 and 1966, they were doing business as traders, importers and manufacturers of cotton fabrics, woollen fabrics and woollen yarn under the names and styles of the following registered partnerships:

(1) Madhusudan Gordhandas & Co. (main firm), v. The Union Of India (2) Madhu Wool Spinning Mills, (3) Madhu Woollen Textile Industries, and (4) Madhu Malimo-Textile Industries.

(3) In 1961, petitioners 1 to 3 started doing business of manufacturing rayon and synthetic fabrics in the name of petitioner 5 firm, i.e. M/s. Madhu Warp-Knit Industries. Petitioner 4 joined the main firm and the other firms in the year 1966. According to the petitioners, between 1959 and 1965, they had, in the name of the main firm and the other firms and under various Export Promotion Schemes, effected (as merchant-exporters and manufacturer-exporters) exports of the value of over Rs. 1.6 Crores, and raw material requirements were being met out of the consequent import entitlement for which they had obtained various import licenses to the tune of about Rs. 59 Lakhs.

(4) The Imports and Exports (Control) Act 1947, vests in the Central Government (respondent 1) the power to prohibit, restrict, or otherwise control imports and exports. Respondents 2 is a company registered under the Indian Companies Act, and is wholly controlled and managed by respondent 1. Import or Export Trade (Control) Policy of the Government of India for each year is notified in the Gazette of India.

(5) By a letter, dated April 14, 1966, the Chief Controller of Imports and Exports informed the main firm that a certain Explanation furnished by it was not found to be satisfactory, and that it was decided that no import licenses or customs clearance permits should be issued to it, its partners and branches, if any, for any item for three annual licensing periods, viz. April-March, 1967, April-March, 1968, and April-March, 1969, even if the same might, otherwise, be admissible. It was, however, made clear in the said letter that the ban did not apply to applications for export licenses and licenses under the Export Promotion Scheme.

(6) It may be stated here that on June 6, 1966, Indian rupee was devalued and all Export Promotion Schemes were abolished. On June 28, 1966, respondent 1, by a public notice. No. 93 ITC (PN) 66, called upon all categories of industries including the art-silk powerloom/warp-knitting industries to apply for their annual raw material requirements so as to enable respondent 1 to evolve a common policy and arrange for the import of raw material for various industries.

(7) Then, on November 5, 1966, the import of man-made fibre yarn was canalised through the State Trading Corporation of India Ltd. (respondent 2) through a Press Note. Between December 30, 1966, and March 2, 1967, import licenses of the value of over rupees 6 Crores were issued to respondent 2 by Respondent 1 for the import of man-made fibre yarn (nylon yarn). In March, 1967, the export of synthetic fabrics, namely, the end-products made out of synthetic yarn, was canalised through respondent 2. According to the petitioners, between March, 1967, and July 27, 1970, they were denied allocation of raw material through respondent 2 and the issue of import licenses even for their normal requirement of spare parts components and necessary machinery for normal running of the plant, licenses for spare parts which were issued earlier were detained by the licensing authorities, and the petitioners had to file writ petitions in the High Court of Bombay challenging the order debarring them from obtaining import licenses and the denial of allocation of raw material through respondent 2. It is stated that the petitioners could not undertake manufacturing activities between April, 1966 and July 1970, and had to close down their factory for want of raw material as well as necessary spare parts and components.

(8) On July 28, 1970, the Chief Controller of Imports and Exports issued a corrigendum circular, No. 12/70-71/HQ., stating that it was thereby clarified that the debarment or abeyance order issued on April 14, 1966, did not apply to the four firms (1) M/s. Madhu Wool Spinning Mills, Bombay, (2) M/s. Madhu Woollen Textile Industries, Bombay, (3) M/s. Madhu Textile Processing Industries, Thana, and (4) M/s. Madhu Warp-Knit Industries, Bombay. It was also stated therein that all the licensing authorities were requested thereby to take notice of the clarification and deal with the applications of the parties in the normal course.

(9) It appears that in October, 1970, the respondents agreed to settle the matter in the Writ Petitions filed in the High Court of Bombay, and certain terms of settlement were negotiated.

(10) On February 23, 1971, a news item appeared in the 'Financial Express' to the effect that the Union Government put forward a scheme for the import polyester filament yarn against exports of art-silk fabrics from the country, that imports of the said yarn would be permitted to manufacturer-exporters of art-silk fabrics under an import license for yarn of the value of Rs. 50 lakhs which the State Trading Corporation had been holding for some time against exports of sugar, and that the Government was understood to have instructed the State Trading Corporation (respondent 2) to issue Letters of Authority for advance import of polyester yarn on certain conditions to those manufacturer-exporters whose average exports during the last two years, i.e. 1968-69 and 1969-70, amounted to Rs.7.5 Lakhs. Thereupon, the petitioners approached the State Trading Corporation of India (respondent 2) who informed them that they should contact the Silk and Rayon Textiles Export Promotion Council, Bombay. The petitioners then wrote letters, dated March 1, 1971, and April 17, 1971, to the said Council requesting that they may be furnished with the particulars of the scheme for the facility of advance import licenses regarding polyester filament yarn. By a letter, dated April 21, 1971, the Council informed the petitioners that the scheme to import polyester filament yarn was being operated by the State Trading Corporation of India Ltd. and the Council was not concerned with its operation, and that the petitioners should, therefore, get in touch with the State Trading Corporation directly. It was added that the Council had neither sought any clarification about the scheme from the Ministry nor was it concerned in implementing the same, and that in fact the Council had opposed the said scheme and had already written to the Ministry accordingly in the matter. In the mean time, the petitioners wrote to respondent 1 a letter, dated April 20, 1971, in which, after setting out the various facts, stated that till April, 1966, they had participated in the Export Promotion Scheme of art-silk fabrics and various other schemes in the name of the main firm and effected exports of the value of over Rs. 1.5 Crores as a result of which they earned import licenses to the tune of over Rs. 60 Lakhs directly in their name and over Rs. 60 Lakhs in the name of over 100 manufacturers of art-silk fabrics in whose behalf

they made exports as their agents as per the requirements of the relevant scheme. They submitted that since April, 1966, they were debarred for three annual licensing periods ending March 31, 1969, from obtaining any import licenses under a debarment order issued by the Office of the Chief Controller of Imports and Exports, New Delhi, as a result of which they were not getting any allocation of nylon yarn through the State Trading Corporation of India and consequently their mills remained closed, that even after the said debarment period was over on April 1, 1969, they were not yet allotted any allocation by the State Trading Corporation of India and their mills continued to remain closed and that the licensing authorities, through Shri K. N. R. Pillai, Joint Chief Controller of Imports and Exports, New Delhi, have how after five years clarified that the department order did not envisage the stopping of Release Orders to the petitioners. They further submitted that in the circumstances they were entitled to the grant of advance license for import of polyester filament yarn and requested that they may be granted their legitimate share of advance license for a minimum amount of at least Rs. 15 Lakhs to enable them to fall in line with other exporters although in view of their past performance they were entitled to even bigger amount.

(11) It is stated that the representative of the petitioners in Delhi thereafter called upon Shri Daulatram, Under Secretary to the Ministry of Foreign Trade, to press the claim of the petitioners to participate in the aforesaid scheme, but that the said officer turned down the contention of the petitioners and informed their representative that there were no exports of the petitioners recorded during the specific licensing periods of 1968-69 and 1969-70 and, therefore, they were not entitled to the grant of advance license or to participate in the said scheme. Thereupon, the petitioners filed the present Writ Petition praying (1) that the decision and/or schema to grant advance import licenses for the import of polyester filament yarn be declared as illegal and/or ultra vires; (2) that the various orders passed while formulating the said scheme and/or in giving effect to the same from time to time be quashed; (3) that a writ of mandamus or any other appropriate Writ, order or direction be issued restraining the respondents, their servants and agents from giving effect to the said decision and/or scheme; (4) that a writ of prohibition or any other appropriate Writ, order or direction be issued prohibiting the respondents, their servants and agents from giving effect to the

said scheme; and (5) that the respondents be directed to grant the petitioners an advance import license of the value of Rs. 15 Lakhs or any other value as may be determined.

(12) Shri A. K. Sen, learned counsel for the petitioners, admitted that the fifth prayer was only in the alternative, and the first four prayers practically amount to one prayer, viz. for quashing the decision and/or scheme regarding the grant of advance import licenses for the import of polyester filament yarn.

(13) The case of the petitioners in the Writ Petition was as follows:

'PRIOR to 1966, the Export Promotion Scheme was in vogue and the raw material requirements of petitioner 5 firm were met from out of the import entitlements in lieu of the exports effected by the petitioners. Between 1959 and 1965, the main firm and respondent 5 firm thus effected exports of a value of over Rs. 1.6 Crores. In April, 1966, the petitioners were wrongly debarred from obtaining any import licenses or custom clearance permits for three licensing periods ending March, 31, 1969: In November, 1966, the import of synthetic yarn was canalised. through respondent 2, and the raw material requirements of manufacturers of art-silk fabrics were to be met by respondent 2 from out of the canalised imports of yarn. In March, 1967, respondent 1 adopted the policy to canalise the export of synthetic fabrics, i.e. the end-products made out of the synthetic yarn also through respondent 2. The combined effect of the canalisation of import of raw material for the manufacturers of synthetic fabrics and that of export of endproducts of such manufacturers brought about a complete monopoly and/or control by the respondents of imports and exports of the aforesaid materials. On account of the wrongful order debarring the petitioners, they were denied their requirements of the raw material, i.e. synthetic yarn. The indigenous source of the raw material was small, the price of the same was very high and the quality of the indigenous yarn was much below the standard required for the high speed and high productive machinery of the petitioners. The petitioners had, therefore, to rely solely upon the imports for raw material requirements. In view of the denial of their requirements of the raw material, the petitioners had practically to close their factory or mills. However, subsequently, by letters, dated July 24/27, 1970, the

Chief Controller of Imports and Exports, New Delhi, clarified that petitioner 5 firm was not within the contemplation of the order of debarment passed on April 14, 1966. In fact in certain Writ Petitions filed in the High Court of Bombay challenging the order of debarment, the respondents conceded in that High Court that the order of debarment did not include respondent 5 firm. Then, on February 23, 1971, a news item appeared in the Financial Express to the effect that respondent 1 decided to grant import licenses in advance for the import of polyester filament yarn to the manufacturer-exporters of rayon fabrics who have fulfilled an export target of at least Rs. 7.5 lakhs in any of the licensing periods 1968-69 or 1969-70. The said proposal to grant import licenses in advance was from out of an import license for the import of polyester filament yarn of the value of Rs.50 Lakhs which respondent 2 had been holding for some time against export of sugar made by it. Coming to know of the said decision or scheme, the petitioners applied to the respondents to enable them to avail the said facility of advance licenses. But, the petitioners were informed that there were no exports of the petitioners recorded during the licensing periods of 1968-69 and 1969-70 and, therefore, they were not entitled to the grant of advance license as per the aforesaid decision or scheme and to participate in the said scheme.'

(14) The petitioners contended in the Writ Petition (1) that the decision to grant import licenses in advance was illegal as the same was not notified in the Gazette; (2) that even otherwise the basis or conditions, viz. the specification of the years 1968-69, 1969-70, and the target of export to the extent of Rs.7.5 Lakhs laid down in the said decision or scheme to grant advance import licenses to a special category of manufacturer-exporters are arbitrary and /or have no basis or nexus with the object of the scheme; (3) that respondent 1 ought to have allowed every manufacturer to participate in the said scheme and/or laid down a reasonable basis for enabling the manufacturers to participate in the said scheme, and the same not having been done the aforesaid basis or conditions violate the fundamental rights of the petitioners guaranteed under Article 14 of the [Constitution of India](#); (4) that the petitioners were unable to export during the period between 1966 and 1969 on account of the illegal and wrongful order of debarment, and in view of the subsequent clarification the petitioners should be held to be entitled to the grant of advance import license of the value of at least 15

Lakhs from out of the import license in favor of respondent 2 on the basis of the past export performance of the petitioners prior to 1966; and (5) that the respondents, in their public character, could not and ought not to have given effect to the said decision or scheme for grant of import licenses in advance limited to about five parties who fulfilled the basis of conditions laid down in the decision, and by doing so the respondents affected the fundamental rights of the petitioners guaranteed under Articles 14 and 19(1)(f) and (g) of the [Constitution of India](#).

(15) In opposition to the Writ Petition, a counter affidavit of Shri R. M. Doiphode, Director, Ministry of Foreign Trade, had been filed on behalf of respondent 1. It was admitted in the said counter affidavit that the Government announced through a Press Note, dated November 5, 1966 (Annexure R-I), that the import of man-made yarn will be canalised through the State Trading Corporation (respondent 2). It was explained that no provision was made in the Import Policy for release or supply of imported raw material, namely man-made yarn to actual users for the period April, 1966, to March, 1967, and the same meant that the supply of the said item was totally banned for normal requirements of Actual users for that period, except under the Export Promotion Scheme, that the intention was to build up a stock with the State Trading Corporation with a view to release the raw material during the subsequent period, i.e. April 1967-March, 1968, that the policy for distribution by releases through the canalising Agency was announced in the Policy Red Book for the period April 1967-March 1968, and that consequently the petitioners had no right to claim the assistance of the raw material in question through the canalising Agency for the period April, 1966 to March, 1967. It was denied that the petitioners were precluded from effecting exports for want of raw material, and it was pointed out that on their own showing the petitioners had admitted in their representation, dated April 20, 1971, that the debarment order was not applicable to the Export Promotion Scheme. It was averred that it was wrong to suggest that the indigenous source of the raw material was small and the price of the same was very high, or that the quality of the same was much below the standard or that the entire raw material required for the manufacture of nylon yarn in India was imported from abroad. It was admitted that the debarment order, dated April 14, 1966, did not apply to the petitioner 5 firm, but it was denied that the petitioners were not able to make any exports as required under the impugned

scheme because of the debarment order. It was stated that in Civil Writ No. 120 of 1969 filed in the High Court of Bombay challenging the debarment order, dated April 14, 1966, a proposal was made to the petitioners and the same was accepted by the petitioners in settlement of all claims, and that accordingly the Writ Petition had since been withdrawn and an allotment of 112 tonnes of nylon yarn had been made to the petitioners.

(16) As regards the allegations and contentions in the Writ Petition regarding the distribution of polyester filament yarn, it was averred that it was not within the knowledge of the deponent how the petitioners received the information regarding the said distribution. It was explained that as part of the country's export drive, the State Trading Corporation effected exports of sugar, that since the international price of sugar was much lower than its internal price, the said exports were effected by the State Trading Corporation at a heavy financial loss, that the policy of the Government was to encourage export and the Government, therefore, granted import licenses which were more commonly known as incentive licenses to exporters in view of the exports made by them, and that as a part of the barter deal involving exports of 50,000 tonnes of raw sugar, the State Trading Corporation was allowed in 1970 to import Rs. 50 Lakhs worth of polyester filament yarn besides stainless steel and cloves up to a certain value so that the losses involved in the export of sugar could be covered. It was also stated that it was decided that a scheme for the distribution of polyester filament yarn be worked out in such a way that it generated additional exports of art-silk goods, that accordingly a scheme was worked out which envisaged the allocation of polyester filament yarn by the State Trading Corporation to such parties as under took to export art-silk textiles four times the value of the allocation within one year of the allotment, that the said allocation of Rs. 50 Lakhs worth of polyester filament yarn was thus expected to generate an export of Rs. 2 Crores in the course of one year, and that in order to eliminate unreliable parties and ensure additionality and enforcement of export obligation, safe-guards on certain lines (set out in the counter affidavit) by way of conditions were evolved. It was submitted that since the petitioners did not fulfill the conditions laid down in the aforesaid scheme for the allocation of polyester filament yarn, the Under Secretary had informed the representative of the petitioners that they were not entitled to the benefit of the

scheme,. It was asserted that the selection, of the manufacturer- exporters to whom the State Trading Corporation was to sell the polyester filament yarn imported by it under the license granted to it by the Government in lieu of export of suger nade by it, was entirely a mattter of commercial judgment of the State Trading Corporation, that the scheme was open to all manufacturer-exporters of art-silk textiles who fulfilled the conditions laid down therein, and that it was false to suggest that the facility was provided only for a special category of exporters, as the petitioners were also free to participate provided they satisfied the conditions laid down in the scheme. It was further explained that polyester filament yarn carries high market premium and the quantity being small and all the manufacturer-exporters not being in a position to utilise the polyester filament yarn in their own establishments, it was feared that if the scheme was extended to all the manufacturer-exporters it may not achieve the intended policy, and that to ensure enforement of export obligations, safe-guards were evolved which were incorporated in the scheme inquestion. It was denied that the scheme violated the fundamental rights of the petitioners under Articles 14 and 19(l)(f) & (g) of the Constitution. It was submitted that the respondents were under no obligation to notify the scheme in the Gazette, that registered exporters were to hold valid registration certificates issued to them by the concerned registering authorities, that the procedure for registration was provided in the Hand Book of Rules and Procedure, that the petitioner 5 firm also was a registered exporter whose registering authority was the Silk and Rayon Textiles Export Promotion Council, Bombay, that the scheme was notified by the State Trading Corporation to the said Council and was circulated to its members, that the said council was requested to invite leading manufacturers and exporters of art-silk fabrics having export performance of more than Rs. 7.5 Lakhs for a meeting in the Office of the State Trading Corporation, that the members present at the meeting were explained the decision of the Government for import of polyester filament yarn under the Rs. 50 Lakh license granted to the State Trading Corporation, and that the terms and conditions of the scheme were also duly notified to the Council and its members and thus there was no need for its publication in the official Gazette. It was submitted that the petitioners themselves were to be blamed for not effecting the necessary exports to achieve the requisite requirements of minimum annual

average exports of Rs. 7.5 Lakhs during the financial years 1968-69 and 1969-70, that the petitioners were not precluded to maintain their exports, that paragraph No. 120 of the Hand Book of Rules and Procedure for the year 1968 and paragraph 117 of the Rules and Procedure for the year 1969 contained provisions for the grant of advance licenses, that the petitioners were at liberty to have raw material available from indigenous sources for effecting exports and thereby obtaining the assistance under the Export Promotion Scheme, that the Replenishment Scheme was applicable to the petitioners during the relevant period, that the debarment order did not apply to export and licenses under the Export Promotion Scheme and the petitioners were at liberty to obtain replenishment for manufacture of art-silk textile for exports, and that the petitioners were thus not entitled to advance import licenses as they did not effect exports of the requisite value during the years 1968-69 and 1969-70.

(17) Respondent 2 filed a reply to the Writ Petition. The averments therein were practically on the same lines as those in the counter affidavit filed on behalf of respondent 1.

(18) The petitioners filed rejoinders to the said affidavits filed on behalf of respondents 1 and 2, and the petitioners reiterated their contentions in the Writ Petition. At a later stage, the petitioners applied for amendment of the Writ Petition by adding paragraphs 14A to 14E and corresponding grounds (e) to (h) after ground (d) in the Writ Petition, and they were allowed to so amend. The petitioners filed an amended Writ Petition. In the said paragraphs added by amendment, the petitioners set out the names of four manufacturer-exporters, viz; Reliance Textile Industries (Reliance Commercial Corporation) Bombay, Vasudev Pranjivandas, Surat, Bharat Vijay Velvet and Silk Mills, Bombay, and Fancy Corporation Ltd. Bombay, who have been granted advance import licenses for various amounts totalling Rs. 45 Lakhs as well as the export performance of each of the said for manufacturer-exporters for the two licensing periods 1968-69 and 1969-70. The petitioners submitted that from the said figures of import licenses and export performance of the said for manufacturer-exporters it was clear that Respondent 1 had devised the entire scheme solely with a view to benefit the said manufacturer-exporters, particularly one of them viz. Reliance Textile Industries which was

granted half of the entire allocation. It was submitted that it was evident from the said circumstance that the entire scheme was devised with a view to benefit Reliance Textile Industries primarily and the remaining three manufacturer-exporters, Vasudev Pranjivandas, Bharat Vijay Velvet and Silk Mills, and Fancy Corporation Ltd., incidentally, ignoring the remaining manufacturer-exporters numbering over 500. It was stated that after the withdrawal of the debarment order the petitioners had been granted back period allocations and also had been favored with re-validation of import licenses which were wrongfully detained by the respondents since 1966-67 relying on the said debarment order. The petitioners reiterated that they were wrongfully deprived of their quota under the scheme of canalisation on account of which they were prohibited from continuing manufacturing activity as also from undertaking consequent export, and that they were thereby precluded in participating in the scheme for advance import licenses. They contended that the said scheme of granting advance import licenses for polyester filament yarn to a selected few was in breach of the constitutional provision in Article 301 of the [Constitution of India](#) in as much as free trade and commerce was affected and a select few were conferred the benefit arising out of a public policy.

(19) In reply to the amendments made in the Writ Petitions, an affidavit of Shri K.N.Bali, Chief Marketing Manager, State Trading Corporation of India Ltd., has been filed on behalf of respondent 2. It was admitted in the said reply that the four manufacturer-exporters mentioned in the amended Writ Petition were granted import licenses in the sums mentioned therein on the basis of their respective average exports during the years 1968-69 and 1969-70. It was averred that Reliance Textile Industries was on the said basis entitled to Rs. 11 .16 Lakhs worth of import licenses, that M/s Rajrattan Silk Mills declined to participate in the scheme, and M/s Bharat Vijay Velvet and Silk Mills did not lift the full quota, that M/s Vasudev Pranjivandas, Surat, accepted only a reduced quantity and M/s Fancy Corporation Ltd. wanted the import allotment for purposes of embroidery and as such their consumption was limited, and that in those circumstances the balance amount of polyester Filament Yarn to the extent of Rs. 11.69 Lakhs was allotted to M/s Reliance Textile Industries subject to the usual terms and conditions including export obligation of 400 per cent. It was, therefore, pleaded

that the import allotments to the said parties was quite proper, and that it was incorrect to say that the scheme was devised with a view to benefit the Reliance Textile Industries as alleged by the petitioners. It was denied that the scheme for the grant of import licenses for the import of polyester filament yarn was violative of Article 301 of the Constitution.

(20) Shri A.K. Sen, learned counsel for the petitioners, contended that the decision or scheme to grant advance licenses for the import of polyester filament yarn should be struck down as illegal and ultra vires the relevant statutory provisions for two reasons. The first reason urged by the learned counsel was that under the provisions in the Imports and Exports (Control) Act, 1947 and the Imports (Control) Order 1955, the creation of State monopoly through a special agency like the State Trading Corporation as well as the subsequent operation of the said agency can be only under the said statutory provisions and that too by notified orders and not by mere executive instructions. For a proper appreciation of the contention reference has to be made to some facts. The Imports and Exports (Control) Act No. 18 of 1947 came into force on March 25, 1947, and was initially to remain in force for a period of three years. Thereafter, it was extended from time to time and thus continued to be in force. Section 3 of the Act empowered the Central Government to make provisions prohibiting or restricting or otherwise controlling imports and exports, and it required that the said provisions should be made 'by order published in the Official Gazette'. Under the said provision in section 3, the Central Government issued several notifications regarding imports from time to time, and they were subsequently replaced by a consolidated Order called the Imports (Control) Order No. 17/55, dated December 7, 1955. The said Order, as amended from time to time, continued to be in force. It may be stated here that the Import (or Export) Trade Control Policy for each year is announced by the Government of India, Ministry of Commerce, in the Gazette of India Extraordinary, and the same is also published each year in the form of a book usually referred to as the 'Red Book'. The Government also publishes each year an Import (or Export) Trade Control Handbook of Rules and Procedures, usually referred to as the 'Blue Book'. It is meant to be a supplement to the Red Book, and it embodies the procedures, rules, and regulations governing the submission of applications for grant of licenses, their validity and utilisation, and other matters

relating to Import (or Export) Trade Control. The provisions in the said Hand Book (Blue Book) are also brought into force by a Public Notice published in the Gazette of India Extraordinary.

(21) As stated earlier, section 3 of the Imports and Exports (Control) Act 1947, empowers the Central Government to make, by order published in the Official Gazette, provisions for prohibiting, restricting or otherwise controlling imports and exports, and in exercise of the said power, the Central Government issued the Imports (Control) Order No 17/55, dated December 7, 1955, which, as amended from time to time, continued to be in force. Clause 3 of the said Order imposed a restriction on import of certain goods and laid down, inter alia, that-

'NO person shall import any goods of the description specified in Schedule 1, except under, and in accordance with, a license or a customs clearance permit granted by the Central Government or by any officer specified in Schedule II.'

Clause 6 provided that the licensing authority may refuse to grant a license, inter alia,

'(H).. .if the licensing authority decided to canalize imports and the distribution thereof through special or specialized agencies or channels '

(22) As already stated in the course of the narration of the facts, import of man-made fibre yarn was canalised through the State Trading Corporation of India Ltd. on November 11, 1966, and licenses of the value of about Rs. 6 Crores for the import of man-made fibre yarn (nylon yarn) were issued to it between December 30, 1966. and March 2, 1967. The petitioners, however, were denied allocations of the said raw material (yarn) between March, 1967 and July 27, 1970, in view of the debarment order, dated April 14, 1966.

(23) We are, however, concerned in this case with polyester filament yarn. It is common ground that prior to 1971-72, no provision was made in the import policy (Red Book) regarding polyester filament yarn, which admittedly meant that there was a general ban on the import of the said article. In the import policy for the year 1971-72, it was indicated in the Red Book (Volume 1) for that year at pages 81

and 127 that the State Trading Corporation was the canalising agency for polyester filament yarn and the same was to be released to the actual users on the recommendation of sponsoring agencies. Going back to the year 1970-71, it was stated in paragraph 3 of the reply filed on behalf of respondent 2 to the Writ Petition that the State Trading Corporation had effected exports of substantial quantities of sugar to foreign countries at a heavy financial loss, that in order to encourage exports, the Central Government grants import licenses to exporters in lieu of exports made by them which are commonly described as incentive licenses, that for the aforesaid exports of sugar, such incentive licenses were granted to the Corporation in April, 1970. for importing cloves, stainless steel and polyester filament yarn, and that the actual license for the import of polyester filament yarn of the value of about Rs .50 Lakhs was issued by the Central Government to the State Trading Corporation in June, 1970. To the same effect were the averments in paragraph 9 of the counter affidavit of Shri R.M. Doiphode filed on behalf of respondent 1. It was further averred in paragraph 6 of the aforesaid reply filed on behalf of respondent 2 that the exploitation or utilisation of the incentive license by the State Trading Corporation and the selection of the parties to whom it is to sell the commodities imported by it pursuant to such license was a purely commercial matter of the State Trading Corporation. In paragraph 9 of the counter affidavit filed on behalf of respondent 1, it was averred that :-

'As a part of the barter deal involving exports of 50,000 tonnes of raw sugar, the S.T.C. was allowed to import Rs. 50 lakhs worth of polyester filament yarn besides the Stainless steel and cloves up to a certain value so that losses in export of sugar could be covered.'

(24) It was also averred that 'it was decided that a scheme for distribution of the imported polyester filament yarn may be worked out in such a way that it generated additional exports of art-silk goods', that 'accordingly a scheme was worked out which envisaged allocation of polyester filament yarn by the S.T.C. to such parties as undertook to export art-silk textiles four times the value of the allocation within one year of the allotment', that 'the allocation of Rs. 50 Lakhs worth of polyester filament yarn was thus expected to generate an export of Rs. 2 Crores in the course of one year', and that 'in order to eliminate unreliable parties

and ensure additionality and enforcement of export obligation' safe-guards were also evolved on the following lines:-

1. The yarn should be allotted to such manufacturer-exporters only whose exports of art-silk textiles during the last two years have been on an average worth Rs.7.5 Lakhs per year.

2. The manufacturer-exporters receiving this yarn will have to undertake an obligation to export art-silk fabrics equal of 400 % of the Cif value of the allotted yarn over and above maintenance of past exports. For this purpose the past exports would be taken as the average annual exports of the last two years. This export obligation will be over and to above and in excess of exports that may have to be made by a manufacturer exporter against any other export obligation that it may have already undertaken for export of art-silk textiles. This export obligation will have to be fulfilled within one year of the date of allotment of polyester filament yarn.

3. The imports would be through letters of Authority in the name of such manufacturer-exporters instead of direct imports by STC.

4. Legally enforceable bonds would be obtained by the Stc from the specific manufacturer-exporters to ensure fulfillment of the export obligation.

5. The Stc will have the freedom not to provide any cash assistance against these exports.

6. Within the above frame-work Stc would allocate the yarn on the basis of their best judgment and with a view to ensuring the maximum export realisation. I. Definition Of MANUFACTURER-EXPORTERS For Eligibility To Participate In The Scheme : II. Enforcement Of Export Obligation III. Method Of Allocation Polyester filament yarn may be allotted to the eligible units in proportion to their export performance of 1968-69 and 1969-70. However, if any unit does not want to take total quantum of allotment, the balance of the quantum may be offered to other eligible units willing to take additional allotments with their export obligation.'

(25) On the basis of the above averments, Shri S. S. Chadha, learned counsel for respondent 1, contended that the license of the value of about Rs. 50 Lakhs for the import of polyester filament yarn was granted to the State Trading Corporation in 1970 when there was no canalisation of the said article, that it was granted only as an incentive license, and that consequently the manner of utilisation or exploitation of the polyester filament yarn was entirely the concern of the State Trading Corporation. The learned counsel also argued that as the license was not issued in pursuance of canalisation under the provisions of the Imports and Exports (Control) Act, 1947, and the imports (Control) Order, 1955, the petitioners were not entitled to claim any participation therein, and that in any case a fair and reasonable scheme was evolved by the respondents according to which the petitioners were also free to participate provided they satisfied the conditions laid down in the scheme. The learned counsel submitted that in the circumstances the respondents were not under an obligation to notify the scheme in the Official Gazette, and relied upon the reasons given therefore in paragraph 14 of the counter affidavit filed on behalf of respondent 1, which read as follows :-

'IT is not correct to say that the respondents were under an obligation to notify the Scheme in the Gazette to enable all concerned to participate in the Scheme. The Registered Exporters are to hold valid registration certificates issued to them by the concerned Registering Authorities, in the case of the petitioner, it is the Silk and Rayon Textiles Export Promotion Council, Bombay, with respect to man-made fabrics. The procedure for registration is provided in Hand Book of Rules and Procedure and the petitioner is a registered exporter. The scheme was notified by the Stc to the Council and circulated to its members. The Council was requested to invite leading manufacturers and exporters of all silk fabric having export performance of more than Rs.7.5 Lakhs for a meeting in S.T.C's Office. The members present at the meeting were explained the decision of the Government for import of polyester filament yarn under the 50 Lakhs licenses to the S.T.C. The terms and conditions of the Scheme were also duly notified to the Council and its members and thus there was no need for its publication in the Official Gazette.'

(26) On the other hand, Shri A. K. Sen. learned counsel for the petitioners, contended that not only a restriction on import by resorting to canalisation through

a special agency like the State Trading Corporation, but also the operation of that agency is governed by the provision in section 3 of the Act, and consequently the scheme which provided for the operation of the agency with regard to the import and the distribution of the polyester filament yarn could be brought into force only by an order published in the Official Gazette as provided in section 3, and not by a mere executive instruction. He also contended that even if the license in question was issued to the State Trading Corporation as an incentive license, it was in substance a modification of the policy to ban import of polyester filament yarn in the year 1970-71, and such modification of the policy could only be made by an order published in the Official Gazette. The learned counsel also pointed out that according to the petitioners they were not informed by the Export Promotion Council, Bombay, about the terms and conditions of the Scheme, and they came to know of it only when a news item appeared regarding the same in the Financial Express.

(27) It may be stated here that apart from the averments in the counter affidavit of Shri R. M. Doiphode, no document has been placed on record by the respondents to show how and by whom the scheme in question was evolved and brought into force. The arguments before us proceeded on the basis that the scheme was evolved and brought into force by executive instruction and not by an order notified in the Official Gazette.

(28) The question for determination is whether the decision to grant license to the State Trading Corporation for import of polyester filament yarn in the year 1970-71, and the scheme evolved regarding the said import and the distribution of the polyester filament yarn imported under the said license can be held to be legal and valid when they were not notified in the Official Gazette. In this connection, Shri Chadha referred to the decision of a Division Bench of the High Court of Madras in re S. Venkatakrishnan, : AIR1958 Mad218 . In that case, the Chief Controller of Imports and Exports, New Delhi, informed the Joint Chief Controller of Madras, Bombay and Calcutta that licenses may be issued to certain co-operative societies to export quantities of dry chillies which may be sold to Ceylon Government. It was contended that the permission granted to the Co-operative Societies to effect the exports was not valid as it was not published in the Official Gazette. Referring to

that contention, the Division Bench observed that they failed to see why the Departmental instruction by the Chief Controller, New Delhi, should be published in the Official Gazette, and that 'there was no statutory requirement that policy decisions of the Government in exceptional circumstances should be published in the Official Gazette'. The said observation is not, in our opinion, of any assistance in the present case. It has to be noted that the import Trade Policy and the Rules and Procedure laid down by the Central Government every year are not mere decisions or statements of policy but consist of detailed provisions of a regulatory nature by which the Central Government seeks either to prohibit, restrict or otherwise control the import trade in respect of various articles, and the said provisions deal in detail with various aspects of the system adopted for restricting import by issuing licenses in pursuance of the provision in clause 3 of the Imports (Control) Order. That is why the said provisions are announced and brought into force by notification in the Official Gazette as required by section 3 of the Imports and Exports (Control) Act, and subsequently published as Red Book and Blue Book. If any particular article is not included and provided for in the policy notified for any particular year, it means that the policy of the Government is to ban or prohibit completely the import of the said article in that year. As stated earlier, polyester filament yarn was not included and provided for in the policy of the Government until the year 1971-72, which meant that the policy of the Government till that year was to ban or prohibit completely the import of that article. If subsequently the Government desired to change its policy regarding the said article, this change in the policy, i.e. the changed policy, was in itself a measure restricting or controlling the import of that article within the meaning of section 3 of the Imports and Exports (Control) Act, and had, therefore, to be brought into effect by notification in the Official Gazette as required by the said section, and not by mere executive instruction. In the present case, although there was a ban or prohibition against the import of polyester filament yarn in the year 1970-71, the Central Government, without announcing a change of the policy by notification in the Gazette, issued an import license to the State Trading Corporation in that year.

(29) It is no doubt true that according to the Central Government it was only an incentive license that was issued to the State Trading Corporation to cover the

losses incurred by it in exporting sugar. But, the fact that the license was granted as an incentive shows only the object or purpose of the grant, and the fact remains that the decision to grant the license still amounted to a change in the earlier notified policy to ban or prohibit completely the import of the article by its non-inclusion in the notified policy and had, therefore, as a new or changed policy, to be brought into effect by notification in the Official Gazette. It is thus clear that in view of the existence of the notified policy of ban on the import of polyester filament yarn in the year 1970-71, the Central Government should have notified the change in the policy, viz. to grant incentive licenses to import the said article, before granting the incentive license to the State Trading Corporation in that year. In this view, the argument of Shri Chadha that there was no canalisation of polyester filament yarn in 1970-71 and the grant of the incentive license to the State Trading Corporation was not by way of canalisation does not have any force. This is because, as explained above, the decision to grant the incentive license to import polyester filament yarn, apart from any canalisation, was a change in the notified policy to ban the import of that article in 1970-71, and the said new or changed policy was in itself a restriction or control of the article within the meaning of section 3 of the Act. However, in this particular case, it is not necessary to quash the decision to grant the license for import of polyester filament yarn in the year 1970-71 and the grant of the licence to the State Trading Corporation for the import of polyester filament yarn worth about Rs. 50 Lakhs in pursuance of the said decision, as no such prayer was made in the Writ Petition and Shri A. K. Sen stated before us that although he urged the contention he does not ask for such an order.

(30) Coming now to the scheme evolved by the Central Government, it has to be noticed that the Government, according to the counter affidavit filed on behalf of respondent 1, decided to evolve a scheme to work out the distribution or allocation of the polyester filament yarn permitted to be imported by the State Trading Corporation under the aforesaid license. In other words, according to respondent 1, the scheme was evolved by the Central Government to prescribe the manner in which the import as well as the allocation or distribution of the polyester filament yarn permitted to be imported by the State Trading Corporation under the license granted to it was to be made. It is, therefore, clear that even according to

respondent 1, the scheme dealt with the operation of the State Trading Corporation with regard to the import and distribution or allocation of the polyester filament yarn of the value of about Rs. 50 Lakhs which was permitted to be imported under the license issued to the said Corporation. As pointed out by the Supreme Court in *Abdul Aziz v. State of Maharashtra* : 1963 CriLJ403 , the power conferred upon the Central Government under section 3(1) of the Imports and Exports (Control) Act 'is not restricted merely to prohibiting or restricting imports at the point of entry but extends also to controlling the subsequent disposal of the goods imported'. Apparently, the scheme in question containing provisions regarding the import and the distribution of polyester filament yarn was evolved by the Central Government in exercise of the aforesaid power under section 3(1) of the Act to control the disposal or distribution of the articles. The scheme was thus virtually an order of the Central Government within the meaning of section 3(1) of the Act and had, therefore, to be notified in the Official Gazette, as provided in the said section. As observed by the Privy Council in *Nazir Ahmed v. King Emperor* Air 1936 Priv 253 'where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all' and 'other methods of performance are necessarily forbidden'. Since the scheme was not notified in the Official Gazette, it has to be held to be illegal and ineffective, and liable to be quashed.

(31) The second reason urged by Shri A. K. Sen in support of his contention that the scheme was liable to be quashed was that the scheme contravenes Articles 14, 19(I)(g) and 301 of the Constitution. The learned counsel pointed out that the creation of a State Monopoly through the State Trading Corporation is no doubt protected under Article 19(6)(ii), but what is protected is the creation of the monopoly through the agency and not the operation of the agency, and that the operation has to be tested in the light of Articles 14, 19(I)(g) read with Article 19(6) and Article 301, and can be challenged if it is unreasonable and unjust. There cannot be any dispute about the said proposition in view of the observations of the Supreme Court in the following cases. In *Daya v. Joint Chief Controller of Imports and Exports and another* : [1963]2SCR73 , N. Rajagopala Ayyangar J. observed in paragraph 8 at page 1800 as under :-

'THE State Trading Corporation being owned and controlled by the Government is an agency or instrument of Government for effectuating its commercial policy.

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