# Daruka & Co vs Union Of India & Ors on 31 August, 1973

## Equivalent citations: 1973 AIR 2711, 1974 SCR (1) 570, AIR 1973 SUPREME COURT 2711, 1973 2 SCC 617 1974 (1) SCR 570, 1974 (1) SCR 570, 1974 (1) SCR 570 1973 2 SCC 617, 1973 2 SCC 617

## Bench: D.G. Palekar, Y.V. Chandrachud, P.N. Bhagwati, V.R. Krishnaiyer

PETITIONER:
DARUKA & CO.

Vs.

RESPONDENT:
UNION OF INDIA & ORS.

DATE OF JUDGMENT31/08/1973

BENCH:
SIKRI, S.M. (CJ)
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SIKRI, S.M. (CJ)
PALEKAR, D.G.
CHANDRACHUD, Y.V.
BHAGWATI, P.N.
KRISHNAIYER, V.R.

CITATION:
1973 AIR 2711 1974 SCR (1) 570
1973 SCC (2) 617
CITATOR INFO :
R 1974 SC 366 (96)
R 1974 SC2349 (10)
RF 1975 SC1564 (28,63)
R 1979 SC 314 (12)
R 1987 SC1794 (22)

ACT:
Import and Exports Act 1947-S. 3 read with the Export Control Order 1968-Export of Mica under the Scheme of Canalisation through the Minerals and Metals Trading Corporation of India Ltd.If violative of Art. 14, 19(1)(g) and 265 of the Constitution of India.

HEADNOTE:
S. 3 of the Imports and Exports Act 1947, empowers the Government to issue orders making provisions for prohibiting

restricting or otherwise controlling the imports and goods of special description and the Export Control Order 1968, and provides that no person shall export goods of the descriptions specified in Schedule-I of the said order, except under 'licence granted by the Central Government etc. Mica scrap and Mica waste are included in item No. 22(a) of Part B of Schedule-1 of the 1968 order. The export of these items is allowed on merits, or subject to ceilings or other conditions to be specified, from time to time.

The Controller of Imports and Exports issued the impugned notice and under it, the export of Mica was decided to be under the scheme of canalisation through the Minerals and Metals Trading Corporation of India. The impugned notice further stated that this canalisation of export scheme would be effective from 24 January, 1972. With regard to cases failing under pre-canalisation commitment category, the Port Licensing Authorities might allow export if the shipping documents produced by the exporters were accompanied by documents showing that the contracts were entered into with the foreign buyers before January 1972 or telegraphic offer or acceptance were dated January 1972 and irrevocable Letter of Credit at site was opened in a Bank of India, or in the foreign country before the 24 January, 1972.

The impugned notice further stated that the exporters who wished to avail themselves of the pre-canalisation commitment category were to furnish particulars, such as name of buyers, quantity, delivery period etc., at the office of the Controller of Imports and Exports.

The Corporation further issued a Press Note prescribing the procedure to be adopted by the exporters taking recourse to the canalisation scheme. Further, the Corporation would realise from the local suppliers as Service Charges not exceeding I per cent of the F.A.S. value. The foreign buyers would have to open unrestricted Letters of Credit in favour of the Corporation.

The Press Note further stated that where Letters of Credit had been opened on or after 24th January 1972 in the name of private agencies, foreign buyers would be requested so that the Letters of Credit were duly amended in the name of the Corporation and contracts finalised directly by shippers were also to be amended in favour of the Corporation for the balance quantity.The payment due to the suppliers would be paid by cheque after realising the proceeds of sale from the foreign buyers, after retaining the marginal I percent of the F.A.S. value as Service Charges of the Corporation.

Afterwards, on representation from several exporters, the Government issued an Export clarification Circular that in respect of cases where Letter of Credit was opened before 31 March 1972, but the period of shipment had expired, exports might be allowed in the name of private parties'. provided the shipment is made not beyond 30 June 1972.

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The petitioner challenged the canalisation of exports

scheme, inter alia, on the following grounds :-

(1)) It was not a canalisation scheme. It was in fact a scheme to transfer the business of the petitioner and good-will in favour of the Corporation which is outside the purview of the Act.

(2) The scheme was an unreasonable restriction and it violated Art. 19(1)(g) of the Constitution of India.

(3) The scheme violated Art. 14 of the Constitution because there was discrimination between the exporters of Mica Powder and Mica Scrap and Mica Waste.

(4) Fixing 24 January 1972 as the date for coming into force of the scheme was arbitrary. Letters of Credit had not reasonable relation to the objects of the Scheme. Therefore, fixing of the date of 24 January 1972 violates Art. 19. The extension of the date from 24 January 1972 to 31st March 1972, is mala fide and is to offer benefits to some and deny the same to the petitioner.

(5) The levy of a charge of I percent on F.A.S. value without conferring any corresponding benefit is an unreasonable restriction and is in substance, a tax, and is, therefore, in contravention of Art. 265 of the Constitution.

Dismissing the Petition,

HELD (i) The policies of imports or exports are fashioned not only with reference to internal or international trade, but also on domestic policies. If the Government decides an economic policy that imports and exports should be by selected channels or through the agency of selected channels, the court would proceed on the assumption that the decision is in the interest of the general public, unless the contrary is shown. [576G]

(ii)The scheme of canalisation is not acquisition of right to carry on trade. The canalisation scheme means that only the recognised agency can carry on trade. The effect of refusal of licence to other traders is that they cannot carry on the trade in house goods. The Corporation carries on trade itself but not because of any acquisition by the Corporation of the right to carry on trade of the unsuccessful applicant for licence. Therefore, there is no violation of Art. 31 or Art. 19(i)(f) of the Constitution.

The dominant purpose of the scheme is canalisation of export and not to acquire the business or goodwill of the traders in favour of the Corporation. As the canalisation of Export through the Corporation would ensure uniform good quality of goods and an increase in the volume of export, the restriction on traders is reasonable. There is no acquisition of property of traders. The Corporation is an

agency through which export is canalised to the total exclusion of citizens.

Davason of Bhimji Gohli v. Joint Chief Controler of Imports and Exports [1962] 2 S.C.R. 73 and Glass Charons Importers and Users Association v. Union of India [1962] 1 S.C.R. 862. referred to. [576H-577D]

(iii)Minerals and Metals Trading Corporation is a State-owned body. The Corporation is appointed to undertake the scheme for export of Mica. No preference is shown to the Corporation. Where canalisation is decided, no licence is granted in favour of any one. Therefore, there is neither any competition, nor any choice in the matter of grant of licence. It is a total exclusion of citizens in order to enable all the country's exports to be made by one licensee. Therefore, Art. 14, is not infringed. [577E]

(iv)Further, Art. 19(1)(g) is also not violated. If the traders wish to export quantities represented by their contracts, they are at liberty to avail themselves of the concession of exports through the Corporation. It is only if they will volunteer not to accept the concessional offer that there would he self induced loss of foreign exchange earnings. Further, the other advantages where the Corporation will enter into a principal to principal contract with the

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foreign buyers are that the traders will be getting facilities of entering into contract with the Corporation which enters into a back-to-back contract with the suppliers. The Service Charges of I per cent of the F.A.S. value cannot be described as a loss because the Corporation is really servicing the contracts. [1578D]

(v)The Service Charge collected by the Corporation is not in the nature of a tax and therefore, provisions of Art. 265 are not attracted. Further, the levy of service charges is not under the 1947 Act. The corporation is a licensee under 1947 Act and the 1968 Order. The Corporation acts in accordance with the terms and conditions of the licence. The government and the licensing authority under the Act, are not collecting any fee or charges from the traders. It is the Corporation which is collecting the Service Charges from the traders who avail the services of the Corporation. The Corporation is in the nature of a commercial undertaking to Which a licence has been granted for the export of certain commodities. The service Charges are nothing but quld pro quo for the services rendered by the Corporation. [578F]

(vi)Further, fixing 24 January 1972 as the date for coming into force of the Canalization Scheme was also not arbitrary. If no date is fixed for bringing into effect the canalization scheme with reference to opening of letter of credit it will give rise to ingenious devices of creating specious contracts. Contracts may be brought into existence by antedating such contracts. Therefore, the opening of

Letters of Credit has rational relationship with the object of the canalisation scheme, and there is no violation of Art. 14. [579D]

(vii)Ordinarily, the import or export of goods under international contracts .of sale frequently requires in modern times the protection of a governmental authority in the form of import or export licence. Where this is the case, the parties usually provide in the contract which of them is to apply for the necessary licence and what is to happen, if an application is refused. If the contract is altogether silent, a term is usually implied making this the duty of one party .or the other. Normally, this duty is upon the seller particularly in the case of F.O.B. and F.A.S. contracts. Nothing has been shown that the contracts in the present case were not subject to the usual terms of contract in such cases that the export was subject to the licence laws of our country for the export of .goods. Therefore, the question that the petitioner would be sued by the foreign buyer would not arise. [579G]

(viii)The impugned notice is not violative of Art. 14 of the Constitution on the ground that there is discrimination between the exporters of Mica powder and exporters of Mica scrap.The exclusion of mica power from the canalization scheme is to develop mica powder industry in our country because this ,industry is developing and is practically nascent is growth. There is an intelligible differentia between mica powder on the one hand and mica scrap and waste on the other in excluding mica powder from the canalisation scheme. [580G]

(ix)The relaxation of the date for opening Letters of Credit from 24 January 1972 to 31 March 1972 is not intended to benefit influential people. This relaxation was made because several exporters made representations that they did not understand the import restrictions and went on opening Letters of Credit. The relaxation was to minimise the hardships which the traders were likely to suffer on account of the coming into force of the impugned Trade Notice. The relaxation was to prevent dislocation of trade on a large scale. here was no mala fide on behalf of the Government in relaxing the date for opening the Letters of Credit from 24 January 1972 to 31 March 1972. [582B]

JUDGMENT:

ORIGINAL JURISDICTION : Writ Petition No. 94 of 1972. Under Article 32 of the Constitution for the enforcement of fundamental rights.

R. K. Garg, S. C. Aggarwala, for the petitioner.

S. T. Desai, B. D. Sharma, M. N. Shroff, for respondents Nos. 1 and 2.

B. Sen, O. C. Mathur, J. B. Dadachanji & Ravinder Narain, for respondent No. 3.

The Judgment of the Court was delivered by RAY, C.J. This petition under Article 32 of the Constitution challenges the Trade Notice dated 29 January, 1972 referred to as the impugned notice.

The import and export of goods is regulated by the Imports and Exports Act, 1947 referred to as the 1947 Act. Section 3 of the 1947 Act empowers the Government to issue orders making provisions for prohibiting, restricting or otherwise controlling the import and export of goods of special description. In exercise of the powers conferred under section 3 of the 1947 Act the Central Government from time to time issued orders regulating export of goods. The Export Control Order 1968 referred to as the 1968 Order came into existence under these powers. Clause 3(1) of the 1968 Order provides that no person shall export goods of the description specified in Schedule 1 of the 1968 Order except under and in accordance with the licence granted by the Central Government or by an officer specified, in Shedule I I of the 1968 Order. Mica scrap and mica waste are included as item No. 22(a) of Part B of Schedule 1 of the 1968 Order. Part B of Schedule 1 of the 1968 Order enumerates the items the export of which is allowed on merits or subject to ceilings 'or other conditions to be specified form time to time.

The impugned Notice is issued by the Controller of Imports & Exports under the aforesaid statutory provisions. Under Trade Notice dated 13 March, 1968 reproducing Export Control Order No. 1/68-EIC dated 8 March, 1968 export of mica including mica splittings, blocks, scrap waste which are included in the list of items in Part B of Shedule I of the Export Control Order was allowed on merits. Under the impugned notice the export of mica is decided to be under the scheme to canalise the export of all grades and variety of mica, excepting manufactured and fabricated mica, micanite, reconstituted mica, mica powder and mica paper through the Minerals and Metals Trading Corporation of India Ltd. (hereinafter referred to as the Corporation). The impugned Notice further states that this canalisation of export scheme will be effective from 24 January 1972. With regard to cases falling under pre- canalisation commitment category the port licensing authorities may allow export if the shipping documents produced by the exporters are accompanied by documents showing that the contract was entered into with the foreign buyers before 24 January, 1972 or telegraphic offer and acceptance is dated prior to 24 January, 1972 and irrevocable letter of credit at sight is opened in a Bank in India or in foreign country before 24 January, 1972. 11-382SuPCI/74 The, impugned Notice further states that exporters who wish to avail themselves of the pre-canalisation commitment category are to furnish particulars on or before 15 February. 1972 at the office of the Controller of Imports & Exports. The particulars are first, full statement showing quantity, grade of the mica (blocks, splittings, condensor films, mica scrap and factory cuttings), delivery period, name of the buyers, contract number and date with particulars of letter of credit number and date and second, quantities already shipped tinder these contracts and balance quantities to be, shipped.

Pursuant to the decision notified under the impugned Notice the Corporation issued immediately thereafter a Press Notice on export of mica prescribing the procedure to be adopted by the exporters taking recourse to the Canalisation Scheme. The Press Note states that after consideration of the prevailing trade practices 'and with a view to causing least dislocation in the existing arrangements

between the buyers abroad and the local sellers it has been decided to consider requests from the trade on furnishing full particulars of foreign buyers and other relevant details to negotiate sales of mica on behalf of the Corporation. The Corporation will enter into a sale contract with the foreign buyers on a principal to principal basis. The Corporation will simultaneously enter into a 'back to back' contract for procurement of mica with the authorised supplier. Foreign buyers will open letter of credit in favour of the Corporation. The Corporation will realise from the local suppliers as Service charges not exceeding 1 % of the FAS value. The price at which sales will be concluded will not be less than the FAS prices fixed under the Government of India 'Mica Export Policy' Notification dated 27 June 1966 as amended from time to time or voluntarily adopted on the recommendation of the Mica Export Promotion Council. The foreign buyers will open confirmed, irrevocable, assignable, divisible without recourse to drawer and unrestricted, letters of credit in favour of the Corporation. The Press Note further states that where letters of credit have been opened on or after 24 January, 1972 in the name of private shippers, foreign buyers have to be requested through cable, so that the letters of credit are duly amended in the name of the Corporation and contracts finalised directly by shippers are also to be amended in favour of the Corporation for the balance quantity. The payment due to the supplier will be paid by cheque after realising the proceeds of sales from the foreign buyers after retaining the marginal one per cent of the FAS value as service charges of the Corporation.

Subsequent to the Press Note the petitioner wrote to the respondent and gave details of contracts accepted by the petitioner from over-seas buyers prior to the canalisation of export scheme which came into effect on 24 January, 1972. The petitioner stated that in some cases shipment had been made and there was a balance to be shipped subsequent to 24 January, 1972. The petitioner gave details of nine such contracts.

After the publication of the impugned Notice several exporters represented that they did not understand the import of restrictions and went on opening letters of credit with respect to contracts entered into between the exporters and the foreign buyers. The Government with a view to lessen the hardships on the traders issued an Export Clarification Circular No. 3 of 1972 dated 17 April 1972 that in respect of cases where fetter of credit was opened before 31 March, 1972 but the period of shipment had expired, exports might be allowed in the name of private parties provided the shipment is made not beyond 30 June, 1972.

The petitioner challenged the canalisation of export scheme on the following grounds. First, it is not a canalisation scheme. It is in fact a scheme to transfer the business of the petitioner and goodwill in favour of the Corporation which is outside the purview of the Act. Second, the scheme is an unreasonable restriction in so far as it results in loss of foreign exchange, loss of profit and enables con- tracting foreign buyers to avoid the contract and sue the petitioner for breach of the contract. Therefore, the scheme violates Article 19(1) (g) of the Constitution Third, after the proclamation of emergency it has to be found whether the canalisation scheme could have been made under the 1947 Act. Fourth, the scheme violates Article 14 of the Constitution. There is discrimination between the exporters of mica powder and mica. scrap and mica waste,. The exclusion of mica powder from the ambit of the scheme will lead to mica scrap and mica waste being converted into mica powder and enable individual exporters to export the same. Fifth, fixing 24 January, 1972 as the date for coming

into force of the scheme with reference to the opening of letters of credit before that date is arbitrary. Letters of credit have no reasonable relation to the objects of the scheme. Therefore, the fixing of the date 24 January, 1972 violates Article 19. The extension of the date from 24 January, 1972 to 31 March 1972 is mala fide and is to confer benefit on some and deny the same to the petitioner. Sixth, the levy of a charge of' one per cent on FAS value without conferring- any corresponding benefit is an unreasonable restriction and is in substance a tax and is therefore in contravention of Article 265 of the Constitution. The scheme of canalisation of export through the Corporation is pursuance to section 3(1) (a) of the 1947 Act and clause 6(1) of the 1968 Order. The 1947 Act confers power to restrict, control or prohibit or otherwise control imports and exports. Clause 6(1) of the 1968 order is as follows :-

> "The licensing authority may refuse to grant a licence if the licensing authority decides to canalize exports through special or specialised agencies or channels".

This Court in Davason of Bhimji Gohil v. Joint Chief Controller of Imports & Exports (1963) 2 S.C.R. 73 considered the State policy regarding export of ore. The Government regulated export of ore through three classes of exporters. First, there were established, shippers who would be granted export quota on the average of the quantities exported during the years 1953, 1954 and 1955. The second class consisted of mica-owners based on an annual average of the quantity of ore on which royalty was paid during the calender years 1953, 1954 and 1955. The State Trading Corporation was the third class which would be given a quota on an ad hoc basis. The state Trading Corporation was allowed an adequate quota to enable them to maximise the exports of manganese ore. The question there was whether the withholding of the right to engage in export trade from new comer mine-owners not having export in certain basic years constituted an unreasonable restriction on their right to carry on business in violation of Article 19(1)(g) of the Constitution. The canalising of exports through special , or specialised agencies was upheld on the ruling of this Court in Glass Chatons Importers & Users' Association v. Union of India (1962) 1 S.C.R. 862.

In Glass Chatons case (supra) the relevant Exports Control Order was of the year 1958. That Control Order was made under section 3 of the 1947 Act. Clause 6 sub-clause (h) of the 1958 Export Control Order conferred power on the Central Government to refuse to grant a licence if the licensing authority decided to canalise export through special or specialised agencies or channels. The language of clause 6(h) of the 1958 Order is in identical language with clause 6(1) of the 1968 Order. The Constitutional validity of clause 6(h) of the 1958 Order was challenged there. Licences for the import of glass chatons were issued only in favour of the State Trading Corporation. The applicants used to import considerable quantities of glass chatons up to 1957. Those merchants challenged the grant of licence in favour of the State Trading Corporation in preference over the applicants and also as a monopoly in favour of the Corporation. The order of the Central Government in terms of clause 6(h) of the Import Control Order 1955 allowing canalisation of export through the Corporation was also impeached to be in contravention of Article 19(1)(f) and (g) and Article 31 of the Constitution. This Court in Glass Chatons case (supra) held that if the scheme of canalisation of imports is in the interest of the general public the refusal of licence to outsiders would also be in the interest of the general public. The canalisation of import was held to be per se not an unreasonable restriction in the interest of the general public.

Policies of imports or exports are fashioned not only with reference to internal or international trade but also on monetary policy, the development of agriculture and industries and even on the political policies of the country but rival theories and views may be held on such policies. If the Government decides an economic policy that import or export should be by a selected channel or through selected agencies the 'court would Proceed on the assumption that the decision is in the interest of the general public unless the contrary is shown.

This Court in glass Chatons case (supra) said that the scheme of canalisation is not acquisition of right to carry on trade. The canalisation scheme means that only the recognised agency can carry on trade. The effect of refusal of hence to other traders is that the cannot carry on trade in those goods. The Corporation carries on trade itself but not because of any acquisition by the Corporation of the right to carry on trade of the unsuccessful applicant for licence,. Therefore, there is no violation of Article 31 or Article 19(1)(f) of the Constitution by the canalisation of export through the State Trading Corporation.

In Devason of Bhimji Gohil case(1) (supra) it was said that the State Trading Corporation might be a special agency or channel for the purpose of enabling the country to maintain and develop the trade in the commodity both from the qualitative and quantitative pomts of view. The canalisation of export through the Corporation would ensure a uniform good quality of goods and also increase the volume of export.

Therefore the dominant purpose of the scheme is canalisation of export and not to acquire the business or goodwill of traders in favour of the Corporation. The restriction on traders is reasonable. There is no acquisition of property of traders. The Corporation is an agency through which export is canalised to the total exclusion of citizens. The contention that the impugned Notice showed preference for the Corporation in infringement of Article 14 is unsound. The Corporation is a State owned body. The Corporation is appointed to undertake this export scheme. No preference is shown to the, Corporation. Where canalisation is decided no licence is granted in favour of any one. Therefore, there is neither any competition nor any choice in the matter of grant of licence. It is a total exclusion of citizens in order to enable all the country's exports to be made by one licencee.

The impugned Notice is challenged on the ground that 24 January, 1972 is an arbitrary fixation of date. The Press Note is impeached on the ground that the procedure for export through the Corporation where no irrevocable letters of credit were opened before 24 January, 1972 is in reality not a canalisation scheme but is a device to transfer the business and goodwill of the traders in favour of the Corporation. The fallacy of the contention is in assuming that traders have a right to carry on the trade of exporting mica waste and mica scrap after coming into force of the canalisation scheme on 24 January, 1972. The Press Note made it clear that the State did not want to disturb the market but intended to save the trade and to prevent a loss to the sellers. The State did not want to dislocate the commitments made by the traders to foreign buyers. This is precisely why the Press Note stated that the Corporation was prepared to enter into contract with foreign buyers and to export goods to them provided they opened letters of credit. After the canalisation scheme had come into effect the contracts between the traders and the foreign buyers came to an end by operation of the statutory restrictions. Therefore the State Rave concession to the traders in order to eliminate

hardship. The traders were given the choice to export provided they fulfilled certain conditions. These were that they could export through the Corporation and they were to pay service charges. It is significant that if the Press Note had not laid down the procedure conferring the privilege of exporting goods even after 24 January, 1972 in performance of contracts which were not supported by irrevocable letters of credit being opened prior to 24 January, 1972 the traders would have suffered loss. The traders could not perform the contracts with the foreign buyers after 24 January, 1972 where fetters of credit had not been opened. Therefore, it is apparent that there was no transfer of business or goodwill in favour of the Corpo- ration.

The contention with regard to contract-, entered into before 24 January, 1972 but where letters of credit have not been opened before that date is that the traders are exposed to loss of business and loss of profits and thereby unreasonable restrictions have been put on the traders' right to carry on business in violation of Article 19 (1)(g). This contention is unacceptable. If the traders wish to export quantities represented by such contracts they are at liberty to avail of the concession of exports through the Corporation. It is only if they will volunteer not to accept the concessional offer that there would be self induced loss of foreign exchange earning. Further the other advantages where the Corporation will enter into on a principal to principal contract with foreign buyers are that the traders are getting the facilities of entering into contract with the Corporation which enters into a back to back contract with the authorised suppliers- The service charges of 1/4% of the FAS value cannot be described as a loss because the Corporation is really servicing the contracts.

The service charge collected by the Corporation is not in the nature of a tax. The provisions of Article 265 are not therefore attracted. Counsel for the petitioner countended that the levy of service charges was not authorised by the 1947 Act which permitted only levy of fee in respect of applications for issue or renewal of licence. The Corporation is a licencee under the 1947 Act and the 1968 Order. The Corporation acts in accordance with the terms and conditions of the licence. It was said on behalf of the petitioner that section 4(a) of the 1947 Act and clause 4 of the 1968 Order excluded levy of any other fees under the Act. The Government and the licensing authority under the Act are not collecting any fee or charges from the traders. It is the Corporation which is collecting service charges from the traders who avail the services of the Corporation. The Corporation is in the nature of commercial undertaking to which a licence has been granted for the export of certain commodities. The service charges are nothing but quid pro quo for the services rendered by the Corporation. Counsel for the petitioner challenged the impugned Notice as violative of Article 14 on the ground that the canalisation scheme made a distinction between subsisting contracts with foreign buyers for which irrevocable letters of credit were opened before 24 January, 1972 and subsisting contracts with foreign buyers for which letters of credit were not opened before 24 January, 1972. It is, therefore, said that the opening of irrevocable letter of credit before 24 January, 1912 had no reasonable relationship to the object of the scheme it cannot be denied that a date has to be fixed for bringing into effect the canalisation scheme. Contracts may be for short or long terms. Usually long term contracts are worked out through instalment delivery at intervals. It will depend on the terms of the contract whether each is an instalment contract severable from other instalments or whether it is one contract to be performed in instalments. On the construction of such a contract depends whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not a right to treat the

whole contract as repudiated.

In the present case, the affidavit evidence is that the obligation to export goods arises when the foreign buyers open letters of credit for the specified quantity of goods. If no date is fixed for bringing into effect the canalisation scheme with reference to opening of letter of credit it will give rise to ingenious devices of creating specious contracts. Contracts may be brought into existence by antedating such contracts. The entire purpose of the canalisation scheme with a view to increasing the export trade of the country, assisting small mine-owners, exporters and processors,. checking smuggling in foreign exchange, under-invoicing, illegal acquisition of foreign currency and eliminating the chances of contravention of various provi- sions of the Foreign Exchange Regulations Act and Exports (Control) Order will be stultified. The utility of a State agency in the smooth running of export trade in such commodity as mica blocks, condensor films, splittings, scrap or waste forms a very significant part of exports of our country. Therefore the opening of letters of credit has rational relationship with the object of the canalisation scheme and there is no violation of Article 14. As a corollary to the fixation of 24 January, 1972 as the date counsel for the petitioner contended that the scheme would enable foreign buyers to sue for breach of contract. This contention is also unsound. Ordinarily, the import or export of goods under international contracts of sale frequently requires, in modem times, the permission of a governmental authority in the form of import or export licence. Where this is the case, the parties will usually provide in the contract which of them is to apply for the necessary licences and what is to happen if the application is refused. If the contract is altogether silent about licences or is expressed to be subject to licences without providing who is to obtain them, a term is usually implied making this the duty of one party or the other. Normally, this duty will be cast upon the seller particularly in the case of F.O.B. and F.A.S. contracts. There may be cases where the circumstances may be such as to make the buyer responsible for obtaining any necessary export licence. The tendency is to cast the duty upon the party best qualified by knowledge of the necessary facts or otherwise to obtain the licence. Once it is determined from the words of the contract or by implication who is to apply for the licences, there is a separate question again depending on the circumstances of the particular case, whether the duty is an absolute one or more usually, whether it is only to use all reasonable diligence to obtain the necessary licences. Performance of the contract in the latter case is only excused if the duty has been performed but no licence has been obtained. if an absolute prohibition of export supervenes upon a contract which is subject to licence the duty cannot be absolute. Nothing has been shown that contracts in the present case were not subject to the usual terms of contract in such cases that the export was subject to the licence laws of our country for the export of goods.

It was said on behalf of the petitioner that the impugned Notice violated Article, 14 of the Constitution on the ground that there was discrimination between exporters of mica powder on the one hand and exporters of mica scrap on the other. It was emphasised that the export of mica powder is not within the ambit of the canalisation scheme. The impugned Notice canalises export of all grades and varieties of mica excepting manufactured and fabricated mica (including die cut condenser films, spacers, bridges, washeres etc.) micanite, raconstituted mica, mica powder and mica paper. The mica export policy published at pages 77-78 of the Export Trade Control Hand Book of Policy and Procedure 1970 published by the Government of India, Ministry of Foreign Trade deals with shipment of any variety other than fabricated mica, inter alia, on the basis of an application in

that behalf and compliance with other terms laid down in that policy and in particular opening irrevocable letter of credit by a foreign buyer in a Bank in India for 100%, of the invoice value of the goods. Shipment of fabricated mica under that policy continued to remain free from the above stipulation regarding opening of 100% irrevocable letter of credit. Fabricated mica in that policy is said to include micanite, built up mica, mica tapes, mica cloth, mica silk, mica paper, mica folium and all varieties of mica cut or purched to specific shapes and sizes, and mica powder. It is said on behalf of the petitioner that as a result of the exclusion of mica powder from the scope of the canalisation scheme, there are possibilities of mica waste and mica scrap being converted into mica powder and exported by individual exporters and there may be a loss in foreign exchange. The affidavit evidence on behalf of the State is that the exclusion of mica powder from the canalisation scheme is to develop mica power industry in our country, because this industry is developing and is practically nascent in growth. Therefore, there is intelligible differentia between mica powder on the one hand and mica scrap and waste on the other, in excluding mica powder, from the canalisation scheme. The State issued another Trade Notice on 20 April. 1972. This April 1972 Notice is also impeached. Under the April Notice which can be described as the second impugned Notice it is stated that the canalisation scheme Provided in the impugned Notice of 29 January, 1972 is modified to the extent that shipments will be allowed up to 30 June, 1972 against subsisting contracts for all grades and varieties of mica which had been executed prior to 24 January. 1972 and ill respect of which letters of credit have not been opened prior to 24 January, 1972. The petitioners contend that the relaxation of the date for opening letters of credit from 24 January 1972 to 31 March, 1972 was intended to benefit influential people. It was said that such influential people went on opening letters of credit up to 31 March, 1972, because of their previous knowledge that there was going to a relaxation in the date. The contention of the petitioners was that this relaxation was mala fide to help influential people. The affidavit evidence on behalf of the State is that this relaxation was made because several exporters made representations that they did not understand the import of restrictions and went on opening letters of credit. On behalf of the State it was said that the relaxation was to minimise the hardships which the traders were likely to suffer on account of the coming into force of the impugned Trade Notice.

The three representations received by the Ministry are from the Bihar Mica Exporters' Association dated 25 January, 1972, the Mica Chamber of Commerce, Gudur, Andhra Pradesh dated 9 February, 1972 and the Bihar Mica Exporters' Association dated 16 March, 1972. Broadly stated, the representations of the traders were that the absence of any detailed information or direction as to the procedure to be followed under the new system, presented three difficulties to the traders. First, there was serious set back in usual flow of mica exports. Second, there was financial loss to the mica exporters. Third, there was financial crisis in the mica industry. The difficulties pointed out were that export consignments worth about Rs. 70 lakhs in the names of different exporters supported by valid contracts and letters of credit were under processing through Joint Chief Controller of Imports & Exports and Customs at Calcutta Port for shipment within 31 January, 1972. The Orders and Credit were not assignable, and were covered under Buyers' Import Licence which stipulated specific dates for shipment and consequently the letters of credit could not be extended or amended if so desired under the new system. Under similar conditions export consignments worth about Rs. 130 lakhs were lying ready for shipment in the month of February, 1972. Goods; worth about Rs. 150 lakhs were under manufacturing process against orders and letters of credit for shipment in March,

1972. Goods worth about Rs. 150 lakhs were awaiting processing line against shipment commitment for the months of April to June, 1972. There were other export contracts for shipment after the month of June, 1972. Some consignments of mica scrap, cuttings, powder, flakes and mica splitting$ were despatched by Rail Wagon from Giridh Kodarma to Calcutta Port for shipment by specific steamer. If for the reason of the changed pattern of export steamers were not availed or shipment was delayed the traders would suffer loss for non-shipment of the goods and incur railway demurrage and Port Commissioners' demurrage and storage charges. The Association therefore asked for relief in the matter of export in accordance with the contractual terms of existing contracts. The Andhra Pradesh Chamber of Commerce added that there were contracts prior to 24 January, 1972 stating shipment date subsequent to 24 January, 1972 for which letters of credit were to be established in due course. Certain contracts were executed in part and for the remaining part letters of credit were to be established in due, course prior to the stipulated time, of shipment. There were contracts prior to 24 January, 1972 for which' letters of credit originally established had expired. Therefore, the Andhra Chamber of Commerce asked for extension of last date for registration of contracts up to 29 February, 1972.

In this background it cannot be said that the Government authorities acted mala fide in extending the date of the opening of the letter of credit from 24 January', 1972 to 31 March, 1972. The relaxation was to minimise hardships to the traders. The relaxation was to prevent dislocation of trade on a large scale. The Association gave instances of traders who could not succeed in opening letters of credit for reasons beyond their control.

For these reasons, the contentions of the petitioner fail. The petition is dismissed. In the facts and circumstances of the case, the parties will pay and bear their own costs. S.C. Petition dismissed.