

Supreme Court of India

Prem Chand Somchand Shah And ... vs Union Of India And Anr on 5 February, 1991

Equivalent citations: 1991 SCR (1) 232, 1991 SCC (2) 48

Author: S Agrawal

Bench: Agrawal, S.C. (J)

PETITIONER:

PREM CHAND SOMCHAND SHAH AND ANR.ETC. ETC

Vs.

RESPONDENT:

UNION OF INDIA AND ANR.

DATE OF JUDGMENT05/02/1991

BENCH:

AGRAWAL, S.C. (J)

BENCH:

AGRAWAL, S.C. (J)

RANGNATHAN, S.

KASLIWAL, N.M. (J)

CITATION:

1991 SCR (1) 232

1991 SCC (2) 48

JT 1991 (1) 340

1991 SCALE (1)128

ACT:

Constitution of India, 1950: Article 14 -Equality-Reasonable classification-ExportHouses-Additional Import Licences-Classification of Licences for the purpose of benefit of flexibilities of import items under Para 215(4) of 1988-91 Imports and Exports Policy-Held Export Houses granted Additional Import Licences prior to 1.4.1988 on the basis of f.o.b. value of Exports and Exports Houses granted Additional import Licences after 1.4.88 on the basis of the net foreign exchange earnings on exports do not constitute a single Class-Held classification of licences valid since basis and conditions of grant of licences under 1978-79 Policy and 1988-91 policy were different.

Import and Export Policy, 1978-79: Paras 165,166, 174 & 176 Import and Export Policy, 1988-91: Paras, 212, 214, 215 and 218-Appendices 3 and 5 Part-A-Export Houses-Additional Export Licences-Benefit of flexibilities in import items under Para 215(4)-Benefit extended to grantees of Additional Import Licences issued after 1.4.1988 i.e. under 1988-91 Policy and denied to grantees of Additional Import Licences issued prior to 1.4.1988 i.e. under 1978-79 Policy, Para 218(10)-Held Export Houses granted Additional Import Licences prior to 1.4.88 cannot claim the benefit of relaxation of import under Para 215(4)-Para 218(10) of 1988-91 Policy held valid.

HEADNOTE:

The petitioners, carrying on import-export of diamonds, filed applications for registration as Export Houses and grant of Additional Import Licences under Para 174 and 176 of the Import and Export Policy 1978-79 which were rejected by the authorities on the ground that they have failed to diversify their exports of "other products" during the year 1977-78. They challenged the order of the authorities by filing writ petitions before the Bombay High Court under Article 226 of the Constitution. One of the petitions was dismissed by a learned single judge of the High Court and the said petitions filed an appeal before a Division Bench of the High Court. During the pendency of the appeal

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and the writ petition, the Supreme Court by its order dated April 18, 1985 decided the case of Union of India v. Rajnikant Bros. holding that there was no requirement of diversification of exports as a condition for the grant of Export Houses Certificates in the Import Export Policy for the year 1978-79 but the grantee of Additional Licences were not only prohibited from importing items which were excluded in the Export Policy 1978-79 but also from importing items excluded under the Import Policy prevailing at the time import. The High Court decided the cases of the petitioners in accordance with the decision of this Court in Union of India v. Rajnikant Bros. Pursuant to the decision of the Bombay High Court petitioners were granted Export House Certificates and Additional Import Licences which were valid for 12 months, with the same condition as provided by this Court in its order dated April 18, 1985 in the case of Rajnikant. However, the petitioners were not able to make imports under the said licences till 31st March, 1988. On 1.4.1988, the Government of India issued a revised Export and Import Policy for the period 1988-91. Under Para 215 of the said revised policy certain flexibilities were granted in the matter of imports to the grantees of Additional Import Licences. However, under para 218(10) of the said revised Policy the holders of the Additional Import Licences issued prior to 1.4.1988 were made ineligible for the benefit of flexibilities in import as contained in para 215(4). Since the petitioners were holding licences issued prior to 1.4.1988 they could not avail the flexibilities in import as contained in Para 215 of the 1988-91 Policy. Consequently, they filed writ petitions in this Court challenging the validity of para 218(10) of the 1988-91 Policy contending (i) that all the Export Houses who were granted Additional Licences constitute a single class and their classification on the basis of date or on the basis of period of exports has no connection with the object sought to be achieved by the 1988-91 policy; (ii)

that Para 218(10) of 1988-91 Policy arbitrarily discriminates between Export Houses who were issued Additional Licences prior to 1.4.1988 since the benefits of Para 214 of 1988-91 Policy were conferred only on the latter; (iii) that in view of the judgement of this Court in C.Naveenchandra and Co. v. Union of India, [1987] 2 S.C.R. 989 the petitioners should be treated at par with the grantees of Additional Licences under the Export Policy for the subsequent years and since there has been relaxation in the matter of policy of canalisation of imports under Para 215(4) in respect Additional Licences granted to Export Houses under the 1988-91 Policy, the petitioners were also entitled to a similar relaxation.

Dismissing the petitions, this Court,

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HELD: 1. The right to equality guaranteed under Article 14 ensures equality amongst equals and its aim is to protect persons similarly placed against discriminatory treatment. It means that all persons similarly circumstance shall be treated alike both in privileges conferred and liabilities imposed. Conversely discrimination may result if persons dissimilarly situate are treated equally. Even amongst persons similarly situate differential treatment would be permissible between one class and the other. In that event it is necessary that the differential treatment should be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and that differentia must have a rational relation to the object sought to be achieved by the statute in question. [242H, 243A-B]

2. A close examination of the Import & Export Policy 1978-79 and the Import & Export Policy 1988-91 shows that there is material difference between the conditions for grant of Additional licences under Import Policy 1978-79 and the conditions for grant of such licences under the Import Policy 1988-91. While in the Import & Export Policy 1978-79 the emphasis was only on the f.o.b. value of exports without taking into account the outgo of foreign exchange in importing the goods required for achieving the exports by an Export House and Additional licences were granted for a much larger amount at a higher percentage on the basis of the f.o.b. value of the exports, whereas in the Import & Export Policy 1988-91 there is a more realistic appraisal of actual benefit to the country's economy by the exports by taking into account the net foreign exchange earnings after deducting the value of the imports and additional licences are issued on the basis of the net foreign exchange earnings for a much lesser value on a smaller percentage. Therefore, the basis for the grant of Additional Licences which are entitled to relaxation in import under the 1988-91 Policy is different from the basis on which Additional Licences were granted under the 1978-79 policy.

[243C, 245B-C, 248A]

3. The petitioners were not granted Additional Licences on the basis of net foreign exchange earnings and they have secured the Additional Licences on the basis of f.o.b. value of the exports, without taking into account the value of goods imported by them for achieving the exports. It cannot be said that the petitioners who have been granted Additional Licences under the 1978-79 Policy and the Export Houses who were granted Additional Licences under the 1988-91 Policy are persons similarly circumstanced. Therefore the petitioners cannot claim the same facilities that have been provided to Export Houses who are granted Additional Licences under the 1988-91 Policy. Hence they have failed to make out a case for interference by this Court under

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Article 32 and consequently they cannot assail the validity of Para 218(10) of the Import & Export Policy 1988-91. [245E, 243D, 245F, 249C, 248B]

4. Export Houses, like the petitioners, who were granted Additional Licences on the basis of order of this Court dated April 18, 1985 are not to be treated at par with Export Houses who are granted Additional Licences under the Import & Export Policy prevalent at the time of import. Import of canalised items under Additional Licences issued to the petitioners would be permissible if the import policy prevailing at the time of import permits them to import such items. Therefore the rights of the petitioners under the Additional Licences issued to them would be governed by the terms of the Import Policy prevailing at the time of import. [246A-B, 247E, 247H]

D. Naveenchandra & Co. Bombay & Anr. v. Union of India  
JUDGMENT:

Raj Prakash Chemicals Ltd. & Anr. v. Union of India & Ors., [1986] 1 S.C.R. 448; Union of India v. Godrej Soaps Pvt. Ltd., [1986] 3 S.C.R. 771; Union of India v. Rajnikant Bros., Civil Appeal No. 1423 of 1984 decided on 18.4.1985; Indo Afghan Chamber of Commerce v. Union of India, [1986] 3 S.C.R. 88, referred to.

B. Vijay Kumar & Co. etc. etc. v. Collector of Central Excise and Customs, [1991] 1 Scale 33; held inapplicable.

& ORIGINAL JURISDICTION: Writ Petition No. 459 & 460 of 1988.

(Under Article 32 of the Constitution of India). Harish N. Salve, S.V. Kamdar and M.N. Shroff for the Petitioners.

P.K. Goswami, Additional Solicitor General, Kailash Vasdev and Ms. A Subhashini for the Respondents.

The Judgement of the Court was delivered by S.C. AGRAWAL, J. These petitions under Article 32 of the Constitution raise a common question as to the validity of sub-para (10) of para 218 of the Import & Export Policy for the period April, 1988 to March, 1991.

The petitioners in both these writ petitions are partnership firms carrying on business of import of rough diamonds and export of cut and polished diamonds. The Import & Export Policy for the period April 1978 to March 1979, in para 174, made provision for grant of certain import facilities to Export Houses which were registered in accordance with the provisions of the said Policy. One of the said facilities was grant of an Additional licence in terms of para 176 of the said Policy for an amount to be calculated at one third the f.o.b. value of the exports of select products made by the Export House in the year 1977-

78. The petitioners submitted application for registration as Export Houses and for grant of Export House Certificate which would have entitled them to the grant of such Additional licence. The said applications of the petitioners were rejected by the authorities on the view that petitioners had failed to diversify their export of "Other Products" during the year 1977-78. The said order refusing the Export Certificate was challenged by the petitioners by filing writ petitions under Article 226 of the Constitution before the Bombay High Court. One of those writ petitions (filed by the petitioners in writ petition No. 460 of 1988 herein) was dismissed by a learned Single Judge of the High Court and the said petitioners filed an appeal before a Division Bench of the High Court. While the said appeal and the other writ petition (filed by the petitioners viz. writ petition No. 459 of 1988 herein) were pending in the Bombay High Court, this Court decided Civil Appeal No. 1423 of 1984, Union of India v. Rajnikant Brothers, and other connected matters by order dated April 18, 1985, wherein it was observed that there was no requirement of diversification of exports as a condition for the grant of Export House Certificates in the Import Policy for the year 1978-1979, and the authorities were directed to issue necessary Export Certificates for the year 1978-79. In that order this Court laid down the following conditioned:

"Save and except items which are specifically banned under the prevalent import policy at the time of import, the respondents shall be entitled to import all other items whether canalised or otherwise in accordance with the relevant rules". The writ petition and the appeal were decided by the Bombay High Court in accordance with the aforesaid decision of this Court in the case of Union of India v. Rajnikant Brothers, (supra) and the High Court directed the authorities to grant Export House Certificates to the petitioners under the Import-Policy 1978-79 within three months. While giving the said direction the High Court imposed a condition in the same terms as laid down by this Court in its order dated April 18, 1985, referred to above.

While construing the aforesaid direction contained in its order dated April 18, 1985, in Rajnikant Brothers case (supra) this Court has held that the grantees of the Additional licences were not only prohibited from importing items which were excluded under the Export Policy 1978-79 but also from importing items excluded under the Import Policy prevailing at the time of import and that the word "banned" was intended to take in terms which were banned altogether as well as items which were banned for import by the holder of an Additional licence. (See: Raj Prakash Chemicals Ltd. & Anr. v. Union of India & Ors. [1986] 1 S.C.R. 448. In Union of India v. M/s. Godrej Soaps Pvt. Ltd. &

Anr., [1986] 3 S.C.R. 771 this Court construed the words 'whether canalised or otherwise' contained in the order dated April 18, 1985, passed in Rajnikant Brothers case (supra) and it was observed that the Court would not know whether in the future certain canalised items could be imported directly by an Export House holding an Additional licence and that the possibility of a policy being framed in the future enabling an Export House holding an Additional licence to directly import items which are 'non-canalised' and also item which are 'canalised' could not be ruled out and it was in this light that the Court can be said to have used the words "whether canalised or otherwise" in the order dated April 18, 1985. The matter was further clarified by this Court in D.Navinchandra & Co. Bombay & Anr. Etc. v. Union of India & Ors., [1987] 2 S.C.R. 989, wherein this Court has observed:

"Analysing the said order, it is apparent, (1) that the importation that was permissible was of goods which were not specifically banned, (2) such banning must be under the prevalent import policy at the time of import, and (3) whether items which were canalised or uncanalised would be imported in accordance with the relevant rules. These conditions had to be fulfilled. The Court never did and could not have said that canalised items could be imported in any manner not permitted nor it could have given a go-bye to canalisation policy". (P. 1000) In accordance with the directions given by the Bombay High Court the petitioners in writ petition No. 459 of 1988 herein were granted the Export House Certificate and were also granted an Additional licence dated November 16, 1987. Similarly, the petitioners in writ petition No. 460 of 1988 herein were granted the Export House Certificate and an Additional licence dated August 31, 1987. These licences were valid for a period of 12 months and they contained the following endorsement: "This licence is valid for import of items permissible to Export Houses under the Additional Licence category as per para 176 of Import Policy for the period 1978-79 excluding those items which were banned in the policy for the period 1978-79 and those which have been specifically banned in the prevailing Import Policy, 1985-88, pursuant to and subject to the decision of the Supreme Court dated 5.3.1986 in M/s. Raj Prakash Chemicals case civil appeal No. 4978 of 1985; the decision dated 15.5.1986 in the case of M/s. Indo-Afghan Chamber of Commerce writ petition No. 199 of 1986, the decision dated 12.9.86 in the case of M/s Godrej Soap Pvt. Ltd. civil appeal No. 3418/1986; the decision dated 12.9.1986 in the case of M/s Star Diamonds Company of India in civil misc. petitions No. 20021-22 of 1986 in civil appeal No. 2924/1984; and the decision dated 15.4.1987 in the writ petition No. 1483 of 1987 filed by M/s. D. Naveen Chandra & Company. xxx"

It appears that the petitioners were not able to make imports under the said Additional licences till March 31, 1988. With effect from April 1, 1988, the Government of India issued the revised Import & Export Policy for the period April, 1988 to March 1991. The Import & Export Policy 1988-1991 also contains in para 214 and 215 provisions for grant of Additional licences to Export Houses. In para 215 of the said Policy certain additional facilities have been given in the matter of imports by Export Houses under Additional licences issued to them. In sub-para(4) 215 it has been provided as under: "(4) Additional licences issued to Export Houses will also be valid for the import of the following items upto 10% (upto 15% in the case of Trading Houses) of the value of the licence for:-

(i) Import of technical designs, drawings and other technical documentation for a value not exceeding Rs. 10 lakhs in the case of Export Houses, and Rs. 25 lakhs in the case of Trading Houses;

(ii) import of items appearing in Appendices 3 Part-A, 3 Part-B and 5 Part-A subject to the following conditions:

(a) that the c.i.f. value of a 'single item' shall not exceed 10% of the flexibility in value terms of Rs.10 lakhs, whichever is less:

(b) where the value for import of a 'single item' on the basis of 10% as at (a) above, works out to less than Rupees one lakh, import would be permitted upto a value of Rs. 1 lakh, provided it is within the overall flexibility allowed on the licence: and

(iii) import of non-OGL capital goods (other than those appearing in Appendices 1 Part-A and 8) without indigenous clearance, subject to the same conditions as stipulated at (ii) above, within the overall flexibility allowed to Export/Trading Houses".

Paragraphs 217 and 218 of the said Policy provide for transitional arrangements. In para 217, it is prescribed that Export Trading House Certificates issued prior to April 1, 1988 would continue to be valid till the date of the expiry and the Export House Trading House can apply for fresh certificates, if they fulfil the eligibility conditions laid down in the policy and in cases where these Certificates are expiring on 31st March, 1988, and the applicants do not fulfil the eligibility conditions for recognition laid down under the revised Policy, recognition would be granted for one year only if they fulfil conditions for renewal of these Certificates as laid down in the Import Policy, 1985-88. Para 218 of the said Policy reads as under:

"218. (1) Where the applications from Export Houses/Trading Houses for Additional licences have not been disposed of by 31st March of the proceeding licensing year, the rate of entitlement will be the same as permissible during the licensing year to which the application pertains, but the items to be allowed will be as per the Import Policy in force on the date of issue of the licence.

(2) Additional licences already issued prior to 1.4.1988 shall continue to be 'non-transferable'. (3) The Additional licences issued prior to 1.4.1988 shall cease to be valid for import of items of raw materials, components and spares which appeared in Parts I and II of List 8, Appendix 6 of Import Export Policy, 1985-88, but are not now covered by Part I of List 8, Appendix 6 of this Policy. These licences will also cease to be valid for the import of items of capital goods which appeared in Appendix 1 Part-B of Import Export Policy, 1985-88 but are now covered by Appendix 1 Part-B of this Policy.

(4) The Additional licences issued to Trading Houses prior to 1.4.1988 will cease to be valid for the import of items which appeared in Appendices 3 and 5 Part-A of the Import-Export Policy, 1985-88 but do not appear in Appendices 3 and 5 Part-A of this Policy.

(5) Additional licences issued to Export Houses/Trading Houses prior to 1.4.1988 shall cease to be valid for import of items of spares appearing in Appendices 2,3, 5 Part-A, 8 and 10 of this Policy.

(6) Notwithstanding the provisions contained in sub paras (3), (4) and (5) above, the restrictions will not apply to the extent the licence holders have already made firm commitments by irrevocable Letters of Credit opened and established through authorised dealers in foreign exchange before 1st April, 1988 but any extension of these letters of credit made after 31st March, 1988 shall be treated as 'fresh commitments'.

(7) Additional licences issued to Export Houses/Trading Houses prior to 1.4.1988 will also be valid within their overall value, for import of raw materials, components, consumables and spares appearing in Appendix 6, List 8, Part -A of this Policy. Similarly, such licences will also be valid for import of items of capital goods now covered by Appendix 1, Part-B of this Policy within their overall value.

(8) REP licences held by Export Houses/Trading Houses and already endorsed prior to 1.4.1988 shall cease to be valid for import of any item which could be imported under Open General Licence under the Import-Export Policy, 1985-88 but are no longer so in this Policy.

(9) Additional licences issued to Export Houses/Trading Houses after 1.4.1988 on exports made during 1986-87 or earlier periods, will be 'non-transferable'. These licences will be valid for import of the items appearing in Part-I of List 8, Appendix 6 of this Policy. These licences when issued to Trading Houses, will also be valid for import of the items appearing in Appendices 3 and 5 Part-A of this Policy, subject to the conditions laid down in this regard, in the Import-Export Policy, 1985-88.

(10) Additional licences issued on Export Houses/Trading Houses prior to 1.4.1988, or issued after 1.4.1988 on exports made during 1986-87 or earlier periods, will not be eligible for the flexibilities in the import of items of raw materials, components and consumables covered by Appendices 3 and 5 Part-A and items of non-UGL capital goods (other than those covered by Appendices 1 Part-A and 8) available under this Policy. However, these licences will be eligible for the endorsement (if not already endorsed) for the import of non-UGL capital goods (other than those covered by Appendices 1 Part-A and 8) as allowed against such licences in the Import Policy, 1985-88, subject to the conditions laid down therein provided the items sought to be imported against such licences continued to be non UGL (other than those covered by Appendices 1 Part A and 8) under this Policy".

The grievance of the petitioners is confined to sub- para (10) of para 218 which lays down that Additional licences issued to Export Houses/Trading Houses prior to April, 1, 1988, or issued after April 1, 1988, on exports made during 1986-87 or earlier periods, will not be eligible for the flexibilities in the import of items of raw materials, components and consumables covered by Appendices 3 and Part-A, and items of non-UGL capital goods (other than those covered by Appendices 1 Part-A 8) available under the revised Policy. Appendix 3 Part-A relates to raw materials, components, consumables, tools and spares (other than Iron and Steel and Ferro-Alloys) and part-B of the said Appendix deal with raw materials (Iron and Steel and Ferro-Alloys). Part-A of Appendix 5 contains the list of items import of which is canalised through public sector agencies. As a result of the aforesaid provision contained in sub-para (10) of the para 218, the petitioners who were granted Additional licences prior to April 1, 1988, cannot avail the flexibilities in import of



items granted under clauses (ii) and (iii) of sub para (4) of para 215 of the Import Policy 1988-1991.

On behalf of the petitioners it has been urged by Shri Salve that sub-para (10) of para 218 of the Import & Export Policy 1988-1991 arbitrarily discriminates between Export Houses who were issued Additional licences prior to April, 1 1988, and Export Houses who were issued Additional licences on or after April 1, 1988 in as much as the Export Houses who were issued Additional licences prior to April 1, 1988, on the basis of exports made during 1986-87 or earlier periods have been denied the facilities which have been given to Export Houses who were issued Additional licences on or April 1, 1988, on the basis of exports made during the period subsequent to 1986-87. It has been submitted that all Export houses who have been granted Additional licences constitute a single class and that there is no basis for classifying such Export Houses into two different categories on the basis of the date of issuance of the Additional Licences or on the basis of the period of the exports against which such licences have been issued and that such a classification has no connection whatsoever with the object sought to be achieved by the Import & Export Policy 1988-91.

On behalf of the respondents it has been submitted by the learned Additional Solicitor General that there is no similarity between the petitioners who have been granted Additional licences on the basis of their exports made during the period 1977-78 in accordance with the Import Policy 1978-79 and the Export Houses who would be granted Additional licences on or after April 1, 1988, under the Import & Export Policy 1988-91 inasmuch as the conditions of eligibility for grant of such licences and the value of licences under the Import & Export Policy 1978-79 were quite different from those contained in the Import & Export Policy 1988-91. It has been urged that under Import & Export Policy 1978-79 Additional licences were to be given on the basis of one third of the f.o.b. value of the exports made in 1977-78 whereas under Import & Export Policy 1988-91 Additional licences are to be given on the basis of not foreign exchange earnings from the exports actually made and the value of such Additional licence is only 10 to 12% of the net foreign exchange earnings.

As regards the right to equality guaranteed under Article 14 the position is well settled that the said right ensures equality amongst equals and its aim is to protect persons similarly placed against discriminatory treatment. It means that all persons similarly circumstan-

ced shall be treated alike both in privileges conferred and liabilities imposed. Conversely discrimination may result if persons dissimilarly situate are treated equally. Even amongst persons similarly situate differential treatment would be permissible between one class and the other. In that event it is necessary that the differential treatment should be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and that differential must have a rational relation to the object sought to be achieved by the statute in question.

The petitioners, in order to successfully invoke the right guaranteed under Article 14 of the Constitution, will have to establish that they and the Export Houses which were issued Additional licences under the Import Policy 1988-91 are similarly situate. A close examination of the Import & Export Policy 1978-79 under which the petitioners have been granted the Additional licences and the Import & Export Policy 1988-91 shows that there is material difference between the conditions

for grant of Additional licences under Import Policy 1978-79 and the conditions for grant of such licences under the Import Policy 1988-91 and it cannot be said that the petitioners who have been granted Additional licences under the Import & Export Policy 1978-79 and the Export & Import Policy 1988-91 are persons similarly circumstanced.

Under the Import & Export Policy 1978-79, there were two requirements for grant of Additional license: one was the condition as to eligibility for registration as an Export House and grant of Export House Certificates; and the other was the basis for issuing the Additional licences to Export House which had been granted Export House Certificates. In Para 165 of the said Policy eligibility for grant of Export House Certificates was to be determined on the basis of the export actually made in the three year base period 1975-76, 1976-77 and 1977-78 and in para 166 it was laid down that annual average f.o.b. value of exports in the prescribed base period of select products should not be less than Rs. One crore or those of non-select products Rs. Five crores, but in the case of a small scale unit or a consortium of small scale units, the said minimum limit was reduced to Rs. 25 lakhs for select products and Rs. 2 crores for non select products. In para 176 of the said Policy it was laid down that the value of the Additional licences to be granted for 1978-79 would be calculated at one third of the f.o.b. value of the export of select products made in 1977-78 and manufactured by the small scale and cottage industries plus 5% of the f.o.b. value of other exports of select products made in the same year. In other words, under the Import & Export Policy of 1978-79 the basis for grant of Export House Certificate as well as grant of Additional licences to Export Houses was the f.o.b. value of the exports.

Under the Import & Export Policy 1988-91 provision with regard to eligibility for the grant of Export House/Trading House Certificate is contained in para 212 which prescribed that the said eligibility shall be determined on the basis of the net foreign exchange (NEF) earnings from the export actually made in preceding three licensing years termed as 'the Base period'. The expression 'net foreign exchange earnings' has been defined as the total f.o.b. value of admissible exports minus the c.i.f. value of Advance/Imprest (including Diamond Imprest/DTC Imperest) Licences/Import- Export Pass Books (excluding Special-Imprest Import-Export Pass Book) if any issued, and the REP licences issued or the eligibility thereto, during the preceding three licensing years. Among the conditions for eligibility for grant of such Certificates are that the annual average NFE earnings in the prescribed base period should not be less than Rs. 2 crores in the case of Export House and Rs. 10 crores in the case of Trading Houses and the NEF earnings in none of the three years of the base period should be less than 25% of the minimum average NFE earnings prescribed. For determining the eligibility of the products manufactured by small scale and cottage sector industries are to be reckoned at twice the actual NFE earnings. In para 215 of the said Policy, it is provided that the Export House/Trading House would be eligible to Additional licences on the basis of the admissible exports made in the preceding licensing year and that the value of these licences will be calculated at 10% of the NFE earnings on the total eligible exports made in the preceding licensing year and that this percentage shall be 12% in cases where an Export/Trading House is able to achieve a minimum growth of 10% in term of NFE realisation in the previous year, over and above the year preceding the same. This indicates that under the Import & Export Policy 1988-91 for the purpose of grant of Export House Certificate as well as Additional licences the emphasis is on the net foreign exchange earnings made by the Export House, which means that the value of the imports made by the Import

House for the purpose of exporting goods is to be excluded from the f.o.b. value of exports. That apart even the value of the Additional licences which can be issued under the Import & Export Policy 1988-91 on the basis of NFE earnings is much less viz. 10% as against 33.33% of f.o.b. value under the Import & Export Policy 1978-79. The said 10% value can be increased to 12% in cases where the Export House is able to achieve a minimum growth of 10% in terms of realisation in the previous year, over the above the year preceding the same.

The aforesaid examination of the provisions contained in the Import & Export Policy 1978-79 and the Import & Export Policy 1988-91 shows that while in the Import & Export Policy 1978-79 the emphasis was only on the f.o.b. value of exports without taking into account the outgo of foreign exchange in importing the goods required for achieving the export by an Export House and Additional licences were granted for a much larger amount at a high percentage on the basis of the f.o.b. value of the exports, in the Import & Export Policy 1988-91 there is a more realistic appraisal of actual benefit to country's economy by the exports by taking into account the net foreign exchange earnings after deducting the value of the imports and additional licences are issued on the basis of the net foreign exchange earnings for a much lesser value on a smaller percentage. The petitioners who were granted Additional licences to the extent of 33.33% of the f.o.b. value of the exports made them during the year 1977-78 cannot, therefore, be said to be persons similarly circumstanced as Export House who exported goods in the year 1987-88 and in subsequent years and obtain Additional licences for a much lesser value under the Import Policy 1988-91 on the basis of the net foreign exchange earnings. The provisions conferring flexibility in the matter of imports contained in sub-para (4) of para 215 of the Import & Export Policy 1988-91 are intended to give an incentive to Export Houses to increase the exports in a way as to enhance the net foreign exchange earnings of the country. The petitioner were not granted Additional licences on the basis of net foreign exchange earnings and they have secured the Additional licences on the basis of the f.o.b. value of the exports, without taking into account the value of the goods imported by them for achieving the exports. They cannot claim to be entitled to the same facilities that have been provided to Export Houses who are granted Additional licences under the Import & Export Policy 1988-91.

Shri H.N. Salve, has, however, urged that in view of the decision of this Court in *D. Navinchandra & Co. case* (supra) the Export Houses who were granted Additional licences under the Import & Export Policy 1978-79 have to be treated at par with Export Houses who have been granted Additional licences under the Import & Export Policy for the subsequent years and since there has been relaxation in the matter of policy of canalisation of imports under sub-para (4) of para 215 in respect of Additional licences granted to Export Houses under the Import & Export Policy 1988-91, the petitioners are also entitled to a similar relaxation. We are unable to agree with this contention. In *D. navinchandra & Co. case* (supra) this Court has not laid down that Export Houses, like the petitioners, who are granted Additional licences on the basis of the order Dated April 18, 1985, are to be treated at par with Export Houses who are granted Additional licences under Import & Export Policy prevalent at the time of import. In that case this Court, while explaining the background in which the order dated April 18, 1985, was passed, has observed:

"It has to be borne in mind that basic background under which the Rajnikant's decision was rendered, the Export Houses had been refused Export House Certificates because it was insisted

that they should have diversified their export and that was a condition for the grant or entitlement of an export house certificate. it was found and it is common ground now that was wrong. Therefore, the wrong was undone. Those who had been denied Export House Certificates on that wrong ground were put back to the position as far as it could be if that wrong had not been done. To do so, the Custom authorities and Govt. authorities were directed to issue necessary Export House Certificates for the year 1978-79 though the order was passed in April, 1985. This was a measure of restitution, but the Court while doing so, ensured that nothing illegal was done." (P.1000) After referring to the decision in Raj Prakash Chemicals Ltd. (supra) this Court has stressed:

"The items had to pass to two tests, firstly, they should have been importable under the import policy 1978-79 and secondly they should also have been importable under the import policy 1985-88 in terms of the Order dated 18th April, 1985, and if one may add, in such terms 'in accordance with the import rules' whether canalised or not canalised." (P. 1001) This Court has gone on to emphasise:

"It must be emphasised that in the Order dated 18th April, 1985, this Court did not do away with canalisation. That was not the issue before this Court. The expression 'whether canalised or not canalised' was to include both. This Court did not say that canalised items could be imported directly by the importers ignoring the canalisation process. We are of the opinion that this Court did not say that canalisation could be ignored. That was not the issue. High public policy, it must be emphasised, It involved in the scheme of canalisation." (Pages 1001-2) Shri Salve has placed reliance on the following observations of this Court in this case:

" Canalised items are those items which are ordinarily open to import only through a public sector agency. Although generally these are importable through public section agencies, it is permissible for any import policy to provide an exception to the rule and to declare that an importer might import a canalised item directly. It is in that sense and that sense only that the Court could have intended to define the entitlement of diamond exporters. They would be entitled to import items which were canalised or not if the import policy prevailing at the time of import permitted them to import items falling under such category. This was also viewed in that light in the case of Indo Afghan Chambers of Commerce (supra)."

These observations only indicate that import of the canalised items under Additional licences issued to Export Houses, like the petitioners, would be permissible if the import policy prevailing at the time of import permits them to import such items. In other words it would depend on the terms of the import policy prevailing at the time of import. The decision in Indo Afghan Chambers of Commerce v. Union of India, [1986] 3 S.C.R. 88 to which reference has been made, is also to the same effect. In fact case Export Houses, like the petitioners, wanted to import to Dry Fruits under the Additional licences issued to them. Under the Import POLIcy 1985-88 prevailing at the time of such import, the import of Dry Fruits was permissible only by dealers engaged in the trade of stocking and selling Dry Fruits. It was held that the Export Hoses could not import Dry Fruits in view of the said restriction placed in the Import Policy 1985-88. The decision of this Court in D. Navinchandra & Co. case (supra) reiterates that the rights of the petitioners under the Additional licences issued to them would be governed by the terms of the import policy prevailing at the time of

import.

Here we find that in the Import & Export Policy 1988-91 there has been relaxation to a limited extent in respect of import by Export Houses who are granted Additional licences under the said Policy on the basis of their exports during that period 1987-88 and subsequent periods. Since the basis for the grant of Additional licences which are entitled to this relaxation is different from the basis on which Additional licences were granted to the petitioners, the petitioners cannot claim the benefit of the same relaxation and assail the validity of sub-para (10) of para 218 of the Import & Export Policy 1988-91.

Shri Salve has invited our attention to the Import Licence dated November 21, 1988 issued in favour of M/s. Suraj Diamonds Industries Pvt. Ltd wherein it is stated that this licence is valid for import of items as per para 215 of Import & Export Policy 1988-91 subject to restrictions/conditions laid down therein. It has been submitted that this licence has also been issued under the Import & Export Policy 1978-79 on the basis of the f.o.b. value of exports. It has been urged that the petitioners as well as the said license, namely, M/s. Suraj Diamonds Industries Pvt. Ltd. are persons similarly situate and whereas M/s. Suraj Diamonds Industries Pvt. Ltd. have been granted an Additional licence whereunder, it is permissible to import items as per para 215 of the Import & Export Policy 1988-91, the said facility has been denied to the petitioners and that the petitioners have been subjected to arbitrary and hostile discrimination. The learned Additional solicitor General had pointed out the said licence to M/s. Suraj Diamonds Industries Pvt. Ltd. was used under a mistake and the said mistake has been rectified on 2nd December, 1988, i.e., within 10 days of the issue of the said licence. In view of the fact that the licence issued in favour of M/s. Suraj Diamonds Industries was issued under a mistake and the said mistake has been rectified, it cannot be said that the petitioners have been subjected to hostile discrimination vis-a-vis other Export House similarly situate.

Before we conclude, we may take note of the recent decision of this Court in B. Vijay Kumar & Co. etc. v. Collector of Central Excise and Customs, [1991] 1 Scale 33. The appellants therein had been granted Additional Import licence in pursuance of this Court's order dated April 18, 1985 in Rajnikant Brothers, case (supra) and had imported canalised items under the said licence. The goods were not cleared by the customs authorities and the Collector of Customs imposed penalty and passed orders for confiscation of the goods and permitted the appellants to take delivery of good on payment of redemption fine. The Customs, Excise & Gold (Control) Appellate Tri-

bunal (hereinafter referred to as 'the Appellate Tribunal') on appeal, while upholding the order of imposition of redemption fine, set aside the order of Collector imposing penalty. In view of the special facts and circumstances of the case and specially having regard to the findings of the Appellate Tribunal that the appellants imported canalised items bona fide, this Court set aside the orders of the Collector and the Appellate Tribunal with regard to confiscation of goods and imposition of redemption fine without dealing with the submissions of learned counsel for the parties with regard to the interpretation and the effect of the earlier judgments of this Court in Raj Prakash Chemicals case (supra), Indo-Afghan case (supra), Godrej Soap case (supra) and D. Navinchandra & Co. case (supra). This decision is, therefore, a decision based on the facts of that

particular case only.

As a result of the aforesaid discussion it must be held that the petitioners have failed to make out a case for interference by this Court under Article 32 of the Constitution.

As indicated earlier, the licences issued to the petitioners were valid for a period of twelve months and the said period has expired during the pendency of these writ petitions. By order dated may 3, 1988, this Court, while directing that notice be issued had further directed that the matter be listed on July 20, 1988, and in these circumstances this Court did not pass any interim order for stay. The writ petitions could not, however, be heard as per the aforesaid directions. Since the matter has been pending in this Court and the Additional licences issued to the petitioners have expired in the meanwhile we consider it appropriate that the period of validity of the said licences should be extended so that the petitioners can avail the same and are able to import the goods which can be so imported under the prevailing Import Policy. It is, therefore, directed that the period of validity of the Additional licences that have been granted to the petitioners under Import & Export Policy 1978-79 may be extended by six months from the date of such extension. Subject to the aforesaid observations, the writ petitions are dismissed. The parties are left to bear their own costs.

T.N.A.

Petitions dismissed.