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INDO AFGHAN CHAMBERS OF COMMERCE & ANR.
ETC.

v.

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UNION OF INDIA & ORS. ETC.

MAY 15, 1986

[R.S. PATHAK AND SABYASACHI MUKHARJI, JJ.]

C *Import Policy 1985-88—Appendix 2 Part B and Item 1 of Appendix 6—Dry fruits—Import by diamond exporters—Holding additional licences—Whether permissible.*

D The petitioner, an associations of dealers engaged in the business of selling dry fruit in North India, who purchase dry fruits either locally or through imports from outside India, challenged the grant of additional licences to the respondents—diamond exporters, under Article 32 of the Constitution.

E On behalf of the petitioners, it was contended: (i) that the goods sought to be imported on the Additional Licences included those which were prohibited by the prevalent Import Policy; (ii) that the principle which was applied to the import of acrylic easter monomers extends likewise to the import of all other commodities under Additional Licences granted to diamond exporters in similar circumstances and, therefore, the diamond exporters are not entitled to import dry fruit; and (iii) that the import of dry fruit is covered by item 121 in Appendix 2 Part-B (List of Restricted Items) of the Import Policy 1985-88 and, therefore, the respondents are not entitled to resort to Item 1 of Appendix 6.

G On behalf of the respondents, it was contended: (i) that paragraph 176 of the Import Policy 1978-79 envisages the grant of Additional Licences for the import of raw materials which have been placed on Open General Licence for Actual Users (Industrial); (ii) that they import the dry fruits as raw material for the purpose of selling to eligible Industrial Actual Users for processing for manufacturing into a variety of products under Item 1 of Appendix 6 of the Import Policy 1985-86; (iii) that item 121 of Appendix 2 Part-B (List of Restricted Items) is not attracted because it refers to “consumer goods”, and consumer goods

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are not raw material for the purposes of item 1 of Appendix 6; and (iv) that the petition under Article 32 is not maintainable because the petitioners' fundamental rights are not violated, in as much as no appeal has been filed by the Customs Authorities or by the Import Control Authorities against the interim order dated January 8, 1986 of the High Court directing the Customs Authorities to permit the respondents to clear the imported consignment of almonds.

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Allowing the Writ Petition and the Appeal,

HELD: 1. Respondents Nos. 10 and 11 are restrained from importing dry fruits during the period 1985-88 under the Additional Licences granted to them under the Import Policy 1978-79. [97F]

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2. Under the Import Policy 1978-79, dry fruits (excluding cashewnuts) could be imported by all persons for whatever purpose under the Open General Licence. No Additional Licence was required. By wrongful denial of Additional Licence to diamond exporters no damage can be said to have been suffered by them and no question of restitution could, therefore, be said to arise. The wrongful denial of the Additional Licences was wholly immaterial to the importing of dry fruits (excluding cashewnuts). The respondents have not shown that the dry fruits were placed on Open General Licence specifically for Actual Users (Industrial). Under the Import Policy 1978-79 their import was open to all persons. [94F, C]

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3. The position in regard to the import of dry fruits (excluding cashewnuts) is simple and suffers from no complexity. Dry fruits (excluding cashewnuts) could be imported by all persons under Open General Licence under the Import Policy 1978-79. But under the Import Policy 1985-88 dry fruits (excluding cashewnuts and dates) are no longer open to import under Open General Licence. If dry fruits (excluding cashewnuts and dates) are regarded as items for stock and sale, the import is governed by paragraph 181(3) of Chapter XIII of the Import Policy 1985-88, which declares that import of dry fruits (excluding cashewnuts and dates) will be allowed against licences issued to dealers engaged in this trade. [94E-H]

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4. The diamond exporters cannot be regarded as dealers engaged in the trade of stocking and selling dry fruits (excluding cashewnuts and dates). They are, therefore, not entitled to the advantage of paragraph 181(3) of the Import Policy 1985-88. [95A-B]

5. Dry fruits must be regarded as consumer goods of agricultural

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A origin. The words "agricultural origin" are used in the broadest sense. Dry fruits do not appear in Appendix 3 Part-A and 5 nor can be imported under Open General Licence under the Import Policy 1985-88. In as much as they fall within item (121) of Appendix 2 Part-B they are excluded from the scope of item 1 of Appendix 6, and cannot be imported as raw materials and consumables for sale to Actual Users (Industrial). "Consumables" are referred to in item 1 of Appendix 6 as goods meant for Actual Users (Industrial) "Consumer goods" in item 121 of Appendix 2 Part-B can refer to dry fruits imported for supply to Actual Users (Industrial). [95F-H; 96A]

C 6. The expression "specifically banned" occurring in the order dated April 18, 1985 of this Court determines the range of the items open to import by diamond exporters holding Additional Licences. The items excluded from import by diamond exporters under Additional Licences under the Import Policy 1985-88 were the items enumerated in Appendix 3 and Appendix 2 Part-A of that Import Policy. Appendix 2 Part-A is the successor of Appendix 4 (List of Absolutely Banned Items) of the Import Policy 1978-79. Appendix 2 Part-B (List of Restricted Items) was also the successor of Appendix 4 (List of Absolutely Banned Items). Appendix 4 in the Import Policy 1978-79 was described as the **Absolutely Banned List**. [96B-E]

E The present Appendix 2 Part-A and Appendix 2 Part-B constitute together what was originally List 4 (List of Absolutely Banned Items) under the Import Policy 1978-79. The diamond exporters holding Additional Licences were, therefore, not entitled to import goods enumerated in Appendix 2 Part-B of the Import Policy 1985-88. [96F-G]

F 7. The diamond exporters are not entitled to take advantage of item 121 of Appendix 2 Part-B for the purpose of importing dry fruits. The holders of Additional Licences are entitled to import only those goods which are included in Appendix 6 Part 2 List 8 of the Import Policy 1985-88. Dry fruits are not included in that List and, therefore, they cannot be imported under Additional Licences. They are also not entitled to the benefit extended by the judgment of this Court dated March 5, 1986 to those diamond exporters who had imported items under irrevocable Letters of Credit opened and established before October 18, 1985. [97B-C]

H 8. An interim order cannot defeat the fundamental rights of the petitioners merely because it has not been questioned by the Customs Authorities or the Import Control Authorities. [97E]

ORIGINAL/CIVIL APPELLATE JURISDICTION: Writ
Petition No. 199 of 1986

Under Article 32 of the Constitution of India.

with

Civil Appeal No. 664 of 1986

From the Judgment and Order dated 20th January, 1986 of the
Bombay High Court in Writ Petition No. 183 of 1986.

V.M. Tarkunde and Rajiv Datta, for the Petitioner in W.P. No.
199 of 1986.

B. Datta, Additional Solicitor General, Soli J. Sorabji and K.K.
Venugopal, A.G. Ganguli, A. Subba Rao, Miss Kutty Kumarmangalam,
C.V. Subba Rao, Harish Salve, K.R. Nagaraja, B.R. Agarwala,
M.M. Jayakar and Miss V. Menon, for the Respondents in W.P. No.
199 of 1986

F.S. Nariman and A.B. Diwan, P.H. Parekh and Uday Lalit, for
the Appellants in C.A. No. 664 of 1986

B. Datta, Additional Solicitor General, K.K. Venlugopal, A.G.
Ganguli, A. Subba Rao, Miss Kutty Kumarmangalam, C.V. Subba
Rao, B.R. Agarwala, M.M. Jayakar and Miss V. Menon, for the Res-
pondents in C.A. No. 664 of 1986.

The Judgment of the Court was delivered by

PATHAK, J. The petitioners, M/s Indo-Afghan Chambers of
Commerce and its President, Sundar Lal Bhatia, are aggrieved by the
grant of additional licences to the respondents, M/s Rajnikant Brothers
and M/s Everest Gems for the import of dry fruits.

The petitioner, M/s Indo-Afghan Chambers of Commerce, is an
association of dealers engaged in the business of selling dry fruit in
North India. The dry fruit is purchased by them either locally or
through imports from outside India. The respondents, M/s Rajnikant
Brothers and M/s Everest Gems, are diamond exporters who have
been issued additional licences pursuant to an order of the Court in the
following circumstances.

A The respondents diamond exporters had applied for the grant of Export House Certificates under the Import Policy 1978-79 and had been denied the Certificates on the erroneous ground that they had not diversified their exports. In writ petitions filed in the Bombay High Court, they were held entitled to the Export House Certificates. Special leave petitions filed by the Union of India against the order of the High Court were dismissed by this Court by its order dated April 18, 1985 which, while confirming the order of the High Court directed the appellants to issue the necessary Export House Certificates for the year 1978-79, and further that: "Save and except items which are specifically banned under the prevalent Import Policy at the time of import, the respondents shall be entitled to import all other items

B whether canalised or otherwise in accordance with the relevant rules."

C The respondents diamond exporters and other like diamond exporters were granted Additional Licences, and started importing goods on those Additional Licences. It is the case of the petitioners that the goods sought to be imported on the Additional Licences included those which were prohibited by the prevalent Import Policy. The diamond exporters commenced the Import of acrylic ester monomers. This was challenged by M/s Raj Prakash Chemicals Ltd., an Indian company manufacturing acrylic ester monomers in India, by a writ petition in the Bombay High Court seeking a clarification of the order dated April 18, 1985 of this Court mentioned earlier. The High Court rejected the writ petition, and an appeal by Special Leave filed by the Indian company was disposed of by this Court by its order dated March 5, 1986. The Court held that it was not permissible for the diamond exporters to import acrylic ester monomers under the Additional Licences granted to them during the period of the Import Policy 1985-88, but having regard to the circumstance that the High Courts had already passed orders permitting such import and further that the Import Control Authorities had specifically allowed such import this Court permitted such imports to be completed in respect of which irrevocable Letters of Credit had been opened and established before October 18, 1985, the date on which for the first time an order was made by the Court imposing a restriction on the clearing of acrylic ester monomers by the Customs authorities. The Court regarded the date, October 18, 1985 as a critical date because the diamond exporters could be said to have been warned on and from that date that the Court could possibly take a different view from that prevailing during the period before that date when, because of the orders of the High Courts and the conduct of the Import Control Authorities, the diamond exporters could have legitimately believed that they were

entitled to effect such imports. It was made clear by the Court that cases in which irrevocable Letters of Credit had been opened and established after October 18, 1985 would not be entitled to the benefit of that order. The petitioners contend that the principle which was applied to the import of acrylic ester monomers extends likewise to the import of all other commodities under Additional Licences granted to diamond exporters in similar circumstances. It is asserted that the respondents diamond exporters and other like diamond exporters began to import dry fruit under their Additional Licences. It is contended that having regard to the terms of the order of this Court dated April 18, 1985 as construed and clarified by its order dated March 5, 1986 the diamond exporters are not entitled to import dry fruit.

By order dated March 5, 1986 the Court construed its order dated April 18, 1985 to mean that only such items could be imported by diamond exporters under the Additional Licences granted to them as could have been imported under the Import Policy 1978-79, the period during which the diamond exporters had applied for Export House Certificates and had been wrongfully refused, and were also importable under the Import Policy prevailing at the time of import, which in the present case is the Import Policy 1985-88. These were the items which had not been "specifically banned" under the prevalent Import Policy. The items had to pass through two tests. They should have been importable under the Import Policy 1978-79. They should also have been importable under the Import Policy 1985-88 in terms of the order dated April 18, 1985.

The case of the petitioners is that under the Import Policy 1978-79 dry fruits (excluding cashewnuts) could be imported by all persons under the Open General Licence. Dry fruits (excluding cashewnuts), is mentioned at item 22 of Appendix 10 of the Import Policy 1978-79 as open to import under the Open General Licence. There was no need to obtain an Additional Licence for importing them in the year 1978-79, and therefore, the wrongful denial of Additional Licences to diamond exporters in the year 1978-79, could not justify any restitution subsequently in regard to the import of dry fruits (other than cashewnuts). There is substance in the contention. Under the Import Policy 1978-79 dry fruits (excluding cashewnuts) could be imported by all persons for whatever purpose under the Open General Licence. No Additional Licence was required. If an Additional Licence was wrongfully denied to diamond exporters at time when dry fruits (excluding cashewnuts) were importable under the Open General Licence no

A damage can be said to have been suffered by diamond exporters who had been refused Export House Certificates, and consequently Additional Licences, under the Import Policy 1978-79. In the circumstances, no question of restitution could be said to arise for the wrongful denial of the Additional Licences. The wrongful denial of the Additional Licences was wholly immaterial to the importing of dry fruits (excluding cashewnuts).

B It is urged by the respondents diamond exporters that paragraph 176 of the Import Policy 1978-79 envisages the grant of Additional Licences for the import of raw materials which have been placed on Open General Licence for Actual Users (Industrial). It has not been shown to us that dry fruits were placed on Open General Licence specifically for Actual Users (Industrial). Under the Import Policy 1978-79 their import was open to all persons.

C We may assume for the purpose of this case that a diamond exporter is legitimately entitled to obtain an Additional Licence under the Import Policy 1978-79 for an item which is different from the item he may have intended to import had the Additional Licences been rightly granted to him originally. In that event, the diamond exporter can succeed only if the item could have been imported under the Import Policy 1978-79 and also under the Import Policy 1985-88 in accordance with the terms of the order of this Court dated April 18, 1985 as construed by this Court by its judgment dated March 5, 1986.

D The position in regard to the import of dry fruits (excluding cashewnuts) is simple and suffers from no complexity. As has been mentioned, dry fruits (excluding cashewnuts) could be imported by all persons under the Open General Licence under the Import Policy 1978-79. But under the Import Policy 1985-88, when the dry fruits (excluding cashewnuts and dates) are now sought to be imported, dry fruits (excluding cashewnuts and dates) are no longer open to import under the Open General Licence. The sanction for importing them must be found under some other provision of the Import Policy. If dry fruits (excluding cashewnuts and dates) are regarded as items for stock and sale, the import is governed by paragraph 181(3) in Chapter XIII of the Import Policy 1985-88. Paragraph 181(3) declares that import of dry fruits (excluding cashewnuts and dates) will be allowed against licences issued to dealers engaged in this trade, the value of the import licence in each case being equal to 20 per cent of the C.I.F. value of the best year's imports of the applicant in respect of dry fruits (excluding

cashewnuts and dates) during any of financial years from 1972-73 to the preceding Licencing year, subject to a minimum of Rs.5000. Admittedly the diamond exportes cannot be regarded as dealers engaged in the trade of stocking and selling dry fruits (excluding cashewnuts and dates). They are, therefore, not entitled to the advantages of paragraph 181(3) of the Import Policy 1985-88.

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But the case of the respondents diamond exporters, is that they import the dry fruits as raw material for the purpose of selling to eligible Industrial Actual Users for processing or manufacturing into a variety of products, such as almond oil, Ayurvedic drugs and medicines, Unani drugs and medicines, processed and package foods, sweets and confectionary, and we are referred to item 1 in Appendix 6 of the Import Policy 1985-88. Now item 1 of Appendix 6 speaks of:

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“1. Raw materials, components and consumables (non-iron and steel items) other than those included in the Appendices 2, 3 Part-A, 5 and 8.”

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The petitioners point out that the item is covered in Appendix 2 Part-B of the Import Policy 1985-88 and, therefore, the respondents diamond exporters are not entitled to resort to item 1 of Appendix 6. Appendix 2 Part-B (List of Restricted Items) contains item 121 which reads:

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“(121) All consumer goods, howsoever described, of industrial, agricultural or animal origin, not appearing individually in Appendices 3 Part-A and 5 or specifically listed for import under Open General Licence.”

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There can be no dispute that dry fruits must be regarded as consumer goods of agricultural origin. The words “agricultural origin” are used in the broadest sense. It is also clear that dry fruits do not appear in Appendix 3 Part-A and 5 nor can be imported under the Open General Licence under the Import Policy 1985-88. Inasmuch as they fall within item (121) of Appendix 2 Part-B they are excluded from the scope of item 1 of Appendix 6, and cannot be imported as raw materials and consumables for sale to Actual Users (Industrial). It is urged by the respondents diamond exporters that item 121 is not attracted because it refers to “consumer goods”, and consumer goods are not raw material for the purposes of item 1 of Appendix 6. There is a fallacy here. It will be noticed that “consumables” are referred to in item 1 of

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A Appendix 6 of goods meant for Actual Users (Industrial). We are not satisfied that "consumer goods" in item 121 of Appendix 2 Part-B cannot refer to dry fruits imported for supply to Actual Users (Industrial).

B In construing the order dated April 18, 1985 of this Court, the judgment dated March 5, 1986 of this Court explained the significance of the words "specifically banned" occurring in the former order. The expression determines the range of the items open to import by diamond exporters holding Additional Licences. It was declared that the items excluded from import by diamond exporters under Additional Licences under the Import Policy 1985-88 were the items enumerated in Appendix 3 and Appendix 2 Part-A of that Import Policy. Appendix 2 Part-A is the successor of Appendix 4 (List of Absolutely Banned Items) of Import Policy 1978-79. A question arose before us whether Appendix 2 Part B of Import Policy 1985-88 could also be regarded as a successor of Appendix 4. It appears from the material placed before us that Appendix 2 Part B (List of Restricted Items) was also successor of Appendix 4 (List of Absolutely Banned Items). Appendix 4 in the Import Policy 1978-79 was described as the Absolutely Banned List. In the Import Policy 1982-83, the same Appendix 4 is described as List of Non-Permissible Items (Banned). The same description of Appendix 4 continued in the Import Policy 1983-84. During that year Beef Tallow was added in Appendix 4. In the Import Policy 1984-85, Appendix 4 became Appendix 2 Part A and Appendix 2 Part B. Appendix 2 Part A was described as a List of Banned Items and Appendix 2 List B was described as List of Restricted Items. In the Contents of the Import Policy 1985-88 the list of Appendices makes clear that Appendix 4 of Import Policy 1983-84 became Appendix 2 Part A and Appendix 2 Part B of the Import Policy 1984-85. The same description of Appendix 2 Part A and Appendix 2 Part B was continued in the Import Policy 1985-88. Therefore, it is apparent that the present Appendix 2 Part A and Appendix 2 Part B constitute together what was originally List 4 (List of Absolutely Banned Items) under the Import Policy 1978-79. On the reasoning which found favour with the Court in its judgment dated March 5, 1986 we hold that diamond exporters holding Additional Licences were not entitled to import goods enumerated in Appendix 2 Part B of the Import Policy 1985-88. On that ground also the respondents diamond exporters are not entitled to take advantage of item 121 of Appendix 2 Part B for the purpose of importing dry fruits. As held by this Court in its judgment dated March 5, 1986, holders of Additional

■ Licences are entitled to import only those goods which are included in Appendix 6 Part 2 List 8 of the Import Policy 1985-88. Dry fruits are not included in that List and therefore they cannot be imported under Additional Licences.

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■ In our opinion the respondents diamond exporters are not entitled to import dry fruits under the Import Policy 1985-88 under the Additional Licences possessed by them. They are also not entitled to the benefit extended by the judgment of this Court dated March 5, 1986 to those diamond exporters who had imported items under irrevocable Letters of Credit opened and established before October 18, 1985. It appears from the record before us that the respondents diamond exporters opened and established the irrevocable Letters of Credit after that date.

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■ One more contention of the respondents diamond exporters remains to be noticed. It is urged that the writ petition under Article 32 is not maintainable because the petitioners' fundamental rights are not violated. It is pointed out that no appeal has been filed by the Customs authorities or by the Import Control authorities against the interim order dated January 8, 1986 of the Bombay High Court directing the Customs authorities to permit M/s Everest Gems to clear the imported consignment of almonds. We do not think that an interim order can defeat the fundamental rights of the petitioners merely because it has not been questioned by the Customs authorities or the Import Control authorities.

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■ The writ petition is allowed and the respondents Nos. 10 and 11, M/s Rajni Kant Brothers and M/s Everest Gems are restrained from importing dry fruits during the period 1985-88 under the Additional Licences granted to them under the Import Policy 1978-79. In the circumstances there is no order as to costs.

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■ Civil Appeal No. 664 of 1986 is directed against the judgment and order of the Bombay High Court rejecting the appellants' writ petition challenging the import of dry fruits by the respondent, M/s Everest Gems under Additional Licences granted under the Import Policy 1978-79. The questions raised in this appeal are identical with those raised in the writ petition disposed of earlier.

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■ In the result this appeal is allowed, the judgment and order dated January 28, 1986 of the Bombay High Court are set aside and the writ

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A petition filed in the High Court is allowed. The respondent, M/s Everest Gems is restrained from importing dry fruits during the period 1985-88 under the Additional Licences granted to them under the Import Policy 1978-79. There is, however, no order as to costs.

B A.P.J. Appeal allowed.