AGRICULTURAL AND PROCESSED FOOD PRODUCTS ETC. A

v.

OSWAL AGRO FURANE AND ORS.

APRIL 30, 1996

[J.S. VERMA AND B.N. KIRPAL, JJ.] B

Imports and Exports (Control) Act 1947 :

Export Oriented Unit—100% export of product—Other than those indicated in industrial licence—Imposition of trade restrictions including fixation of minimum price for export—Unit contended such restrictions not applicable to it in view of saving provisions of Clause 15(j)—Held : Clause 15(j) applicable only to those products indicated in industrial licence not saved under the Clause—Trade restrictions applicable in respect of these products—Fixing of minimum price held valid. C D

Registration and Licensing of Industrial Undertakings Rules, 1952 : Rule 16.

Export—Industrial licence—Variation or amendment of—Permissible at the instance of the undertaking—Export of product not indicated in original licence—Subsequently the undertaking expressed willingness to export said product indicating amount of foreign exchange to be earned—Accordingly Licence amended making amendment a condition—Held : amendment was valid and the undertaking obliged to export said product pursuant thereto—Industries (Development and Regulation) Act, 1951. E F

Central Excise and Salt Act, 1944 : Sections 3 and 5A.

100% Export Oriented Unit—Production of excisable goods—Sold within country instead of exporting them—No permission obtained from authorities—Excise duty not paid—Non-payment of Excise duty not disclosed in writ petition filed before High Court—High Court by interim order permitted unit to clear goods without payment of excise duty—Held : in absence of permission from authorities to sell goods within country, unit liable to pay full amount of excise duty—Since the unit, a commercial organisation, obtained unfair and undue advantage from High Court the amount due was a bank loan on which interest at 18% per annum was payable. G H

A *Constitution of India, 1950 :*

Articles 136 and 226—Relief—Interest on amount due to Government—Incorrect order obtained from High Court by company—Thereby no excise duty paid and amount invested in its business—Held : amount due to be treated as bank loan—Hence, while paying excise duty company liable to B *pay interest at bank rate.*

Articles 136 and 226—Export of goods—At price less than minimum price by virtue of unwarranted interim order by High Court—Conditional order passed by Supreme Court that company would make good the difference C *between minimum price and actual price if export was in violation of law—Held : company obtained unfair and undue advantage as a result of interim order of High Court—It would be incumbent on Supreme Court to interfere under Article 136 and grant appropriate relief—Export as well as its price in violation of law—Company liable to pay difference between minimum price and actual export price—Even thought if valid authorisation was issued* D *for export the company was liable to pay only 5% commission but it made export in violation of law and under conditional orders passed by Supreme Court, it could not be allowed to say it was not liable to pay difference.*

Articles 136 and 226—Process of Court—Abuse of—Suppression of E *material fact—Writ petition filed by company before Delhi High Court—Without making any reference to its earlier petition filed before Punjab and Haryana High Court in respect of same matter—Statements in both writ petitions contrary to each other—Held : had company disclosed details of its earlier petition, Delhi High Court would not have entertained the petition.*

F *Interpretation of Statutes :*

Saving provision—Merely preserved right or obligation that existed did not and could not confer any new or additional right—It is different from exemption provision.

G **The Government of India, Ministry of Commerce issued a notification whereby a scheme was formulated to facilitate setting up of 100% export oriented units. The respondents were granted industrial licence to manufacture Furfural and edible rice bran oil in a 100% export oriented project. This licence was issued subject to various conditions, one of which** H **was Condition No. (vi) which stated that the entire 100% production shall**

be exported. The Government of India in exercise of its powers under Section 3 of the Imports and Exports (Control) Act, 1947, issued the Export (Control) Order, 1988 and it came into force with immediate effect. The new order imposed a restriction to the effect that no person shall export any goods of the description specified in Schedule I to the Order. However, Clause 15(j) of the said new Order stipulated that this Order shall not apply to products manufactured in an approved 100% Export Oriented Units.

The aforesaid Export (Control) Order 1988 was amended so as to include in Part-C in Schedule I in List II a number of items including non-basmati rice which was allowed to be exported against registration-cum-allocation certificate issued by the appellant and also fixed its minimum export price.

The respondents filed a writ petition in the High Court challenging the validity of Clause No. (vi). This writ petition was subsequently transferred to this Court. Thereafter, the respondents filed another writ petition challenging the validity of Clause 15(j) of the Export Control Order, 1988 without making any reference to the earlier petition. The High Court passed an interim order permitting the respondents to export non-basmati rice subject to the condition that the respondents would furnish a security of the minimum price fixed by the appellants and the price at which non-basmati rice was exported. Aggrieved by the High Court's judgment the appellants preferred the present appeal in which this Court directed that the export was being permitted subject to the condition that the respondents would make good the difference in dollars if ultimately it was held that they were not entitled to export the said rice.

On behalf of the appellants it was contended that the industrial licence which has been granted was only for the manufacture of two items, namely, Furfural and edible rice bran oil and this was subject to the condition that the entire 100% production of these items was to be exported; that according to Clause 15(j) of the Export (Control) Order, 1988, only the export of Furfural and its bye product edible rice bran oil was saved from the operation of the Export (Control) Order 1988 and not the export of non-basmati rice; that the filing of the writ petition in the High Court without making any reference to the earlier petition was a clear abuse of the process of the Court; and that the respondents were liable to

A pay the difference between the actual export price and the minimum export price fixed by the appellants.

On behalf of the respondents it was contended that Clause 15(j) was not confined to the end product governed by the Industries (Development and Regulation) Act, 1951 but is also extended to the bye-products; that B they on their own volition could export other items manufactured in the factory; that Clause 15(j) brought in the geographical or topographical concept thereby meaning that whatever was manufactured in the export oriented unit was free from the shackles of the Export (Control) Order, 1988; that by using the plural word 'products' in Clause 15(j), the implica- C tion was that it was to apply to all the products manufactured in the unit; that the appellant was entitled to only 5% of the minimum price fixed and not the difference between the actual sale price and the minimum price fixed; and that even if the High Court had taken an erroneous view this Court in exercise of its discretionary jurisdiction under Article 136 of the Constitution should not interfere. D

Allowing the appeal, this Court

HELD : 1.1. Clause 15(j) of the Export (Control) Order, 1988 is a saving provision and not an exemption clause. A saving provision or clause E merely preserves what exists. Clauses 3 and 15 of the export (Control) Order have to be read together. Clause 3 places restrictions and makes provision with regard to export of goods specified in Schedule I and Schedule III of the Order. If, however, a case falls within any of the various provisions of sub-clauses of Clause 15, then in that case only the Order F does not apply. Clause 15, to put it differently, merely preserves any right or obligation which existed prior to the issuance of the Export (Control) Order and it did not, and could not, confer any new or additional right. Clause 15(j) merely preserves the right of the respondent to export those products which it could export as on the date of the Export (Control) Order, 1988 and any amendment in the schedule to the said Order would G not and cannot give the respondent a right to export non-basmati rice, which right it did not have on the date of the Export (Control) Order. When the Export (Control) order 1988 was promulgated, the respondent had an industrial licence which made it obligatory to export its entire production of Furfural. It was this right to export Furfural which was H preserved by Clause 15(j) and the respondent could make its exports

without following the provisions of the said Order. [90-B; 91-A-D] A

1.2. Keeping in view the nature of a saving provision it is not correct to say that every product manufactured in a 100% export oriented unit was exempt from the applicability of the provisions of the said Order. Clause 15 clearly provides that what is saved are the products for which the export oriented unit is approved and not any other product manufactured by it. B The word "approved" in Clause 15(j) must be read both with the words "products" as well as with words the "export oriented unit". A unit is granted approval, as an export oriented unit in respect of specific product to be manufactured by it. The names of those products are indicated in the licence granting approval and the saving Clause 15(j) is applicable to C those products the manufacture and export of which has been approved as a 100% export oriented unit. The language of the said sub-clause is capable of no other interpretation. [91-F-H; 92-A]

Shah Bhojrai Kuverji Oil Mills and Ginning Factory v. *Subbash Chandra Yograj Sinha,* [1962] 2 SCR 159, relied on. D

F.A.R. Bennion "*Statutory Interpretation*" Second Edition, pp 494 - 495, referred to.

2.1. The submission that clause 15(j) of the Order brings in E geographical or topographical concept does not flow from the scheme of the Order or the language of the clause. When Clause 15(j) refers to "100% export oriented unit" it is quite obvious that the clause has been inserted in the Export (Control) Order, 1988 in view of the promulgation and existence of the export promotion scheme. The scheme for export oriented units was for grant of approval for the manufacture of products which, F according to the conditions contained in the approval, had to be exported from the country. It is the contention of the respondent that under the terms of its licence it was under an obligation to export only Furfural and not other product. It is on this basis that it has been contended in the transferred case that the respondent is under no obligation to export G edible rice bran oil. The obligation to export the entire quantity of Furfural manufactured by it arises because of a specific condition to export 100% production contained in the industrial licence. [92-B-D]

2.2. Clause 15(j) had to be inserted so as to save such conditions which had been incorporated in the industrial licence which was issued to H

A the respondent. Had clause 15(j) not been incorporated in the Order it may have been possible for a unit to try and content that by virtue of the restriction on exports being placed by Clause 3 of the Export (Control) Order, the unit was not in a position to export its products, though it was obliged to do so when the licence was issued. The implication of the insertion of the saving clause therefore, was that the existing right or commitment for the export of the products was not in any way curtailed or taken away by the promulgation of the said Order. No extra right or licence to export an item, which the unit could not previously export was sought to be conferred by Clause 15(j). [92-E-G]

C 2.3. The use of the word "products" in plural, does not mean that very product made or produced in the unit could be exported. The said word "products" signifies that there may be more than one product which may be required to be exported in terms of the industrial licence or registration of the export oriented unit and clause (15(j) would save the export of all such items. [92-H; 93-A]

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2.4. The appellant was entitled to allow exports against registration-cum-allocation certificate and reading the same along with Clause 3 and 4 of the Export (Control) Order, conditions not inconsistent with the Act or the Order, could be imposed while permitting export. One of the E conditions imposed by the appellant for export of non-basmati rice was that it could not be exported at less than the minimum price fixed by it and it was clearly entitled to do so. There is thus no merit in the contention that the appellant could not fix the minimum price at which non-basmati rice could be exported. [93-G-H; 94-A-B; 93-B]

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3. The High Court ought not to have exercised its jurisdiction under Article 226 of the Constitution for more than one reason and therefore, it would be incumbent upon this Court to interfere under Article 136 of the Constitution and not to allow the respondent to take advantage of an G obviously wrong decision of the High Court. Firstly the High Court misconstrued Clause 15(j) of the Order and held that because the respondent was an export oriented unit, it could export any item manufactured by it, which conclusion is wholly incorrect. Secondly the High Court not to have entertained the writ petition because of the respondent's conduct. It had filed and earlier writ petition in the Punjab and Haryana High Court H dealing with the same issue, namely, its obligation and right to export its

products under the licence and in terms of the Export (Control) Order. It is possible that the Delhi High Court may not be aware of the pendency of the Writ petition in the Punjab and Haryana High Court, regarding the export of edible rice bran oil, because there is no reference to the filing of the said case in writ petition filed in the Delhi High Court. The respondent is guilty of suppression of this very important fact. It was contended in the Punjab and Haryana High Court that it was under no obligation to export the edible rice bran oil and its only obligation was to export Furfural, while in the writ petition filed in the Delhi High Court, a somewhat contrary contention was raised, namely, that being an export oriented unit, it was entitled to export non-basmati rice, in addition to Furfural. Had the respondent indicated in the writ petition filed in the Delhi High Court that it had also filed a petition in the Punjab and Haryana High Court which was still pending, relating to export of edible rice bran oil, then Delhi High Court most probably would not have entertained the petition because the proper course which should have been followed by Oswal Agro was to raise this contention, regarding export of non-basmati rice, in the writ petition filed in the Punjab and Haryana High Court or to file a new petition there. Under these circumstances the exercise of jurisdiction under Article 136 of the Constitution is clearly called for, more so when it is admitted that the respondent had exported non-basmati rice at a price far less than the minimum price fixed by the appellant. Therefore the respondent could not, in law, export non-basmati rice. The Delhi High Court, instead of passing interim orders and allowing export of non-basmati rice, ought to have dismissed the writ petition. [94-E-H; 95-A-E]

4. It is clear that Oswal Agro had exported non-basmati rice which, in law, it was not entitled to export without getting the permission from the appellant and at a price less than what was fixed by it. The export was possible only because of interim orders which were passed first by the Delhi High Court and thereafter by this Court. This Court made it clear that the export was being permitted subject to the condition that the respondent would make good the difference in dollars if ultimately it was held they were not entitled to export the said rice. After the imposition of such a condition, the respondent chose to make the export of rice. It availed of the permission which was granted by the courts and as the permission was a conditional one, it is not open to it to contend that it is not liable to make good the difference when it has been found that they were not, in law, entitled to export rice without authorisation from the

A appellant. Having taken advantage of the interim orders of the High Court and of the order of this court, in particular, the respondent cannot now be permitted to escape from the condition which was imposed upon it. Even though, if a valid authorisation had been issued for the export of rice, the appellant may have been entitled to receive only 5% commission but as the B respondent has made export of rice in violation of law and under the conditional orders passed by this Court, it cannot be now allowed to say that is not liable to pay the difference between the price at which the rice was exported and the minimum price fixed by the appellant. The liability to pay to appellant arises by virtue of interim orders by the High Court and this Court, which orders are binding on the parties. [96-A-B; E-H; 97-A]

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5.1. It is clear that the respondent was willing to export edible rice bran oil, if it was permitted to do so. In fact it had also indicated the amount of foreign exchange which it would earn by the export of edible rice bran oil. It is on the basis of this willingness that the industrial licence was amended by D incorporating clause (vi) which had the effect of making it a condition for the respondent to export edible rice bran oil. [99-H; 100-A-B]

5.2. Under Rule 16(2) of the Rules the owner of an industrial undertaking may ask for variation or amendment of the licence and under E sub-rule (2) the Ministry of Industrial Development has the power to vary or amend the licence and while doing so, amend or alter or add any one or more conditions. In as much as the export promotion scheme had been promulgated with a view to encourage export oriented units so as to earn more foreign exchange, it is not surprising that, viewed in that context, the Government of India accepted the request for permission to export edible F rice bran oil and a specific condition to that extent was incorporated in the industrial licence by inserting clause (vi). It is interesting to note that no protest against that amendment appears to have been lodged by the respondent. The reason obviously must have been that this amendment was sought for and the respondent had categorically stated that it was G willing to export edible oil, if permitted. The respondent did not readily protest and on the contrary, commenced the production of the rice bran oil. It also accepted the other amendments made in the licence, which had been sought by it. Under these circumstances, and seeing the conduct of the respondent, it is not entitled to any relief under Article 226 of the H Constitution as it was obliged to export the rice bran oil. [100-C-F]

6. The High Court clearly overlooked the statutory provisions of Sections 3 and 5A of the Central Excise and Salt Act, 1944 and the respondent got an unfair and undue advantage as a reason thereof. It is therefore, not only liable to pay the amount of excise duty which was due and payable but it also has to pay interest thereon. The respondent which was a commercial Organisation had approached the High Court in exercise of its discretionary jurisdiction under article 226 of the Constitution of India purportedly to get justice. In actual fact it sought and obtain interim orders which resulted in its not becoming liable to pay excise duty which, under no circumstances, could have been a matter of dispute. A litigant who obtains an incorrect order and does not pay the statutory dues should not be allowed to make any profit or gain from the infraction of law. The money which was legitimately due to the Government has been utilised by the respondent in its business. Dealing with such cases which have financial implications involving business houses or companies it is the commercial principles which must be applied by the Court while ordering payment of interest. Had the respondent instead of using the Government money, obtained the said amount of loan from a bank, it would have had to pay interest thereon at the bank rate then prevailing. A lending institution like a bank would normally have advanced money for the purposes of business at the bank rate which is fixed with periodical rest. In addition thereto, a bank would normally also obtain a collateral security so as to safeguard the loan advanced by it. The respondent, on the other hand, had not paid the excise dues to the Government and the Government money has presumably been used in its business. No collateral security has been furnished by them because none was ordered by the Court. Under these circumstances, there is no reason as to why the respondent would not be required to pay at least that rate of interest, and on such terms, as it would have to pay to a bank if that amount of money had been obtained by it on loan. Keeping this principle in mind, it would be just and proper that the respondent be directed to pay, in addition to the excise duty payable, interest at the rate of 18% per annum. [103-B-H; 104-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3785 of 1992 of Etc. Etc.

From the Judgment and Order dated 31.3.92 of the Delhi High Court in W.P. No. 42 of 1992.

A M. Chandrasekhar, Additional Solictor General, R.F. Nariman, Ram Jethmalani, Tarun Bajaj, Dhananjay K. Singh, Atul K. Bandhu, V. Shekhar, Rajiv Dutta, Naresh Kr. Sharma, A. Subba Rao and Ms. Sushma Suri for the appearing parties.

The Judgment of the Court was delivered by

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KIRPAL, J. This judgment will dispose of appeals arising from the judgment of the High Court of Delhi which had permitted Oswal Agro Furane Ltd. (hereinafter referred to as 'Oswal Agro') to export non-basmati rice and T.C. (C) No. 15 of 1996 which was a writ petition filed by the Oswal Agro in the Punjab and Haryana High Court seeking permission to sell in the domestic market the edible rice bran oil manufactured by it.

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The Government of India Ministry of Commerce, on 31st December, 1980 issued a notification whereby a scheme was formulated to facilitate setting up of 100% export oriented units. It was decided to give such units certain concessions so as to enable them to meet figures of foreign demand in terms of pricing, quality precision etc. Such an export oriented unit was to belong to an industry in respect of which the export potentional and export targets had been considered by the relevant Export Promotion Council. The units which were intending to set up such industries were required to apply for approval, to the Department of Industrial Development, Ministry or Industry.

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The Punjab State Industrial Development Corporation on 9th/22nd July, 1982 made an application to the Ministry of Industry for the grant of industrial licence to manufacture Furfural and other edible products in a 100% export oriented project. In the application it was stated that the proposed project envisaged the putting up of a composite unit, inter alia, consisting of two paddy shelling units, each having a shelling capacity of 30 tonnes per hour. The application also further stated that after shelling the rice, the rice produced on custom basis would be returned back to the paddy suppliers; the residual rice husk would be subjected to Furfural extraction and edible oil would be extracted from the rice bran obtained as a bye product. It was stated that the edible rice bran oil so produced would be 100% import substitution because the country was importing edible oil. On 19th May, 1986, industrial licence was granted to M/S. Punjab Agro Furane Ltd., Chandigarh , which was set up by the Punjab State industrial Corporation. The new industrial undertaking was to have

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an installed capacity of manufacturing 3000 tonnes of Furfural and 3000 tonnes of Edible Rice Bran Oil, as a bye product. This licence was issued subject to various conditions one of which was that "the entire '100 per cent' production shall be exported." A

Oswal Agro entered into an agreement with the Punjab State Industrial Corporation for establishing the unit for manufacturing Furfural and as a result thereof the name of the Punjab Agro Furane Ltd. was changed to Oswal Agro Furane Ltd. On 18th May, 1987, the Government of India issued a letter by which the industrial licence dated 19th May, 1986, which had been issued for the manufacture of Furfural was amended. By this amendment a number of additional conditions were included in the industrial licence. One of the conditions which was incorporated was that the rice shelling plant will not be a part of 100% export oriented project but the Government may consider granting permission for the import of this plant subject to levy of such duties as may be decided at that time. This condition regarding the rice shelling plant was challenged by the company by filing Civil Writ Petition No. 3622 of 1987 in the Punjab and Haryana High Court. By judgment dated 2nd June, 1989, the High Court allowed the writ petition and held that the project was a comprehensive one and permission for the import of rice shelling plant had by necessary implication been granted by the Government of India and, therefore, the plant could be imported without payment of customs duty. This decision has become final as the same was not challenged by the Government of India. As a consequence thereof the rice shelling plant was imported by the respondents without payment of customs duty. B C D E

One more condition which was incorporated in the licence by the aforesaid letter of 18th May, 1987 was condition No. (vi) which stated that "you shall also export rice bran oil produced in the 100% export oriented unit. If, however, it is so required by the Government, you will agree to supply the said oil to an agency that will be nominated by the Government at prices not higher than the international prices." It was also by this amendment letter dated 18th May, 1987, that it was recognised that the project would be implemented by M/s. Oswal Agro Furane Ltd. F G

The Government of India on 30th March, 1988, in exercise of its powers under Section 3 of the Imports and Exports (Control) Act, 1947, issued the Export (Control) Order, 1988. This order repealed the earlier H

A Export (Control) Order 1977 and it came into force with immediate effect. Restriction on export of certain goods was imposed by clause 3 of the new Order which inter alia, stated that "Save as otherwise provided in this Order no person shall export any goods of the description specified in Schedule I, except under and in accordance with a licence granted by the Central Government or by an officer specified in Schedule II." In this order B a saving clause was inserted in Clause 15. In the present appeals we are concerned with the construction of Clause 15(j) of the said order, which reads as follows :

"15. Saving - Nothing in this Order shall apply to -

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(j) products manufactured in and exported from the respective Free Trade Zones and approved 100 per cent Export Oriented Units except textile items covered by bilateral arrangements;"

The aforesaid Export (Control) Order 1988 was amended by an D order dated 14th October, 1991 so as to include in Part-C in Schedule I in List II a number of items including non-basmati rice. As a result of this amendment non-basmati rice was allowed to be exported subject to the following conditions "exports shall be allowed against registration-cum-allocation certificate issued by the Agricultural and Processed Food Product Export Development Authority (herein after referred to 'APEDA') - E appellant herein". This amendment was followed by a Trade Notice dated 15th October, 1991, issued by the appellant by which procedure was laid down for allotment of quota which envisaged that the minimum export price of non-basmati rice, which was fixed, was US $ 231 FOB per MT. This was followed by a letter dated 15th October, 1991 from Government F of India to APEDA, inter alia, stating that additional quota of non-basmati rice for export subject to minimum export price of US $ 231 per MT had been released and it was stated that the Highest unit value realisation, and not cornering of quota by any party, should be the priority for allowance of export.

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It is in the background of the aforesaid facts that we may now refer to the filing of the writ petitions by the respondents with which we are now concerned.

On 7th January, 1991, Writ Petition No. 561 of 1991, was filed H by Oswal Agro in the Punjab and Haryana High Court wherein they

challenged the validity of Clause No. (vi) in the aforesaid amendment letter dated 18th May, 1987 and it was contended that they were under no obligation to export the edible rice bran oil and that they should be permitted to sell the same in the domestic tariff area. It is this writ petition which, vide this Court's order dated 14th March, 1996, has been transferred to this Court and is T.C. (Civil) No. 15 of 1996. On 12th January, 1992, Oswal Agro filed another writ petition No. 42 of 1992 in the High Court of Delhi claiming that it was not bound by the provisions of the Export (Control) Order, 1988 and it should be allowed to export, without any restriction, the non-basmati rice produced by it.

It will be appropriate, at this stage, to consider the points arising in these two cases, the Delhi case dealing with the case of export of rice and the Punjab case relating to the export of edible rice bran oil, separately.

The case relating to export of rice. The writ petition was filed in the Delhi High Court because vide letter dated 7th January, 1992, the Assistant Collector of Customs, Kandla, did not allow the export of rice and in fact, directed Oswal Agro to unload the rice which had been loaded. It appears that the action by the customs authorities had been taken when the appellants herein had informed the Assistant Collector of Customs, Kandla, that export of non-basmati rice could be allowed only when registration-cum-allocation certificates are issued. Inasmuch as Oswal Agro wanted to export the non-basmati rice without, any registration-cum-allocation certificate from the appellant and below the minimum price which had been fixed, the aforesaid action was taken by the Customs Authorities of stopping Oswal Agro from exporting rice. In the writ petition filed by the respondents in the Delhi High Court it was contended that being a 100 per cent export oriented unit, it was exempted from any trade restriction, inter alia, by virtue of the saving Clause 15(j) of the Export (Control) Order 1988. Another contention which was raised was that the fixation of minimum price by the appellant herein was without any power and authority. Further contending that Oswal Agro had entered into a number of contracts for the export of rice, it was submitted that the appellants herein were estopped from stopping the said export. According to Oswal Agro it had entered into contracts dated 16th October, 1991, 18th October, 1991 and 21st October, 1991, whereby it was under a contractual obligation to supply 1,07,000 M.T. of non-basmati rice to M/s Continental Grain Company, New York. It is an admitted case that the price at which Oswal Agro wanted to export the non-basmati rice, without any registration or

A authorisation from the appellant was US $ 213 per M.T., i.e., below the minimum price fixed by the appellant herein.

On 15th January, 1992, the Delhi High Court issued rule nisi and, by an interim order of the same day, stayed the operation of the aforesaid order dated 7th January, 1992, of the Assistant Collector of Customs, B Kandla and directed that there shall be no interference in the loading/shipment of non-basmati rice by Oswal Agro to the extent of 13200 M.T. It was further directed that this was subject to the condition that Oswal Agro will furnish a security of the amount of difference between the minimum price fixed by the appellants herein and the price at which the said quantity of C rice was being exported by Oswal Agro and the security was to be furnished within three weeks after competition of the shipment/export of the said quantity of rice.

By judgment dated 31st March, 1992 a Division Bench of the Delhi High Court allowed the aforesaid writ petition. It accepted the contention D on behalf of Oswal Agro that the provisions of the Export (Control) Order, 1988, were not applicable to the respondents by merely observing as follows:

> "The contentions of Mr. Banerjee, the learned counsel for the petitioner appears to have force. As stated hereinabove, in terms E of clause 15(j) of the Export (Control) Order 1988, nothing in this order shall apply to the 100 per cent export oriented Unit. In view of the aforesaid clause the notification dated 14th October, 1991, by which the said order has been amended, will not apply to the petitioner's unit which is admittedly a 100 per cent export oriented F unit. Since the Trade Notice dated 15th October, 1991, has been issued pursuant to the notification dated 14th October, 1991, the same will also not apply to the exports being made by 100 per cent export oriented Units."

The High Court also held that there was no provision in the Export G (Control) Order 1988 for fixing the minimum price for non-basmati rice. By taking note of the fact that vide letter dated 15th October, 1991, of the appellants herein, the last date for exporting the entire quantity of non-basmati rice was 31st March, 1992, the High Court while allowing the writ petition granted three months' time to export the balance quantity of 83800 H M.T. of non-basmati rice.

On 15th May, 1992, in Special Leave Petition (c) No. 6854 of 1992, filed by the appellant, from which Civil Appeal No. 3785 of 1992 arises, this Court while directing the petition to be listed on 8th September, 1992 gave Oswal Agro the liberty to export the rice in question on the undertaking that in the event of the Court holding that the item was a canalised item and Oswal Agro was not entitled to export the same, then it would make good the difference, as determined, in dollars.

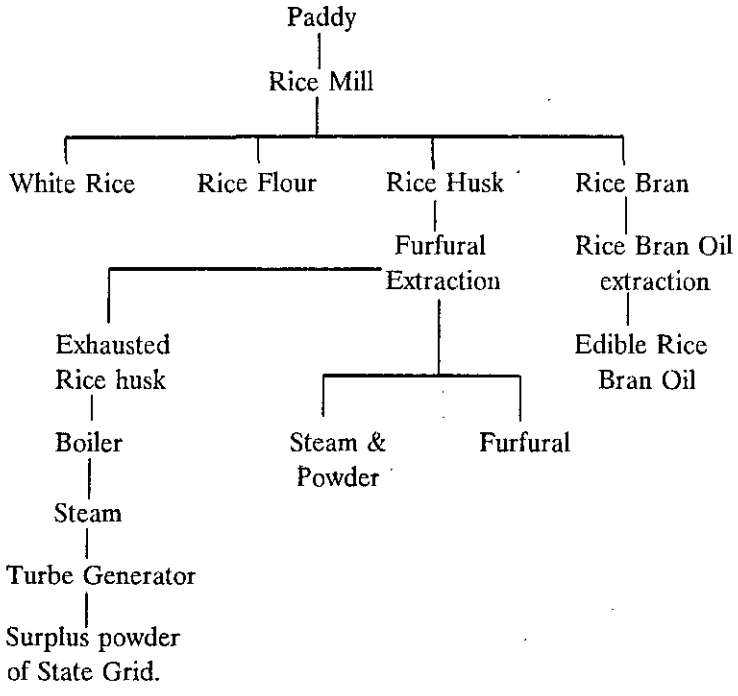
Notwithstanding the fact that the aforesaid special leave petition was pending in this Court. Oswal Agro moved another miscellaneous application before the Delhi High Court in which it was stated that by the end of June, 1992, 66,099.680 M.T. of non-basmati rice would be exported and that for exporting the remaining quantity in question time may be extended upto 31st August, 1992, and it be also permitted to export the same to buyers other than with whom the earlier contracts were alleged to have been entered. On 9th July, 1992, the High Court allowed this application and extended the time till 8th September, 1992, to export the balance quantity of rice but with the observation that the same was "subject to the conditions laid down by the Supreme Court in their order dated 15th May, 1992." Thereupon this Court on 8th September, 1992, granted leave to appeal and stayed the operation of the High Court judgment.

On behalf of the appellant it is contended by Mr. R.F. Nariman, learned senior counsel, that the industrial licence which had been granted was only for the manufacture of two items, namely, Furfural and edible rice bran oil and this was subject to the condition that the entire 100% product of these items was to be exported. He further submitted that according to clause 15(j) of the Export (Control) Order, 1988, only the export of Furfural and its bye product edible bran rice oil was saved from the operation of the Export (Control) Order, 1988 and not the export of non-basmati rice. Elaborating this submission he contended that the construction placed by the High Court on Clause 15(j) would mean that so long as there was a 100% approved export oriented unit then it could export any goods irrespective of what was approved to be manufactured for export by that unit. It was also contended that filing of the writ petition in the Delhi High Court was a clear abuse of the process of the court inasmuch as the petition had been filed without making any reference to the earlier Writ Petition No. 561 of 1991 which was filed in the Punjab and Haryana High Court and that the statements made in both the writ petitions were contrary

A to each other. It was also contended that the High Court in its discretion ought not to have granted any relief to Oswal Agro on the principle analogous to Order 2 Rule 2 of the Code of Civil Procedure. Lastly, it was submitted that Oswal Agro had exported 86,500 MT of non-basmati rice in violation of the Export (Control) Order and by virtue of the undertaking given by it to this Court, it is liable to pay the difference between the actual B export price and the minimum export price fixed by the Government and so calculated this difference which comes to US $ 24,54,644 at the current foreign exchange rates.

Mr. Ram Jethmalani, learned senior counsel for Oswal Agro at the C outset conceded that in terms of the industrial licence Oswal Agro was under no obligation to export basmati rice. According to him the only obligation which it had, in terms of the licence, was to export Furfural and not edible rice bran oil. For justifying the export of non-basmati rice. Mr. Jethmalani relied upon clause 15(j) and submitted that the said clause was D not confined to the end product governed by the IDR Act but it extended to bye products manufactured in that factory. In other words his submission was that an export oriented unit, by virtue of Clause 15(j) was entitled to export not merely the goods mentioned in the industrial Unit but also other products manufactured in that factory. He submitted that with respect to E the licensed product the Oswal Agro was under an obligation to export but because of Clause 15(j) the Oswal Agro, on its own volition, the export oriented unit could export other item which are also manufactured in that factory. It was contended that what was sanctioned in the case of the respondent was a project which started from the stage of dehusking of F paddy and, therefore, whatever was covered by the scheme would be covered by Clause 15(j). While referring to Clause15(j), it was contended that it was not intended for exemption for those items which a unit was obliged export and, therefore, a different meaning or purpose should be assigned to Clause 15(j). By giving the construction to the said clause, as canvassed by the appellant, Mr. Jethmalani contended that it would result in G changing the language of the said clause. Clause 15(j), it was also submitted, brought in the geographical or topographical concept thereby meaning that whatever was manufactured in the export oriented unit was free from the shackles of the Export (Control) Order, 1988. In the end it was contended that by using the plural word 'products' in Clause 15(j), the implication was H that it was to apply to all the products manufactured in that unit.

Before considering the rival contentions, it will be important to see the scheme was proposed for approval by the respondent. The following table set out in the Writ Petition No. 3622 of 1987 filed by the respondent in the Punjab and Haryana High Court is relevant :



A bare perusal of the aforesaid table shows that the raw material which was required for the manufacture of Furfural is rice husk while for the manufacture of rice bran oil the raw material required is rice bran. In the application dated 9th/22nd July, 1982 for the grant of industrial licence, it was clearly stated that though the respondent proposed to set up two shelling units but after shelling the rice produced on custom basis would be returned back to the paddy suppliers. It is only in order to obtain sufficient quantity of raw material, namely, rice husk that a composite project was proposed which contemplated the setting up of a rice mill as well. Under the circumstances it will not be correct to state that the immediate raw material required for the manufacture of Furfural was paddy. In fact the raw material was rice husk, though, no doubt the same is obtained after shelling of paddy. Therefore, the process of shelling of paddy by the respondent, which results in the production of non-basmati

A rice as well as rice husk, is not an essential requirement for the manufacture of Furfural.

Clause 15 is a saving provision and not an exemption clause. A saving provision or clause merely preserves what exists. In Statutory Interpretation by F.A.R. Bennion, Second Edition, at page 494 and 495 the learned author B with regard to the saving clause has said that "A saving is a provision the intention of which is to narrow the effect of the enactment to which it refers so as to preserve some existing legal rule or right form its operation. A saving resembles a proviso, except that it has no particular form. Furthermore it relates to an existing rule or right, whereas a proviso is usually C concerned with limiting the new provisions made by the section to which is attached." Again at page 494 and 495 it is stated "A saving is taken not to be intended to confer any right which did not exist already." To the same effect is a decision of this Court in *Shah Bhojraj Kuverji Oil Mills and Ginning Factory* v. *Subbash Chandra Yograj Sinha,* [1962] 2 SCR 159. While D dealing with the effect of a proviso it was observed as follows :

> "The law with regard to provisos is well-settled and well-understood. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule. E But provisos are often added not as exceptions or qualifications to the main enactment but as savings clauses, in which cases they will not be construed as controlled by the section. The proviso which has been added to s. 50 of the Act deals with the effect of repeal."

F

Dealing with the proviso to Section 7 of the Bombay General Clauses Act, the Court observed as under :

> "The substantive part of the section repealed two Acts which were in force the State of Bombay. If nothing more had been said, G s. 7 of the Bombay General Clause Act would have applied, and all pending suits and proceedings would have continued under the old law, as if the repealing Act had not been passed. The effect of the proviso was to take the matter out of s. 7 of the Bombay General Clauses Act and to provide for a special saving. It cannot H be used to decide whether s. 12 of the Act is retrospective".

Clauses 3 and 15 of the Export (Control) Order have to be read together. Clause 3 places restrictions and makes provision with regard to export of goods specified in Schedule 1 and Schedule III of the Order. If, however, a case falls within any of the various provisions of sub-clauses of Clause 15, then in that case only the Order does not apply. Clause 15, to put it differently, merely preserves any right or obligation which existed prior to the issuance of the Export (Control) Order and it did not, and could not, confer any new or additional right. Clause 15(j) merely preserves the right of Oswal Agro to export those products which it could export as on 30th March,1988, and any amendment in the schedule to the said Order, like the one made on 14th October, 1991, would not and cannot give Oswal Agro a right to export non-basmati rice, which right it did not have on 30th March, 1988. On 30th March, 1988, when the Export Trade (Control) Order 1988 was promulgated, Oswal Agro had an industrial licence which made it obligatory to export its entire production of Furfural. It was this right to export furfural which was preserved by Clause 15(j) and Oswal Agro could make its exports without following the provisions of the said Order.

It is true that a unit which sets up a rice mill for the purpose of producing non basmati rice is not required to obtain a licence under the I.D.R. Act but under the scheme of 31st December 1980 even those units or industries which were not covered by the I.D.R. Act could be registered by making an application under Clause 6 of the said scheme. If there was such a unit producing non-basmati rice, then the export by such a unit would be saved by virtue of Clause 15(j).

Keeping in view the nature of a saving provision it is not possible to accept the contention of Mr. Jethmalani that on the plain reading of the said sub-clause every product manufactured in a 100% export oriented unit was exempt from the applicability of the provisions of the said Order. Clause 15 clearly provides that what is saved are the products for which the export oriented unit is approved and not any other product manufactured by it. The word 'approved' in sub-clause (j) of Clause 15 must be read both with the words 'products' as well as with words the 'export oriented unit'. A unit is granted approval, as an export oriented unit in respect of specific product to be manufactured by it. The names of those products are indicated in the licence granting approval and the saving Clause 15(j) is applicable to those products the manufacture and export of

which has been approved as a 100% export oriented unit. The language of the said sub-clause is, in our opinion, capable of no other interpretation.

The submission that sub-clause (j) of Clause 15 of the said Order brings in geographical or topographical concept does not flow from the scheme of the Order or the language of the clause. When the Clause 15(j) refers to "100% export oriented unit" it is quite obvious that the clause has been inserted in the Export Trade (Control) Order, 1988 in view of the promulgation and existence of the promotion scheme of 1980. The said scheme for export oriented units was for grant of approval for the manufacture of products which, according to the conditions contained in the approval, had to be exported from the country. It is the contention of the respondent herein that under the terms of its licence it was under an obligation to export only Furfural and no other product. It is on this basis that it has been contended in the transferred case that the respondent is under no obligation to export edible rice bran oil. The obligation to export the entire quantity of furfural manufactured by it arises because of a specific condition contained in the industrial licence which were is follows :

> "(i) the entire (100 per cent) production shall be exported.
>
> (ii) You shall export the entire production (100%) less rejects not exceeding 5 (five) per cent for a period of 10 (ten) years."

Clause 15(j) had to be inserted so as to save such conditions which had been incorporated in the industrial licence which was issued to the respondent. Had Clause 15(j) not been incorporated in the Order it may have been possible for a unit to try and contend that by virtue of the restriction on exports being placed by Clause 3 of the Export (Control) Order, the unit was not in a position to export its products, though it was obliged to do so when the licence was issued. The implication of the insertion of the saving clause, therefore, was that the existing right or commitment for the export of the products was not in any way curtailed or taken away by the promulgation of the said Order. No extra right or licence to export an item, which the unit could not previously export, was sought to be conferred by Clause 15(j).

The use of the word "products" in plural, does not mean that every product made or produced in the unit could be exported. The said word "products" signifies that there may be more than one produce which may

be required to be exported in terms of the industrial licence or registration of the export oriented unit and Clause 15(j) would save the export of all such items. A

There is also no merit in the contention that the appellant could not fix the minimum price at which the non-basmati rice could be exported. According to Clause 3 of the Order no person can export any good of the description specified in Schedule I except and in accordance with the licence granted by the Central Government or an officer specified in the Second Schedule. Clause 4 of the said Order provides that a licence which is granted under the Order may contain such conditions which are not inconsistent with the Act or the Order, as the licensing authority may deem fit to impose. On 14th October, 1991, the Export Trade (Control) Order was amended and in Schedule I in List II Part C of the said Order Entry No. 65 was inserted which reads as follows : B C

"65. Grains and flour, namely : D

(i)	Non-basmati rice	Exports shall
(ii)	Wheat	be allowed
(iii)	Wheat products viz. raws, resultant atta, wheat bran.	against registration-cum-allocation E
(iv)	Maida, suji and whole meal atta (wheat flour of not less than 95% extraction)	certificate issued by the Agricultural
(v)	Barley	Processed Food F
(vi)	Maize	Products Export
(vii)	Bazra	Development
(viii)	Jowar	Authority
(ix)	Ragi	(APEDA)" G

The aforesaid entry made the appellant as the authority which was entitled to allow exports against registration-cum-allocation certificate and reading the same along with Clauses 3 and 4 of the Export Trade (Control) Order, conditions not inconsistent with the Act of the Order, could be imposed H

A while permitting export. One of the conditions imposed by the appellant for export of non-basmati rice was that it could not be exported at less than the minimum price fixed by it and, in our opinion, it was clearly entitled to do so.

B The reliance by the High Court on the earlier decision of the Punjab and Haryana High Court, while allowing import of capital goods, is clearly misplaced. That writ petition was concerned only with the question of import of machinery for the purpose of shelling paddy which would enable Oswal Agro to obtain the raw material required by it, namely, rice husk. That petition was not concerned with the question of export of rice and, C therefore, the said decision had no application to the present case. The question whether the rice shelling plant was a part of a 100% export oriented unit is wholly immaterial while considering in the present case whether Oswal Agro could export non-basmati rice.

D It was also contended by Mr. Jethamalani that even if it be assumed that the High Court has taken an erroneous view and had wrongly concluded that Oswal Agro could export non-basmati rice, this Court, in exercise of its discretionary jurisdiction under Article 136 of the Constitution, should not interfere.

E The facts as stated hereinabove, on the other hand, show that the High Court ought not to have exercised its jurisdiction under Article 226 of the Constitution, for more than one reason, and, therefore, it would be incumbent upon this Court to interfere under Article 136 of the Constitution and not to allow Oswal Agro to take advantage of an obviously wrong F decision of the High Court. Firstly the High Court misconstrued Clause 15(j) of the Order and held that because Oswal Agro was an export oriented unit, therefore, it could export any item manufactured by it, which conclusion is wholly incorrect. Secondly the High Court ought not to have entertained the writ petition because of Oswal Agro's conduct. It had filed an earlier writ petition in the Punjab and Haryana High Court dealing with G the same issue, namely, its obligation and right to export its products under the licence and in term of the Export (Control) Order. It is possible that the Delhi High Court may not be aware of the pendency of the writ petition in the Punjab and Haryana High Court, regarding the export of edible rice bran oil, because there is no reference to the filing of the said case H in the writ petition filed in the Delhi High Court. Oswal Agro is guilty

of suppression of this very important fact. It was contended in the Punjab and Haryana High Court that it was under no obligation to export the edible rice bran oil and its only obligation was to export Furfural while, in the writ petition filed in the Delhi High Court, a somewhat contrary contention was raised, namely, that being an export oriented unit, it was entitled to export non-basmati rice, in addition to Furfural. Had Oswal Agro indicated in the writ petition filed in the Delhi High Court that it had also filed a petition in the Punjab and Haryana High Court which was still pending, relating to export of edible rice bran oil, then Delhi High Court most probably would not have entertained the petition because the proper course which should have been followed by Oswal Agro was to raise this contention, regarding export of non-basmati rice, in the writ petition filed in the Punjab and Haryana High Court or to file a new petition there.

Under these circumstances, the exercise of jurisdiction under Article 136 of the Constitution is clearly called for, more so when it is admitted that the respondent had exported over 87,000 M.T. of non-basmati rice at a price far less than the minimum price fixed by the appellant.

For the aforesaid reasons we conclude that Oswal Agro could not, in law, export non-basmati rice. The Delhi High Court, instead of passing interim orders and allowing export of non-basmati rice, ought to have dismissed the writ petition.

It was contended by the learned counsel that even if it be assumed that the export of non-basmati rice below the minimum price fixed by the appellant was not permissible even then the only loss which has been suffered by the appellant was the 5% on the difference in the price at which the rice was exported and the minimum price which was fixed. Elaborating the contention it was submitted that the sale proceed of the rice which was exported would always belong to the respondent and the appellant was only entitled to received 5% of the proceed. Therefore if there was an export at less than the minimum price fixed then the shortfall of the amount which is received would be to the account of Oswal Agro. The loss to the appellant herein, it was submitted, would only be to the extent of 5% of the sale price which should have been realised and the difference between the actual sale price and the minimum price fixed was not payable by Oswal Agro to the appellant.

We are unable to agree with the aforesaid submission. It is clear that

A Oswal Agro had exported non-basmati rice which in law, it was not entitled to export without getting the permission from the appellant and at a price less then what was fixed by it. The export was possible only because of the interim orders which were passed first by the Delhi High Court and thereafter by this Court. To recapitulate, the first interim order was passed on 15.1.1992 by the Delhi High Court permitting the export of the said rice B on the condition that Oswal Agro would furnish a security of the amount of difference between the minimum price fixed by the appellant herein and the price at which the said quantity of rice was exported by Oswal Agro. Thereafter, this Court on 15.5.1992, when Oswal Agro wanted to export more non-basmati rice, passed order to the effect that "in the meantime C the respondent will be at liberty to export the rice in question on the undertaking that in the event of the Court holding that the item was a canalised item and the respondents were not entitled to export the same, the respondent will make good the difference, as determined, in dollars". The third interim order was passed by the High Court of Delhi on 9.7.1992 D when it permitted the export of balance quantity of rice but observed that this was "subject to the conditions laid down in this Court's aforesaid order of 15.5.1992".

First the Delhi High Court on 15.1.1992 and thereafter this Court in its order dated 15.5.1992 made it clear that the export was being permitted E subject to the condition that Oswal Agro would make good the difference in dollars if ultimately it was held that they were not entitled to export the said rice. After the imposition of such an condition, Oswal Agro chose to make the export of rice. It availed of the permission which was granted by the courts and as the permission was a conditional one, it is now open to them to contend that it is not liable to make good the difference when it F has been found that they were not, in law, entitled to export rice without authorisation from the appellant herein. Having taken advantage of the interim orders of the Delhi High Court and of the order dated 15.5.1992 of this Court, in particular, Oswal Agro cannot now be permitted to escape from the condition which was imposed upon it. Even though, if a valid authorisation had been issued for the export of rice, the appellant may have G been entitled to receive only 5% commission but as Oswal Agro has made export of rice in violation of Law and under the conditional orders passed by this Court, it cannot be now allowed to say that it is not liable to pay the difference between the price at which the rice was exported and the minimum price fixed by the appellant. The liability to pay to the appellant,

H

in other words, arises by virtue of interim orders passed by the High Court Court and this Court, which orders are binding on the parties

Edible Oil

As regards the challenge to the amendment of the industrial licence vide letter dated 18th May, 1987, Clause (vi) was included as an additional condition in the industrial licence, which reads as follows :

> "You shall also export rice bran oil produced in the 100% export oriented unit. If, however, it is so required by the Government, you will agree to supply the said oil to an agency that will be nominated by the Government at prices not higher than the international prices."

This amendment was made nearly one year after the grant of the industrial licence and more than four and a half year after the issuance of a letter of intent. The very insertion of this clause shows that, prior thereto, Oswal Agro was probably under no obligation to export edible rice bran oil. In the industrial licence originally issued it is not mentioned that edible rice bran oil had to be exported. On 13th June, 1986, an agreement was entered into between Oswal Agro and the Government in which it was specifically stated that "the unit shall earn foreign exchange by exporting 100% of their products of furfural for a period of ten years, counting from the prescribed dates after allowing rejects upto 5 per cent of production as aforesaid." This agreement makes specific no mention of Oswal Agro being under an obligation to export edible rice bran oil.

The question which arises is whether the industrial licence could be amended so as to incorporate a specific condition requiring the export of edible rice bran oil.

The Government had framed "The Registration and Licensing of Industrial Undertaking Rules, 1952" under which applications had to be filed for grant of an industrial licence under the Industries (Development and Regulation) Act, 1951. Admittedly these rules are applicable and the industrial licence dated 19th May, 1986 specifically states that the same was being issued by the Central Government in exercise of the powers conferred on it by Rule15(2) of the said Rules.

Rule 16 of the said Rules makes a provision for variation or amendment of licence. The said Rule reads as follows :

A "16. Variation or Amendment of Licences - (1) Any owner of an industrial undertaking in respect of which a licence has been granted, who desires any variation or amendment in his licence shall apply to the Ministry of (Industrial Development) giving the reasons for the variation or amendment.

B (2) The Ministry of (Industrial Development) after carrying out such investigation as it may consider necessary, may vary or amend the licence. The Ministry of Commerce and Industry may also consult the Licensing Committee before coming to a decision."

C Before the issuance of the licence on 19th May, 1986, a letter of 20th August, 1982 was written by the Director, Punjab State Industrial Development Corporation to the Secretariat for industrial approval, Government of India, Ministry of Industries, in which it was stated as follows :

"We are prepared to undertake to export 100% production of the
D edible rice bran oil and de-oiled cake. Also we are ready to export polished rice produced from our project if allowed by the Government of India. Pursuant to the aforesaid undertaking it was in the letter of intent dated 20th October, 1982, issued by the Government of India, the two items whose manufacture was permitted was
E Furfural with an annual capacity of 6000 tonnes and edible rice bran oil "as a bye product" with an annual capacity of 3000 tonnes. It was further stated in the letter of intent that "the entire 100% production shall be exported".

Though in the industrial licence dated 18.8.1986 on the formal agree-
F ment executed thereafter, there was no mention with regard to the expansion of edible rice bran oil, the Secretary, Government of Punjab, Department of Industries wrote a letter dated 30.7.1986 (photocopy of which has been placed on record in this Court by the appellant) in which reference was made to the approval of the change in the name of the company from Punjab Agro Furane Limited to Oswal Agro Furane
G Limited, cancellation of an agreement with a foreign company; change of financing pattern for the project as approved by the term lending institutions; and revalidation of capital goods import beyond two years as the letter of intent was issued on 25.10.1982. This letter also replied to some querries which appeared to have been raised by the officers of the Ministry
H of Industries and in response to one of the querries, it was, inter alia, stated

as follows : A

> "The rice bran, so obtained, would be processed for production of edible grade rice bran oil and deoiled cake. The Company would export deoiled cake. It has given an undertaking to export edible rice bran oil also, as and when permitted by Government of India. Presently, large quantities of edible oil are being imported and B export of edible oil is not permitted. Till export of edible rice bran oil is permitted, this oil can be sold to the domestic market directly or through a State designated agency and has to be treated as a deemed export."

C

It was also mentioned in this letter that they were prepared to export rice 'if so permitted by Government of India'. This letter also contained the amount of foreign exchange which could be earned by exporting furfural, rice bran cake, edible grade rice bran oil "if permitted" and non-levy rice "if permitted". The statement to this effect, in the said letter, was as follows:

D

> "It may be mentioned that the project does not envisage any recurring import of raw material. The only concession, which it would enjoy under 100% EOU, is one time duty-free import of equipment, presently not being manufactured in India for the requisite capacity and specifications. It will earn an annual foreign E exchange of Rs. 5.80 crores per year (Annex. I) if it is permitted to export only furfural and rice bran cake. It will earn foreign exchange of Rs. 10.70 crores per annum (Annex. II) if it is permitted to export edible rice bran oil in addition to furfural and rice bran cake. It will be able to earn a foreign exchange of Rs. 16.10 crores per annum (Annex. III) if it is permitted to export F non-levy rice, edible grade rice bran oil, rice bran cake and furfural. The company is in a position to export even rice husk ash from the boilers, at the rate of 70 tonnes per day and earn foreign exchange equal to Rs. 1.50 crores per year (Annex. IV)."

G

After the receipt of the aforesaid letter the impugned letter was issued amending the licence of Oswal Agro whereby the aforesaid condition No. (vi) relating to export of edible rice bran oil was also incorporated.

It is clear from the aforesaid letter written and the undertaking given, that Oswal Agro was willing to export edible rice bran oil, if it was H

A permitted to do so. In fact it had also indicated the amount of foreign exchange which it would earn by the export of edible rice bran oil. It is on the receipt of the aforesaid letters, specifically letter dated 30th July, 1986, which was followed by a reminder dated 6th November, 1986, that the impugned letter was issued on 18th May, 1987, amending the industrial licence. The amendment now made, where by clause (vi) was incorporated in the industrial licence, had the effect of making it a condition for Oswal Agro to export edible rice bran oil.

Under Rule 16(2) of the aforesaid Rules the owner of an industrial undertaking may ask for variation or amendment of the licence and under sub-rule (2) the Ministry of Industrial Development has the power to vary or amend the licence and, while doing so, amend or alter or add any one or more conditions. Inasmuch as the export promotion scheme of 1980 had been promulgated with a view to encourage export oriented units so as to earn more foreign exchange, it is not surprising that, viewed in that context, the Government of India accepted the request for permission to export edible rice bran oil and a specific condition to that extent was incorporated in the industrial licence by the amendment letter dated 18th May, 1987. It is intersting to note that though the amendment in the industrial licence was made on 18th May, 1987, no protest against the said amendment appears to have lodged by Oswal Agro. The reason obviously must have that this amendment was sought for, and in fact as far back as 1982 an undertaking to export edible rice bran oil had been given and even in the letter dated 30th July, 1986, the respondent had categorically stated that it was willing to export edible oil, if permitted. Oswal Agro did not readily protest and, on the contrary, commenced the production of the rice bran oil. It also accepted the other amendments made in the license, which had been sought by it. Under these circumstances, and seeing the conduct of Oswal Agro, it is not entitled to any relief under Article 226 of the Constitution as it was obliged to export the rice bran oil.

In the writ petition which was filed in the High Court at Punjab and Haryana, and which has been transferred to this Court, Oswal Agro have not made any mention with regard to the aforesaid letters dated 20th August, 1982, containing the undertaking to export edible rice bran oil and letter dated 30 July 1986, in which again it is stated that the rice bran would be exported, if the Government grants permission. These are material document and they would explain the reason as to why the Government

vide its letter dated 18th May, 1987, amended the industrial licence and incorporated therein the condition that the respondent would export the entire quantity of edible rice bran oil produced by it. A

It will also be seen in the said letters of 20th August, 1982 as well as of 30 July, 1986, not only was a mention made with regard to the export of edible rice bran oil but an undertaking was given that if it was allowed, it would also export polished rice produced at its unit. While providing for the export of edible rice bran oil, when an amendment to that effect in the industrial licence was carried out vide letter dated 18th May, 1987, no amendment was made in the industrial licence for granting permission for export of rice, even though such permission was sought for. It can, therefore, be concluded that whereas the Government had agreed to allow Oswal Agro to export edible rice bran oil produced by it, and had made it a condition of the industrial licence, no such permission was granted in respect of export of rice. This would be an additional reason for dismissing Oswal Agro's writ petition filed in the Delhi High Court and for allowing the appellant's appeal. B C D

In the Writ Petition filed in the Punjab & Haryana High Court what was impugned was the decision of the Customs and Excise Authorities of Chandigarh in not allowing the respondents to clear the rice bran oil for sale in domestic tariff area. The prayer in the Writ Petition, inter alia, was that Oswal Agro should be allowed to clear the rice bran oil manufactured by it for sale in the domestic tariff area as it was not obligatory on its part to export the rice bran oil produced by it. The High Court vide order dated 14.1.1991, inter alia, stayed the operation of the aforesaid clause (vi) of the letter dated 18.5.1987 requiring the export of rice bran oil subject to the undertaking that if the Writ Petition was dismissed, then Oswal Agro would be liable to pay an amount equal to the custom duty leviable as if the edible bran oil was deemed to have been imported. This was followed by another interim order dated 4.2.1991, after notice to the opposite party, whereby Oswal Agro was granted permission to sell the rice bran oil in the domestic tariff area. The oil which had been produced so far had been stored in the custom bonded area and by the this order of 4.2.1991, it was further directed that the said oil would be released under the supervision of the concerned Revenue Officer. The interest of the revenue was sought to be safeguarded by the Court directing that an undertaking should be filed by Oswal Agro that in the eventuality of the dismissal of the Writ E F G H

A Petition, they will pay the customs duty along with interest treating the oil to have been imported.

Apart from the fact that by virtue of the interim order of the High Court Oswal Agro has to pay duty, inasmuch as it has now been held by us that the respondent was not entitled to sell the rice bran edible oil in
B the domestic market and he was under an obligation to export the same, Oswal Agro was infact not entitled to the type of interim relief which was granted by the High Court. As will be presently seen it's conduct has been such that it succeeded in obtaining an interim order contrary to the statutory provisions which were applicable.

C

According to Section 3 of the Central Excise and Sale Act, 1944 (hereinafter referred to as 'the Act'), duty of excise was payable on any excisable goods which are produced or manufactured inter alia by a 100% export oriented undertaking and allowed to be sold in India. The proviso to sub-section 1 of Section 5A of the Act further states that general
D exemption which is granted under Section 5A(1) will apply to excisable goods which were produced or manufactured by a 100% export oriented undertaking and allowed to be sold in India. Sub-section 2 of the said Section does give the Government power to exempt from payment of excise duty any excisable goods by passing a special order to that effect. But, in
E the present case, no such exemption duty in fact was applicable. It appears that a Notification granting exemption from payment of excise duty of goods manufactured in a 100% export oriented undertaking vide notification dated 9.12.1988 was issued under Section 5A(1) of the Act but by a subsequent Notification dated 20.3.1990, the earlier Notification of 9.12.1988 was rescinded. The clear effect of this was that with effect from
F 20.3.1990 there was no exemption from payment of excise duty on the goods manufactured by 100% export oriented units which goods were cleared for sale in domestic market.

In a present case the oil which had been produced was stored in a
G bonded warehouse and it is only after the interim orders of the Punjab and Haryana High Court dated 4.1.1991 and 4.2.1991 that the oil was cleared from a bonded warehouse. As on that day, by virtue of the aforesaid Notification dated 20.3.1990 there was no exemption from payment of excise duty on edible rice bran oil and full amount of duty was payable on clearance of the goods.

H Neither in the Writ Petition nor in the application for stay, was there

any prayer with regard to non-payment of excise duty by Oswal Agro. Even if the impugned clause (vi) in the amended licence, which made it obligatory for Oswal Agro to export its entire quantity of edible rice bran oil, had been quashed even then for the purposes of removing the oil from the bonded warehouse for sale in the domestic market, excise duty in any case was payable. Under no circumstances, was Oswal Agro entitled to any order, interim or final, which could have allowed it to clear the goods without payment of excise duty. The High Court clearly overlooked the statutory provisions of Section 3 and 5A of the Act and Oswal Agro got an unfair and undue advantage as a reason thereof. It is, therefore, not only liable to pay the amount of excise duty which was due and payable but it also has to pay interest thereon.

What is the rate of interest which should be paid on the amount of excise duty payable is the next question. In a case like the present, Oswal Agro has clearly gained a undue advantage by obtaining an order which it was not entitled to get in accordance with law. Oswal Agro which is a commercial organisation had approached the High Court in exercise of its discretionary jurisdiction under Article 226 of the Constitution of India purportedly to get justice. In actual fact it sought and obtained interim orders which resulted in its not becoming liable to pay excise duty, which under no circumstances, could have been a matter of dispute. A litigant who obtains an incorrect order and does not pay the statutory dues should not be allowed to make any profit or gain from the infraction of law. The money which was legitimately due to the Government has been utilised by Oswal Agro in its business. Dealing with such cases which have financial implications involving business houses or companies it is the commercial principles which must be applied by the Court while ordering payment of interest. Had Oswal Agro, instead of using the Government money, obtained the said amount of loan from a bank, it would have had to pay interest thereon at the bank rate then prevailing. A lending institution like a bank would normally have advanced money for the purposes of business at the bank rate which is fixed with periodical rest. In addition thereto, a bank would normally also obtain a collateral security so as to safeguard the loan advanced by it. Oswal Agro has, on the other hand, not paid the excise dues to the Government and the Government money has presumably been used in its business. No collateral security has been furnished by them because none was ordered by the Court. Under these circumstances, there is no reason as to why Oswal Agro should not be required to pay at least

A that rate or interest, and on such terms, as it would have to pay to a bank if that amount of money had been obtained by it on loan. Keeping this principle in mind, it would be just and proper that Oswal Agro be directed to pay, in addition to the excise duty payable, interest at the rate of 18% per annum.

B *CONCLUSION* :

In view of the aforesaid discussion Oswal Agro is under an obligation to pay the difference between the actual export price and the minimum export price, fixed by the Appellant in respect of non-basmati rice exported by it in view of the interim orders which had been passed by the High Court C and this court permitting such export. According to the appellant taking into consideration the total quantity of rice exported by Oswal Agro between April, 1991 and March, 1992 when the minimum export price was fixed at the rate of US $ 231 per MT and between April, 1992 and March 1993 when the minimum export price fixed was US $ 270 per M.T. the total D amount payable by Oswal Agro would come to US $ 24, 54, 644 at the current foreign exchange rate. We, accordingly, direct this amount to be paid by Oswal Agro to the appellant within a period of four weeks from the date of this judgment.

With regard to payment of duty regarding rice bran oil, counsel for E both the parties have placed their respective charts on the record showing the amount which is payable. Whereas, according to Oswal Agro the total duty payable is only Rs. 6,88,59,894.00 which includes basic duty and auxiliary duty, according to the appellant the total duty payable is Rs. 19,75,55,192.97 and, in addition thereto interest of 12,55,09,088.40 as interest @ 18% P.A. is payable. There is no dispute, as the charts show, with F regard to the quantity of rice bran oil which has been cleared by Oswal Agro from 1990-91 to 1995-96. There is also no dispute with regard to the sale price received. The difference in the final figure arises because Oswal Agro have claimed deduction by way of expenses towards freight, octroi, rebate and discount. In addition thereto, it has claimed that duty is payable G at a lower rate in view of the Notification dated 17.10.1991 which had the effect of reducing the effective rate of duty. The appellants, on the other hand, have contended that the benefit of Notification like that of 7.10.1991 is not available since Oswal Agro had not obtained permission for the authorities for clearance in the domestic tariff area.

H The perusal of the Notification in question indicates that the effective

rate of excise duty on clearance of goods from 100% from export oriented unit to domestic tariff area would stand reduced if the goods so manufactured are "allowed to be sold in India". Oswal Agro never took permission of the authorities concerned to sell the rice bran oil in India. It is only by virtue of interim orders which were passed by the Punjab & Haryana High Court in 1991, after being opposed by the authorities, that the oil was removed from the bonded warehouse and sold in the domestic tariff area. The conditional order passed by the High Court permitting the sale of the oil in the domestic tariff area cannot be regarded as Oswal Agro having been allowed to sell goods in the domestic tariff area as contemplated by the said Notification dated 7.10.1991. In that view of the matter, full amount of basic duty and auxiliary duty was payable by it. Taking into consideration the different quantities of oil cleared during different periods and keeping in view the current rate of duty, the total amount of basic and auxiliary duty payable by Oswal Agro would come to the aforesaid figure of Rs. 19,75,55,192.97 as calculated by the appellant. In addition thereto, Oswal Agro is also liable to pay interest @ 18% as calculated by the appellant herein which comes to Rs. 12,55,09,088.00. It is hereby directed that Oswal Agro shall pay this amount of duty and interest within eight weeks from the date of this judgment and it shall also pay to the appellant herein, as well as to the Union of India, one set of costs which are quantified at Rs. 50,000.

A B C D

V.S.S. Appeal allowed.