

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION  
WRIT PETITION NO.4838 OF 2016

Shah Nanji Nagsi Exports Pvt. Ltd. ... Petitioner  
Vs.  
Joint Directorate General of Foreign Trade & others ... Respondents

Mr. Vikram Nankani, Senior Advocate a/w. Mr. Sham Dewani and Mr. Chirag Chanani i/b. Dewani Associates for Petitioner.

Mr. Rajshekhar Govilkar a/w. Mr. M. S. Bharadwaj and Mr. Vikas Salgia for Respondents.

**CORAM : UJJAL BHUYAN &  
MILIND N. JADHAV, JJ.**

**Reserved on : FEBRUARY 02, 2021**

**Pronounced on: MAY 21, 2021**

**Judgment and Order : (Per Ujjal Bhuyan, J.)**

Heard Mr. Vikram Nankani, learned senior counsel for the petitioner and Mr. Rajshekhar Govilkar, learned counsel for the respondents.

2. By filing this petition under Article 226 of the Constitution of India, petitioner seeks quashing of the following orders:-

- i. Order-in-original dated 14.02.2014 passed by the Joint Director General of Foreign Trade, New Delhi;
- ii. Order-in-appeal dated 24.07.2015 passed by the Additional Director General of Foreign Trade, New Delhi; and
- iii. Order in review dated 04.11.2015 passed by the Director General of Foreign Trade i.e., respondent No.3 and

further seeks a direction to respondent No.3 to delete the condition of 'actual user' in the two licenses bearing Nos.0550001698 dated 31.12.2009 and 0550001804 dated 09.04.2010 issued by respondent No.3 to respondent No.4 for importing maize (corn) for and

on behalf of the petitioner. An alternative prayer has been made by the petitioner to remand the matter back to respondent No.1 to adjudicate the matter afresh after quashing the above orders dated 14.02.2014, 24.07.2015 and 04.11.2015.

3. Relevant facts as has been pleaded and which can be culled out from the documents on record may be briefly encapsulated as under.

4. Petitioner as a trading house was incorporated in the year 1919. In the year 1997, it was incorporated into a private limited company. It is basically engaged in the business of export of rice, oil seed, food grains and pulses. In this connection, petitioner has been granted trading house certificate by the appropriate authority. Petitioner is also engaged in the import of green peas, yellow peas and corn directly as well as canalized through public sector undertakings. Petitioner is having its registered office at Nagpur in the State of Maharashtra.

5. Respondent No.4 is a public sector undertaking and is a recognized state trading enterprise for import of maize (corn). Maize (corn) is an item the import of which was allowed under the tariff rate quota scheme.

6. On 20.11.2009, petitioner approached respondent No.4 for import of maize (corn) under tariff rate quota as per public notice issued by the Directorate General of Foreign Trade i.e., respondent No.3. On that basis, respondent No.4 submitted application dated 25.11.2009 in the office of Joint Directorate General of Foreign Trade, New Delhi i.e., respondent No.1 for an import licence for import of 7000MT of maize (corn) under tariff rate quota scheme on behalf of the petitioner. Respondent No.1 issued import licence No.0550001698 dated 31.12.2009 to respondent No.4 for import of 7000 MT of maize (corn) at concessional rate of customs duty as per Ministry of Finance, Department of Revenue Notification No.21/2002-Customs dated

01.03.2003 for the year 2009-2010 subject to 'actual user' condition and other usual conditions.

7. On behalf of the petitioner, respondent No.4 submitted another application dated 22.02.2010 to respondent No.1 for obtaining an import licence for import of 6000 MT of maize (corn) under tariff rate quota. On the basis of the said application, import licence bearing No.0550001804 dated 09.04.2010 was issued to respondent No.4 for import of 6000 MT of maize (corn) at concessional rate as per Ministry of Finance, Department of Revenue Notification No.33/2010-Customs dated 12.03.2010 for the year 2010-11 subject to 'actual user' condition besides other usual conditions.

8. Petitioner has stated that on the strength of the above two licenses, respondent No.4 imported maize (corn) and got it cleared from the customs authorities and stored in its warehouses. Thereafter it issued invoices in favour of the petitioner after adding its profit to the value of the goods imported.

9. Directorate of Revenue Intelligence initiated investigation against the petitioner on the allegation that the 'actual user' condition in the two license was violated. Petitioner has alleged that under coercion it was compelled to pay huge amount of customs duty i.e., Rs.2,96,80,536.00 which it was not required to pay in view of the concessional rate of import.

10. At that stage petitioner filed Writ Petition (L) No.2520 of 2013 before this Court challenging the action of respondent No.3 in inserting the condition of 'actual user' in the two licenses dated 31.12.2009 and 09.04.2010 for import of maize (corn). Petitioner also prayed for refund of customs duty of Rs.2,96,80,536.00. A further prayer was made that in view of the two notifications, the customs authorities were not entitled to claim any customs duty on import of maize (corn) by the petitioner

through respondent No.4. During pendency of the writ petition, show cause notices were issued by respondent No.1 on 30.08.2013 alleging breach of the 'actual user' condition in the licences by the petitioner. Directorate of Revenue Intelligence also issued show cause notice dated 04.09.2013 as to why customs duty of Rs.3,05,70,953.00 should not be recovered on the ground that the import of maize (corn) was in breach of the 'actual user' condition. Besides petitioner was called upon to show cause why the amount of Rs.2,96,80,536.00 deposited during investigation should not be adjusted towards the demand.

11. In view of issuance of such show cause notices, amendment was made in the writ petition to challenge the legality and validity of the above show cause notices as well.

12. This Court by the order dated 20.11.2013 disposed of Writ Petition (L) No.2520 of 2013 by observing that show cause notices dated 30.08.2013 issued by respondent No.1 and the show cause notice dated 04.09.2013 issued by the Directorate of Revenue Intelligence emanate from alleged violation of the 'actual user' condition contained in the licences dated 31.12.2009 and 09.04.2010. Therefore, a view was taken that it would be proper if the two notices dated 30.08.2013 with regard to the licence condition be first taken up and concluded and thereafter the notice dated 04.09.2013 be adjudicated upon. Accordingly, respondent No.1 was directed to adjudicate upon the show cause notices dated 30.08.2013 after giving the petitioner an opportunity of personal hearing on all issues. Thereafter depending upon the outcome of the said proceedings, it was held that the show cause notice dated 04.09.2013 might be adjudicated upon.

13. In the meanwhile, public notice No.47 dated 18.05.2011 was issued by respondent No.3 clarifying that the 'actual user' condition was non-mandatory. This public notice was challenged in the High Court of Andhra Pradesh by filing Writ Petition No.6349 of 2011. In the said writ

petition a common counter affidavit was filed on behalf of Union of India in the Ministry of Commerce and Industry; Secretary, Ministry of Agriculture, Government of India; and Director General of Foreign Trade through the Assistant Director General of Foreign Trade working in the office of Joint Director of Foreign Trade, Hyderabad. In the said affidavit, stand was taken that stipulation of 'actual user' condition was already non-mandatory which was clarified by public notice No.47 dated 18.05.2011.

14. Respondent No.1 passed the order-in-original dated 14.02.2014. Taking the view that it was beyond the purview of the adjudicating authority to sit on judgment on the legality of the conditions inserted in the import licences, respondent No.1 refrained from deciding on the matter of legality of 'actual user' condition. After taking such view, respondent No.1 held that petitioner was liable to ensure compliance of the licence conditions under which maize (corn) was imported. It was held that respondent No.1 was convinced that petitioner had imported maize (corn) totalling 2245.7 MT for an invoice value of Rs.4,62,03,566.00 under the two licences and sold the same in the open market without processing or making any value addition. Thus petitioner contravened the 'actual user' condition present in the licences thereby making it liable for action under section 11(2) of the Foreign Trade (Development and Regulation) Act, 1992. In the light of the above, respondent No.1 imposed penalty of Rs.1,50,00,000.00 on the petitioner, however dropping further action under rule 7 of the Foreign Trade (Regulation) Rules, 1993. It was clarified that the fiscal penalty so imposed was over and above the amount of customs duty paid or payable by the petitioner.

15. It may be mentioned that Writ Petition (L) No.306 of 2014 was filed by the petitioner before this Court challenging the decision of respondent No.1 not to adjudicate validity of 'actual user' condition in the two licences. Notwithstanding pendency of the said writ petition,

respondent No.1 proceeded to adjudicate the matter and passed the order-in-original dated 14.02.2014. When Writ Petition (L) No.306 of 2014 was taken up for consideration on 20.02.2014, this Court noted that the earlier writ petition of the petitioner was not entertained by the Court on the ground that the adjudicating authority should first decide the show cause notices on all issues after affording the petitioner an opportunity of personal hearing. It was also noted that petitioner found itself in a situation where its main contention was neither decided by this Court nor by the adjudicating authority. In the circumstances, an interim direction was issued that order dated 14.02.2014 should not be acted upon till the next date.

16. It may also be mentioned that Writ Petition (L) No.306 of 2014 was subsequently registered as Writ Petition No.1906 of 2014. The said writ petition was finally disposed of on 03.03.2015 by giving liberty to the petitioner to file appeal against the order dated 14.02.2014 under section 15 of the Foreign Trade (Development and Regulation) Act, 1992.

17. It appears that petitioner filed appeal against the order dated 14.02.2014. According to the petitioner, there was delay in adjudicating the appeal which had compelled the petitioner to approach this Court again for expediting hearing of the appeal. It is alleged that when the stay prayer was heard, the appellate authority i.e., respondent No.2 decided the appeal itself. It may not be necessary for us to traverse through the pleadings on the above aspect as the same may not have much relevance now. Be that as it may, respondent No.2 passed the order-in-appeal dated 24.07.2015. Taking the view that there was no reason to interfere with the order dated 14.02.2014, the appeal was dismissed.

18. Petitioner preferred review petition for review of the aforesaid order dated 24.07.2015. However, by order dated 04.11.2015 the review

petition was dismissed.

19. Aggrieved, present writ petition has been filed seeking the reliefs as indicated above.

19.1. In the writ petition petitioner has also referred to and relied upon notings and comments made by various officers under respondent No.3 on the 'actual user' condition. It is stated that the then Joint Director General of Foreign Trade, Ms. Shubhra in her note dated 18.03.2011 had referred to public notice No.7 dated 09.05.2003 and thereafter expressed her view that the 'actual user' condition should not have been included in the licences issued from 2004 onwards and that this condition had lost its relevance in the context of the tariff rate quota scheme. Such view was approved by the then Additional Director General of Foreign Trade, Shri. Amitabh Jain.

20. It may be mentioned that this Court by order dated 17.06.2016 granted ad-interim stay of the order-in-original dated 14.02.2014 on condition that petitioner should furnish security in the form of bank guarantee of a nationalized bank to cover the demand. It was clarified that subject to such compliance, no coercive steps should be taken to recover the amount.

21. On 14.09.2016, this Court admitted the writ petition as *prima facie* arguable questions were found. However, respondents were granted liberty to encash the bank guarantee which would be subject to outcome of the writ petition.

22. It is seen that against such order dated 14.09.2016, petitioner had approached the Supreme Court by filing S.L.P. No.28268 of 2016. By order dated 03.10.2016, Supreme Court dismissed the Special Leave Petition but granted liberty to the petitioner for approaching the High Court to fix a date of hearing.

23. Thereafter on civil application being filed by the petitioner before this Court, the hearing was expedited on 06.06.2017. However, for one reason or the other, the matter could not be heard. Ultimately, the matter was heard on 01.02.2021 and 02.02.2021.

24. Respondents have filed reply affidavit through Shri. Varun Singh, Deputy Director General of Foreign Trade working in the office of Additional Director General of Foreign Trade, Mumbai. A preliminary objection has been raised as to maintainability of the writ petition. It is submitted that respondent No.1 had already passed order-in-original dated 14.02.2014 adjudicating the show cause notices dated 30.08.2013 by a reasoned order. Petitioner had filed appeal against the said order before respondent No.2 who dismissed the appeal also by a speaking order on 24.07.2015. In such circumstances, petitioner has got no ground to seek setting aside of the adjudication order. Petitioner also cannot challenge the 'actual user' condition in the two licences because at the time of receipt of the licences, petitioner had agreed to the condition and on that basis had made import of maize (corn). It is also contended that customs department is a necessary party to the proceedings. Therefore, the writ petition is hit by non-joinder of necessary party.

24.1. After referring to the sequence of events leading to issuance of the two licences, it is stated that petitioner had imported a total of 2245.7 MT of maize (corn) for a total invoice value of Rs.4,62,03,566.00. Petitioner arranged lorry receipts from M/s. Mahalaxmi Cargo Movers showing movement of maize (corn) from Navi Mumbai to Pune for processing of maize (corn). However, according to the department such transportation had never taken place. The imported maize (corn) was sold in the original packing to various parties without carrying out any processing. Petitioner was well aware of the 'actual user' condition and was trying to cover up sale of imported maize (corn) by showing false lorry receipts and by issuing invoices of different nomenclature. Director



of the petitioner namely, Shri. Ashwin Shah in his statements recorded on 29.12.2010 and 13.04.2012 under section 108 of the Customs Act, 1962 had admitted that petitioner was aware of the 'actual user' condition and that it had entered into an agreement with respondent No.4 for complying with the said condition. Many of the buyers in their statements recorded under section 108 of the Customs Act, 1962 stated that they had purchased the imported maize (corn) from the petitioner in the original packing as it was imported.

24.2. In so far public notice No.47 dated 18.05.2011 is concerned, it is stated that the said notice had made the 'actual user' condition non-mandatory with effect from 18.05.2011. Operation of the said public notice was put to challenge before the High Court of Andhra Pradesh but the High Court upheld the public notice.

24.3. As regards insertion of 'actual user' condition in the licenses, it is submitted that petitioner was aware of the same right from issuance of the two licenses. Petitioner and respondent No.4 had entered into agreement for complying with various conditions including that of 'actual user' condition. Petitioner tried to create documentary evidence to show that it had processed the imported maize (corn) after import and thereafter sold the same. According to the respondents, challenge to the 'actual user' condition is an after thought. Petitioner having accepted the licences and having acted on the same is now debarred from assailing the conditions in the licences including the 'actual user' condition.

24.4. Reference has been made to Rule 13 of the Foreign Trade (Regulation) Rules, 1993 to contend that a licensee is required to comply with all the conditions of the licence. It is asserted that the 'actual user' condition was valid till 18.05.2011 when public notice No.47 was issued whereafter it became non-mandatory.

24.5. In the circumstances, respondents seek dismissal of the writ

petition.

25. Petitioner has filed rejoinder affidavit to the reply affidavit of the respondents reiterating the averments made in the writ petition. Regarding preliminary objection raised by the respondents it is submitted that the order-in-original dated 14.02.2014 as upheld by the order-in-appeal dated 24.07.2015 is not in accordance with law and therefore, petitioner has rightly challenged the same before this Court. On the question of non-joinder of a necessary party, it is stated that petitioner has not impugned any action or order of the customs authority. Therefore, customs authority is not a necessary party to the writ proceeding.

25.1. Respondent No.1 by declining to adjudicate on the challenge to the 'actual user' condition had abdicated his jurisdiction. Besides, failure of respondent No.1 to adjudicate on the issue is contrary to the direction of this Court. On the one hand he declined to adjudicate the issue, on the other hand respondent No.2 as the appellate authority while affirming the order of respondent No.1 upheld the 'actual user' condition.

25.2. Contention of the petitioner is that as on 01.04.2008, notification No.21/2002-Customs was holding the field in so far levy of customs duty on import of maize (corn) was concerned. On 01.04.2008, Government of India through the Ministry of Finance issued notification No.42 / 2008 amending the said notification No.21 / 2002 by clarifying that concessional customs duty on maize (corn) would henceforth be 'nil'. Earlier, the customs duty on maize (corn) was 15%. With effect from 01.04.2008, it was reduced to 'nil'. Thus all import consignments of maize (corn) after 01.04.2008 were cleared at zero per cent duty.

25.3. Reference has been made to the reply affidavit filed by the respondents before the Andhra Pradesh High Court to contend that 'actual user' condition arbitrarily inserted in the two licences is without

any authority of law. Therefore, respondent No.1 was not justified in issuing the show cause notices and adjudicating the same to the prejudice of the petitioner *vide* the order-in-original dated 14.02.2014.

26. Mr. Nankani, learned senior counsel for the petitioner submits that the core issue is insertion of the condition of 'actual user' in the two licences. He submits that the said condition is without jurisdiction as the parent statute i.e., the Foreign Trade (Development and Regulation) Act, 1992 does not provide for such a condition so also the Foreign Trade (Regulation) Rules, 1993. He submits that conditions present in a licence have to conform to the statute. Those cannot be outside the statute. Mr. Nankani has also referred to the reply affidavit filed by the Director General of Foreign Trade and its subordinate authorities before the Andhra Pradesh High Court where a clear cut stand was taken that the 'actual user' condition was non-mandatory under the tariff rate quota scheme since the year 2003. Public Notice No.47 dated 18.05.2011 issued under the Export Import (EXIM) Policy clarified that the 'actual user' condition was non-mandatory for allocation of quota under the tariff rate quota scheme. He has also referred to the decision of this Court dated 20.11.2013 and submits that in violation of the direction of this Court, respondent No.1 declined adjudication on the 'actual user' condition causing serious prejudice to the petitioner.

26.1. Elaborating on his submissions Mr. Nankani submits that paragraph 2.59 of the Foreign Trade Policy 2004-2009 contains the tariff rate quota scheme. This scheme provides for import of goods into India with quantity restrictions and only designated entities are allowed to apply for licences. He submits that there is no 'actual user' condition in the tariff rate quota scheme. Despite no provision for 'actual user' condition in the Foreign Trade Policy as well as in the tariff rate quota scheme licences were issued in the present case with the 'actual user' condition in the name of respondent No.4. Upon import of maize (corn) respondent No.4 sold the imported goods to the petitioner. It is alleged

that petitioner further sold the goods to another buyer. The allegation is that the goods were not sent for job work but were sold by the petitioner to another buyer in violation of the 'actual user' condition contained in the licences. Mr. Nankani argues that since the Foreign Trade Policy did not contain an 'actual user' condition, imposition thereof in the two licences is, therefore, without jurisdiction and without any authority of law.

26.2. Ultimately, government issued notification dated 18.05.2011 amending the application form for obtaining licence i.e., ANF2B. He submits that notification dated 18.05.2011 is clarificatory in nature since the 'actual user' condition was never a part of the Foreign Trade Policy. It is well settled that a clarificatory provision or notification has retrospective effect. Any condition which is not part of the Foreign Trade Policy cannot be imposed. Merely because the licence application form made a reference to the actual user condition, it does not mean that the same can be lawfully imposed. An application form cannot prevail over the Foreign Trade Policy. Since imposition of 'actual user' condition in the licences is without jurisdiction, the consequential orders dated 14.02.2014, 24.07.2015 and 04.11.2015 cannot be sustained legally and those are as such liable to be set aside and quashed.

27. Mr. Govilkar, learned counsel for the respondents on the other hand submits that petitioner was fully aware of this particular condition present in the two licences. As a matter of fact, while making the application form for import of maize (corn) petitioner gave a declaration / undertaking that it would abide by the provisions of the Foreign Trade (Development and Regulations) Act, 1992 and the rules and orders framed thereunder as well as provisions of the Foreign Trade Policy. He submits that petitioner not only accepted the said condition but also acted upon the same. Conduct of the petitioner post import to justify compliance with the 'actual user' condition is highly questionable as evidently there was no processing or actual use of the imported goods

by the petitioner. Fictitious documents were created to show compliance with the 'actual user' condition. In such circumstances, he submits that petitioner is estopped from challenging the 'actual user' condition contained in the two licences.

27.1. Referring to the Export Import (EXIM) Policy, he submits that it is not a statutory law. Therefore, it cannot be contended that the subject licences being not in conformity with the policy become unsustainable in law.

27.2. Mr. Govilkar has placed reliance on the decision of the Supreme Court in *Union of India Vs. M/s. Anglo Afghan Agencies*, **AIR 1968 SC 718** on the point of estoppel.

28. In his reply Mr. Nankani submits that the basic issue is the power to impose penalty. If a penalty is sought to be imposed, there must be a violation of the law. Without violation of law, no penalty can be imposed. In this connection, he poses a question to himself, “show me the law”? His contention is that the 'actual user' condition is not traceable to any law and without infraction of law, no penalty can be imposed. There is complete absence of power to insert the 'actual user' condition and consequently to impose penalty for alleged violation of such condition. Referring to the Foreign Trade Policy he submits that if there is conflict between policy and circulars, the policy will prevail. In support of his submissions, Mr. Nankani has submitted three compilations of judgments including decision of this Court in *Narendra Udeshi Vs. Union of India*, **2002 SCC Online Bom. 962**, *Priyanka Overseas Private Limited Vs. Union of India*, **1991 Supp. (1) SCC 102** and *Atul Commodities Private Limited Vs. Commissioner of Customs*, **(2009) 5 SCC 46**.

29. Submissions made by learned counsel for the parties have been duly considered. Also perused the materials on record and considered the

judgments cited at the Bar.

30. We have seen that petitioner through respondent No.4 had applied before respondent No.1 and was granted two licences for import of maize (corn) under the tariff rate quota scheme, the licences being 0550001698 dated 31.12.2009 and 0550001804 dated 09.04.2010. In the first licence it was mentioned as under:

“Maize (corn) at the concessional rate of customs duty as per Ministry of Finance (Department of Revenue) Notification No.21/2002-Customs dated 01.03.2003 for release of tariff rate quota for the year 2009-10 subject to actual user conditions and other usual conditions of the import LIC. Import of said item shall be completed before 31.03.2010.”

In the second licence it was remarked as follows:-

“Maize (corn) at concessional duty as per Department of Revenue Notification No.33/2010 dated 12.03.2010 under tariff rate quota (TRQ) for the F.Y. 2010-11 subject to the condition that the import will be completed before 31.03.2011 i.e., consignment must be cleared before this date and also subject to actual user conditions besides other usual conditions.”

30.1. Thus from a perusal of the two licences, we find that the licences were granted by respondent No.1 subject to the 'actual user' condition and other usual conditions of import.

31. The 'actual user' condition as appearing in the two licences was challenged by the petitioner before this Court in Writ Petition (L) No.2520 of 2013 besides demanding refund of customs duty paid by the petitioner under protest. During pendency of the writ petition, show cause notices dated 30.08.2013 were issued by respondent No.1 under section 13 of the Foreign Trade (Development and Regulation) Act, 1992 (briefly 'the Act' hereinafter) alleging breach of the 'actual user'

condition in both the licences. Directorate of Revenue Intelligence also issued show cause notice dated 04.09.2013 contending that petitioner was not entitled to benefit of customs notification No.21/2002 - Customs dated 01.03.2002 in view of breach of 'actual user' condition in the licences and thus demanding customs duty of Rs.3,05,70,953.00, besides calling upon the petitioner to show cause as to why the paid amount of Rs.2,96,80,536.00 should not be adjusted towards the demand.

32. Petitioner brought the above show cause notices on record in the pending writ petition and those were also put to challenge.

33. By the order dated 20.11.2013, a Division Bench of this Court disposed of Writ Petition (L) No.2520 of 2013. This Court noted that all the show cause notices emanated from the alleged violation of the 'actual user' condition contained in the two licences. Therefore, High Court was of the view that it would be in the fitness of things if the two notices dated 30.08.2013 with regard to the licences be first concluded on an expeditious basis and thereafter the notice dated 04.09.2013 issued by the Directorate of Revenue Intelligence be adjudicated, if necessary. The writ petition was disposed of with a direction to respondent No.1 to first adjudicate the show cause notices dated 30.08.2013 on all issues expeditiously after giving the petitioner an opportunity of personal hearing. It was clarified that depending upon the outcome of the said proceeding, the show cause notice dated 04.09.2013 issued by the Directorate of Revenue Intelligence would be adjudicated.

34. In Writ Petition No.6349 of 2011 (*M/s. Sriven Marketing Vs. Union of India*) filed in the Andhra Pradesh High Court challenging public notice No.47/2009-14 dated 18.05.2011, counter affidavit was filed by Shri. K. Komalavally who was then serving as Assistant Director General of Foreign Trade in the office of Joint Director General of Foreign Trade, Hyderabad. The counter affidavit was filed on behalf of respondent Nos.2 to 4 i.e., Union of India through the Commerce

Secretary to the Government of India, Ministry of Commerce and Industry, Department of Commerce; Secretary to the Government of India, Ministry of Agriculture; and Director General of Foreign Trade, Ministry of Commerce and Industry, Department of Commerce, New Delhi. After dealing with import of maize (corn) under the tariff rate quota scheme of the Foreign Trade Policy, reference was made to notification No.21/2002-Customs dated 01.03.2002 providing for concessional rate of duty on import of four items under the tariff rate quota in accordance with the procedure notified through a public notice. Following the same, Director General of Foreign Trade issued public notice No.38/2002-07 dated 04.10.2002 laying down the procedure for import of various items under the tariff rate quota scheme. As per the procedure, import under the tariff rate quota was allowed only through eligible state trading enterprises. It was stipulated that state trading enterprises would have to import on behalf of actual users.

34.1. The said counter-affidavit thereafter goes to state that in an inter-ministerial meeting held on 29.04.2003, a decision was taken to remove the 'actual user' condition to make the tariff rate quota scheme prioritized in terms of need base of the applicants. Accordingly, it was stated that the 'actual user' condition was made non-mandatory under the procedure for import of all items under the tariff rate quota scheme and in this connection, public notice No.7 / 2002-07 dated 09.05.2003 was issued specifying that eligible state trading enterprises could avail the quota as per request of the applications received.

34.2. Proceeding further the counter affidavit stated that as per provisions of public notice No.38/2002-07 dated 04.10.2002 imports under the tariff rate quota by eligible state trading enterprises on behalf of actual users were allowed. But as per decision taken in an inter-ministerial meeting held on 29.04.2003 'actual user' condition was made non-mandatory under the procedure for import of all items under the tariff rate quota scheme and public notice No.7/2002-07 dated



09.05.2003 was issued specifying that eligible state trading enterprises could avail the quota as per request of the applications received.

34.3. To further clarify the matter, public notice No.47/2009-2014 dated 18.05.2011 was issued which clarified that 'actual user' condition stipulated under the prescribed application form for import authorization i.e., ANF2B was not mandatory. Thus, filling up of the prescribed form ANF2B pertaining to 'actual user' condition was made optional by the above public notice.

34.4. In paragraph 6 of the said counter affidavit, it was clearly stated that the stipulation of 'actual user' condition was already held non-mandatory under the tariff rate quota scheme since the year 2003. Public notice No.47/2009-2014 dated 18.05.2011 only clarified the position that filling up of prescribed information in ANF2B form pertaining to 'actual user' condition was non-mandatory for allocation of quota under the tariff rate quota scheme.

34.5. Thus as per the counter affidavit of Union of India and Director General of Foreign Trade before the Andhra Pradesh High Court in Writ Petition No.6349 of 2011, the stipulation of 'actual user' condition was already non-mandatory under the tariff rate quota scheme since the year 2003. This position was only clarified by public notice No.47/2009-2014 dated 18.05.2011.

35. In the affidavit in reply filed by the respondents in the present proceeding through Shri. Varun Singh, Deputy Director General of Foreign Trade working in the office of Additional Director General of Foreign Trade, Mumbai, stand has been taken that public notice No.47 dated 18.05.2011 had made the 'actual user' condition non-mandatory with effect from 18.05.2011. Regarding the notes and correspondences in the offices of respondent Nos.1, 2 and 3 particularly with regard to the averments made by the petitioner *vis-a-vis* noting made by the then Joint

Director General of Foreign Trade, Ms. Shubhra on 18.03.2011 that the 'actual user' condition should not have been inserted in the licences from the year 2004 onwards, stand taken is that she does not represent respondent No.1 but respondent No.3. Decision of the competent authority was different from the views of Ms. Shubhra i.e., the 'actual user' condition was valid till 18.05.2011.

36. First of all in so far the affidavit in reply of the respondents to the present writ petition is concerned, the stand taken that Ms. Shubhra the then Joint Director General of Foreign Trade did not represent respondent No.1 but respondent No.3 and that the decision of the competent authority was different from the views of Ms. Shubhra, we may point out that respondent No.1 is an officer subordinate to respondent No.3, who is appointed by the central government under section 6 of the Act. Respondent No.1 cannot take a view which is different from respondent No.3. So far reference to competent authority is concerned, it is not understood as to who is referred to as the competent authority - respondent No.1 or respondent No.3.

37. Be that as it may, the moot point is while before the Andhra Pradesh High Court, Union of India and Director General of Foreign Trade had taken the stand that the 'actual user' condition was non-mandatory since the year 2003 and that this position was clarified by way of the public notice No.47/2009-2014 dated 18.05.2011, in the reply affidavit filed in the present case on behalf of the respondents by Shri. Varun Singh, Deputy Director General of Foreign Trade, the stand taken is that the 'actual user' condition has been made non-mandatory with effect from 18.05.2011 only and that the 'actual user' condition was valid till 18.05.2011. Thus, the stands taken by the respondents in the two proceedings before the two High Courts are contradictory. Respondents more particularly, Union of India and Director General of Foreign Trade cannot speak in multiple voices in different High Courts to suit their positions in the respective litigations. Union of India and for that matter,

Director General of Foreign Trade must speak in one voice.

37.1. As a consequence, if what Shri. Varun Singh has averred on oath in the affidavit in reply filed in the present case is correct, then the averments made in the counter affidavit of Union of India and Director General of Foreign Trade filed through Shri. K. Komalavally would be incorrect. In that case Shri. K. Komalavally may even be hauled up for perjury for making incorrect statements before the Court. Conversely, if the stand taken in the counter affidavit by Union of India and Director General of Foreign Trade before the Andhra Pradesh High Court is taken as correct then the stand taken by the respondents in the reply affidavit in the present proceeding would be incorrect and Shri. Varun Singh would be held responsible for that.

38. When respondent No.1 adjudicated the show cause notices, it noted the proceedings before the Andhra Pradesh High Court but only stated that public notice No.47 dated 18.05.2011 indicated that the 'actual user' condition was made non-mandatory with effect from 18.05.2011. Either the stand taken by Union of India and Director General of Foreign Trade before the Andhra Pradesh High Court was not brought to the notice of respondent No.1 or he had conveniently overlooked the stand so taken. Be that as it may, respondent No.1 took the stand that it was beyond the purview of the adjudicating authority to adjudicate on the legality of the conditions imposed in the import licences and therefore, he refrained from deciding on the matter of legality of the 'actual user' condition. However, after referring to the said condition and the provision of rule 13 of the Foreign Trade (Regulation) Rules, 1993, respondent No.1 held that petitioner had violated the 'actual user' condition of the licences thereby making it liable for action under section 11(2) of the Act. Consequently, the penalty was imposed.

39. Reverting back to the order of this Court dated 20.11.2013, we find that this Court had directed respondent No.1 to adjudicate the show

cause notices dated 30.08.2013 on all issues after giving the petitioner an opportunity of personal hearing. 'All issues' would include validity of the 'actual user' condition in the licences or whether such a condition was mandatory or non-mandatory. This is because this Court had noted that the show cause notices had emanated from the 'actual user' condition which was impugned in the said writ petition. Validity of the 'actual user' condition or whether it was mandatory or not is the central issue. Refusal of respondent No.1 to adjudicate on this issue is not only violative of the directions of this Court as contained in the order dated 20.11.2013 but also amounts to non-exercise of jurisdiction vested in him. As rightly pointed out by this Court in the order dated 20.11.2013 the core issue is the insertion of 'actual user' condition in the two licences - whether such insertion is legally permissible or without entering into this aspect, whether such condition is directory or mandatory are issues which are required to be gone into by respondent No.1. Failure to do so has occasioned non-exercise of jurisdiction.

40. Thus upon thorough consideration of all relevant aspects, we are of the view that the impugned order dated 14.02.2014 passed by respondent No.1 cannot be sustained in law and is required to be set aside and quashed. We are further of the view that the matter requires to be heard afresh on all issues as directed by this Court earlier and as indicated above.

41. Since the order-in-original dated 14.02.2014 is interfered with, the order-in-appeal dated 24.07.2015 and the order in review dated 04.11.2015 cannot survive. In so far encashment of bank guarantee furnished by the petitioner is concerned as well as the claim for refund of excise duty paid, needless to say those would be subject to such decision that may be taken by respondent No.1 on remand.

42. Since we have decided as above, it is not necessary to delve into the other ground(s) urged by the petitioner.

43. Consequently and in the light of the above, impugned orders dated 14.02.2014, 24.07.2015 and 04.11.2015 are hereby set aside and quashed. Matter is remanded back to respondent No.1 for a fresh decision in accordance with law after giving due opportunity of hearing to the petitioner and having regard to the discussions made above. Let such decision be taken by respondent No.1 within a period of three months from the date of receipt of a copy of this judgment and order.

44. Writ petition is accordingly allowed to the above extent. However, there shall be no order as to costs.

**(MILIND N. JADHAV, J.)**

**(UJJAL BHUYAN, J.)**

*Minal Parab*