* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 30.06.2020
Date of Decision: 14th July, 2020

\+ **W.P.(C) 7676/2019 & CM Nos. 45339/2019, 12503/2020**

DEVKI GLOBAL CAPITAL PVT. LTD. & ANR. ..... Petitioners

Through: Mr.Jayant Mehta and Mr.Abhimanyu Arun Walia, Advs.

versus

UNION OF INDIA AND ORS. ..... Respondents

Through: Mr.Jasmeet Singh, CGSC with Mr.Srivats Kaushal, Adv. for UOI.
Mr.Gaurav Barathi, Adv. for the applicant in CM No.35918/2019.

AND

W.P.(C) 11123/2019 & CM Nos. 45817/2019, 12499/2020

K. L GUPTA AND SONS PVT. LTD.& ANR. ..... Petitioners

Through: Mr.Jayant Mehta and Mr.Arun Abhimanyu Walia, Advs.

versus

UNION OF INDIA AND ANR. ..... Respondent

Through: Mr.Anil Soni, CGSC, UOI with Mr.Devesh Dubey, Adv.

AND

W.P.(C) 11125/2019 & CM Nos. 45821/2019, 12480/2020

SHAMBHYU MERCANTILE LTD. & ANR. ..... Petitioners

Through: Mr.Jayant Mehta & Mr.Abhimanyu Arun Walia, Advs.

versus

UNION OF INDIA AND ANR. ..... Respondents

Through: Mr.Anil Soni, CGSC, UOI with Mr.Devesh Dubey, Adv.

AND

W.P.(C) 13124/2019 & CM Nos.53488/2019, 12458/2020

SUN ORGANIC INDUSTRIES PVT. LTD. & ANR. ....Petitioners

Through: Mr.Ashish Dholakia and Ms.Damini Chawla, Advs.

versus

UNION OF INDIA AND ANR. ..... Respondents

Through: Mr.Jasmeet Singh, CGSC with Mr.Srivats Kaushal, Adv. for UOI.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. These petitions have been filed by the petitioners feeling aggrieved of the non-registration by the respondent no.2- the Narcotics Commissioner, of their contracts for import of poppy seeds from Turkey.

2. It is the case of the petitioners that in terms of the Foreign Trade Policy, poppy seeds are freely importable, subject only to the conditions mentioned in Clause 3, Chapter 12, Section II of Schedule 1 of the Import Policy. The said conditions *inter alia* require import contracts to be compulsorily registered with the respondent no.2.

3. Clause 17 of the National Policy on Narcotic Drugs and Psychotropic Substances provides that the import of poppy seeds shall continue till self-sufficiency is achieved and the only condition for such import is that the poppy seeds should have been imported from a country authorized internationally to grow opium poppy for export and that it has been legitimately cultivated.

4. The petitioners further place reliance on the Public Notice dated 25.06.2019 containing 'the Guidelines for Registration of the Sales Contracts for import of poppy seeds from Turkey' (hereinafter referred to as the 'Guidelines') to contend that the determination of the Country Cap for the purpose of import of poppy seeds from Turkey has to be made on the basis of the recommendation by a Committee comprising of the Narcotics Commissioner; one representative of the Directorate General of Foreign Trade (DGFT); and one representative of the Department of Revenue, and is to be based upon the stock and production of the poppy seeds as communicated by the Turkish Grain Board (TMO) or the Turkish Embassy in India.

5. The petitioners further place reliance on the MOU executed between India and Turkey on trade in poppy seeds and specifically Clause 2 thereof to contend that the said Agreement also acknowledges that the determination of the Country Cap shall be made by the Government of India in consultation with the Government of Turkey and after taking into account the production of poppy seeds in Turkey in a crop year, balance from the previous crop years and domestic or other export requirement of Republic of Turkey.

6. Based on the above documents, the learned counsels for the petitioners submit that the purpose of fixing the Country Cap for import from Turkey is only to ensure that the import is of legally grown poppy seeds. Once the quantity of legally grown and exportable poppy seeds is available in Turkey and the same is verified by the Committee constituted under the Guidelines, the said quantity has to be fixed as the Country Cap. The respondents cannot arbitrarily deny or restrict the Country Cap in spite of legally grown opium poppy being available in Turkey for export and the recommendation of the Committee appointed under the guidelines verifying the said fact.

7. On the facts of the present case, they submit that the respondent no.1 had fixed 18000 MTs as a Country Cap on 09.08.2019. The Turkish Embassy has informed the respondent no.1 that there is 8438 MTs quantity of poppy seeds still available in Turkey for export to India for 2019-20. Based on the availability of poppy seeds in Turkey, the Committee as mentioned in the Guidelines, recommended that the Country Cap be increased in line with the licit cultivation of opium poppy carried out by Turkey. However, in spite of such recommendation, the respondents have arbitrarily confined the Country Cap for import of poppy seeds to 18000 MT.

8. The learned counsels for the petitioners submit that therefore, the determination of the Country Cap by the respondents is not only arbitrary but is also against the Foreign Trade Policy, the Guidelines and the MOU mentioned hereinabove. They submit that due to such arbitrary fixation of the Country Cap, not only the petitioners would suffer as they have

already entered into contracts for import of poppy seeds with the entities in Turkey and have incurred financial liabilities for such contracts, the public would also suffer as it has resulted in an artificial increase in the price of the poppy seeds in the domestic market.

9. They place reliance on the judgment dated 29.11.2013 passed by the Allahabad High Court in in Public Interest Litigation (PIL) No.22067/2013 tiled *Ayurveda Sewashram Kalyan Samiti Thr. Secretary Allahabad vs. Union of India Thr. Secretary & 3 Ors.,* to submit that the respondent no.2 has been charged with the purpose of registering the contracts for due implementation of the Policy of the Government of India. Such Policy merely requires a certificate that the poppy seeds have originated in a country where opium poppy is grown licitly and legally. The Import Policy being a statutory document, cannot be derogated from. Therefore, the respondents cannot arbitrarily fix the Country Cap or deny registration of the contracts of the petitioners on arbitrary ground.

10. As far as the registration of their agreements by the respondent no.2 is concerned, the learned counsels for the petitioners submit that in terms of the Guidelines, the respondent no.2 has to register all contracts that have been duly registered with the TMO. They submit that the sale contracts of the petitioners have been registered by the TMO and documents acknowledging such registration have been filed on record. However, in spite of such registration by the TMO, the respondent no.2 in turn is not registering the sale contracts of the petitioner presumably because the Country Cap has been exceeded. They submit that if the Country Cap has been exceeded, the respondents are under an obligation

to devise a fair and transparent manner of distribution of such Country Cap amongst various importers. They submit that the respondents cannot resort to a 'first cum first serve' manner of allocating such Country Cap amongst various importers of poppy seeds. They place reliance on the judgment of the Supreme Court in ***Centre for Public Interest Litigation & Ors. vs. Union of India & Ors.*** (2012) 3 SCC 1 to submit that in such matters, the respondents cannot adopt the 'first cum first serve' principle for allocation of the Country Cap.

11. The learned counsels for the petitioners further submit that the arbitrary manner of dealing by the respondents is apparent from the fact that this Court by its order dated 18.07.2019 passed in WP(C) No.7676/2019 had *prima facie* concurred with the contention of the petitioners that if the registration of the TMO itself is exhausted on the basis of the Country Cap, then the Guidelines would work on 'first cum first serve' basis, which is not the methodology under the said Guidelines. Thereafter, the respondents stated before this Court that the Country Cap had not been fixed by it and therefore, no import would be permissible for the crop year 2018-19. As certain contracts had been registered by the TMO even prior to the declaration of the Country Cap for the crop year 2019-20, the respondents placed reliance on the communications dated 27.08.2019 and 06.09.2019 from the Turkish authorities to contend before this Court that all registrations granted by TMO prior to the fixation of the Country Cap shall be cancelled and the process of registration shall be started afresh by the TMO. Based on this assurance, this Court by its order dated 11.09.2019 was pleased to dispose of WP(C)

No.7676/2019. However, instead of adhering to their statements, the TMO has re-registered the very same contracts which were registered before declaration of the Country Cap thereby, in a manner, misleading this Court into disposing of the said writ petition at that stage. They submit that even otherwise, by re-registering the same contracts, the petitioners have been denied an opportunity of fair play and equal treatment thereby vitiating the entire process. The respondents, in spite of complaint from the petitioner, have not asked the TMO to explain its conduct thereby allowing such arbitrary procedure to be accepted.

12. On the other hand, the learned counsel for the respondents submits that as far as the fixation of the Country Cap is concerned, the same, apart from being based upon the stock and production of poppy seeds in Turkey, is also to be based on the domestic production. He submits that the recommendation of the Committee appointed in terms of Clause 1 of the guidelines was duly considered by the Competent Authority and taking into account the domestic production in the summer crop of 2020, it was decided not to increase the Country Cap beyond the already fixed limit of 18000 MT. He submits that the fixation of the Country Cap being a policy decision, this Court cannot sit in an appeal on such decision.

13. As far as the registration of the contract is concerned, the learned counsel for the respondents submits that in terms of the procedure prescribed in the Guidelines, it is the obligation of the exporting company in Turkey to get the sales contract registered with the TMO. As far as the respondents are concerned, once the application is made by the importer

for registration of the sales contract, the respondent no.2 is to verify the fact of registration of the sales contract by TMO through the online system maintained by the TMO. Only where the sales contract is found to be registered by the TMO on such online system, provisional registration to importer is granted. In the present case, on the online system maintained by the TMO, the contracts of the petitioners were not found to be registered. Incase, the petitioners have any grievance against such non-reflection of their registration on the online system of the TMO, the petitioners would have to take it up with the TMO or the Turkish Authorities, however, cannot challenge the non-registration of their agreements by the respondent no.2. He submits that the respondents have not acted arbitrarily in matter of registration of contracts. He submits that the criteria of 'first cum first serve' has not been adopted by the respondent no. 2.

14. I have considered the submissions made by the learned counsels for the parties.

15. The relevant provisions of the Import Policy with regard to import of poppy seeds are reproduced hereinbelow:

"ITC(HS), 2017

SCHEDULE1-IMPORT POLICY

Section II *Chapter-12*

1207 91 00	*Poppy seeds*	*Free*	*Import subject to Policy Condition (3) below*

(3) Import of Poppy Seeds (Exim Code No. 1207 91 00) shall be allowed subject to the following conditions:

a) Import permitted only from Australia, Austria, France, China, Hungary, the Netherlands, Poland, Slovakia, Spain, Turkey and Czech Republic, United Kingdom, Democratic People's Republic of Korea, Macedonia, Germany and Ukraine;

b) The importer shall produce an appropriate certificate from the competent authority of the exporting country that Opium Poppy have been grown legally in that country; and

c) All import contracts for this item shall compulsorily be registered with the Narcotics Commissioner, Gwalior prior to import in accordance with the guidelines issued by the Department of Revenue, which may, inter - alia, include fixing of Country Caps, imposing quantitative restriction, if any, per importer or any other relevant provisions as deemed necessary for implementation of National Policy on Narcotic Drugs and Psychotropic Substances."

16. A reading of the above would clearly show that though described as freely importable, the import of poppy seeds is subject to the policy conditions, which *inter alia* restrict the countries from which such imports can be made; the requirement of such opium poppy being grown legally in that country; and the registration of the import contracts with the respondent no.2 in accordance with the Guidelines issued by the Department of Revenue, which may *inter alia* include fixing of the Country Cap.

17. The 'National Policy on Narcotic Drugs and Psychotropic Substances', in Clause 17 provides that the import of poppy seeds will

continue till self-sufficiency is achieved. Therefore, the intent of the policy is clearly to promote consumption of the domestic production. The said Clause further provides for registration of the import contracts. Clause 17 of the Policy is reproduced hereinbelow:

> *"17. Import of poppy seeds will continue till self-sufficiency is achieved. The policy is to allow import of poppy seeds from any country provided it has originated in any of the countries authorized internationally to grow opium poppy for export and that it has been legitimately cultivated. No import will be allowed from countries where opium poppy is not legitimately cultivated. All contracts for import of poppy seeds will be compulsorily registered with the Narcotics Commissioner. Before registering such contracts, the Narcotics Commissioner shall satisfy that the country from which the poppy seeds are proposed to be imported legally cultivates opium poppy and can produce the quantity of seeds which are sought to be imported."*

18. The Guidelines for registration of sales contract framed by the Department of Revenue provide that the Country Cap for the purpose of import of poppy seeds from Turkey shall be approved by the Department of Revenue "on the basis of recommendation" of the Committee as mentioned in Clause I of the Guidelines, and based upon stock and production of poppy seeds as communicated by the TMO. Clause 1 of the Guidelines is reproduced hereinbelow:

> *"I.* ***Determination of Country Cap***
>
> *The Country Cap for the purpose of import of poppy seeds from Turkey shall be approved by Department of Revenue on the basis of recommendation by a Committee comprising*

Narcotics Commissioner, one representative of Directorate General of Foreign Trade (DGFT) and one representative of Department of Revenue. The Country Cap will be based upon stock and production of poppy seeds as communicated by the Turkish Grain Board (TMO) or Turkish Embassy in India."

19. A reading of the above document would clearly show that the import of the poppy seeds is subject to the determination of the Country Cap by the Department of Revenue. Such determination has to be based on the 'recommendation' of the Committee. It is also to be guided by the intent of achieving self-sufficiency. Though it is stated to be based upon the stock and production of poppy seeds as communicated by the TMO, a fair and harmonious reading of the above document does not in any manner support the contention of the petitioner that the respondents are under an obligation to fix the Country Cap based on the figure as may be communicated by the TMO of the availability of the legitimately grown opium poppy in Turkey. The same is also the effect of Clause 2 of the MOU executed between the Government of India and Government of Turkey, which is reproduced hereinbelow:

"2. Each year, the quantity of poppy seeds which shall be imported by India from Turkey shall be decided by Government of India in consultation with Government of Turkey taking into account the production of poppy seeds in Turkey in a crop year, balance from previous crop years and domestic or other export requirement of Republic of Turkey."

20. The said Clause clearly shows that the quantity of poppy seeds which shall be imported by India from Turkey shall be decided by the 'Government of India in consultation with the Government of Turkey'.

21. Though, such determination is to be based on the production of poppy seeds in Turkey in a crop year, the balance available from the previous crop year and the domestic or other export requirement of Turkey, it cannot be said that the Government of India becomes obliged to allow the import of the entire quantity of poppy seeds as may be communicated by the Government of Turkey to be available for export from it.

22. A fair and harmonious reading of the above Clauses would clearly show that even though one of the relevant consideration for determination of the Country Cap is the quantity of the poppy seeds available in Turkey for exports, the same is not the sole criteria, and such determination can take place based on other relevant criteria/considerations, such as domestic production and demand of poppy seeds in India.

23. In the present case, though the Committee appointed in terms of Clause 1 of the Guidelines acknowledges the availability of 8438 MTs of poppy seeds in Turkey for exports to India, the Competent Authority has taken into account the imports allowed from China and Czechoslovakia, the domestic licit production of poppy seeds in 2019, and the expected production/availability of poppy seeds in April-May, 2020, for its decision to finalize the Country Cap at 18000 MT. Such determination cannot, therefore, be said to be arbitrary or unreasonable.

24. In terms of Clause I of the Guidelines, the Competent Authority has to base its decision determining the Country Cap on the recommendation of the Committee constituted in terms of the said Clause. However, it cannot be said that such recommendation is binding on the Competent Authority, that is, the Department of Revenue. The Competent Authority, for germane reasons, may decide not to agree with the recommendations, as has happened in the present case. The learned counsel for the respondent has produced before this Court the relevant file notings on the consideration of the recommendations by the Competent Authority. The same reflects due application of mind on the recommendations and reasons for not agreeing to the same.

25. The determination of the Country Cap would be in the realm of economic policy and unless found to be *mala fide*, unreasonable, arbitrary or unfair, this Court in exercise of its powers of judicial review cannot interfere with the same. Reference may be had to the judgments of the Supreme Court in ***Ugar Sugar Works Ltd. vs. Delhi Administration & Ors***. MANU/SC/0189/2001; **Balco Employees' Union (Regd.) v. Union of India & Ors.** (2002) 2 SCC 333); ***Villianur Iyarkkai Padukappu Maiyam v. Union of India****, (2009) 7 SCC 561;* ***Shri Sitaram Sugar Co. Ltd. and Ors. vs. Union of India (UOI) and Ors***., MANU/SC/0249/1990; ***Peerless General Finance and Investment Co. Ltd. v. Reserve Bank of India,*** **(1992) 2 SCC 343;** ***Delhi Development Authority vs. Joint Action Committee, Allottee of SFS Flats AIR 2008 SC 1343.***

26. Similar has to be the answer regarding there being an abnormal increase in the price of poppy seeds in India due to the restriction in the Country Cap. It would be for the policy makers to consider this factor while determining the Country Cap, however, only because the price is high in India, it cannot be said such determination is arbitrary or unreasonable.

27. The learned counsels for the petitioners have also submitted that the Country Cap for import of poppy seeds from Turkey cannot be restricted on basis of the Guidelines to promote 'self sufficiency' or in other words to give preference to domestic production, without issuing a Notification under Section 9A of the Foreign Trade (Development and Regulation) Act, 1992.

28. This argument, however, need not detain me as in none of these petitions, there is a challenge laid to the Guidelines. In any case and as noted therein above, Clause 3(c) of Section II, Chapter-12 of the Schedule-1 of the Import Policy states that the registration of the contracts is to be in accordance with the guidelines issued by the Department of Revenue, which may, inter-alia, include fixing of country cap. I may also note the judgement of the Bombay High Court in ***Chailbihari Trading Private Limited & Ors. v. Union of India & Ors.*** *MANU/MH/2412/2019* and of the Karnataka High Court in ***Om Traders & Ors. v. The Union of India & Ors.*** *MANU/KA/0457/2018* on which reliance has been placed by the learned counsel for the respondent to contend that the Guidelines have been upheld by the court.

29. As far as the decision of the respondents not to register the contracts of the petitioners is concerned, the procedure for registration is prescribed in the Guidelines, the relevant clauses of which are reproduced hereinbelow:

> *"**III. PROCEDURE***
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> *(i) Once the application is received by Narcotics Commissioner, requesting for registration of sales contract for import of poppy seeds from Turkey, the office of the Narcotics Commissioner shall verify the fact of registration of sales contract by TMO (through online system maintained by TMO).*
>
> *(ii) If the sales contract is found to be registered by TMO, Narcotics Commissioner will grant provisional registration to importer if condition as specified in Para –II are fulfilled. Such provisional registration will be sent to the importer and the online system maintained by TMO shall be up-dated accordingly."*
>
> *(iii) The applicant importer, on receiving provisional registration will be required to open Irrevocable Letter of Credit (ILC) in favour of Turkish Exporter or make advance payment to the extent of minimum 20% of total contract value of qty. allowed to be registered in provisional registration.*
>
> *Explanation: Contract value for the purpose of this clause will be computed proportionately in case quantity allowed to be imported under provisional registration is less than the quantity indicated in the sales contract.*
>
> *(iv)The applicant importer shall again approach Narcotics Commissioner within 21 days of issue of provisional registration alongwith proof of Advance Payment/Opening of ILC through his bank. Office of the Narcotics Commissioner within 10 working days on receipt of proof of advance payment/opening of ILC shall issue registration for import of poppy seeds from Turkey to the importer and update the online system accordingly. If such a proof of advance payment/opening*

of Letter of Credit is not received by the office of the Narcotics Commissioner within 21 days from date of issue of provisional registration, the provisional registration will be deemed to be cancelled and accordingly application will be considered to have been rejected.

(v) The applicant importer shall have an option to open ILC/Make Advance Payment and submit proof to Narcotics Commissioner alongwith the application as prescribed in Para(II)(a). In such a case,sales contract registration will be issued to applicant importer directly without the stage of issue of Provisional Registration;"

30. The MOU between the Government of India and Government of Turkey also provide for the same procedure in Clauses 1 to 3 and Clause 5, which are reproduced hereinbelow:

"1. Turkish Grain Board (TMO) shall maintain an online system to enable regulation of export of poppy seeds from Turkey to India. Exporting companies shall submit application through the Agean Exporters Association (EIB) (responsibility given by law) to TMO for obtaining membership of the online System.

2. Each year, the quantity of poppy seeds which shall be imported by India from Turkey shall be decided by Government of India in consultation with Government of Turkey taking into account the production of poppy seeds in Turkey in a crop year, balance from previous crop years and domestic or other export requirement of Republic of Turkey.

3. The exporting companies shall get registered with the TMO. Each sales contract entered into by the exporting company with Indian importer shall be registered with TMO through the online system referred. It shall be the responsibility of TMO not to register sales contract in excess of the quantity referred to in Para 2 above.

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5. The Central Bureau of Narcotics (CBN) will register the sales contract registered by TMO as per details accessed on the online system maintained by TMO in accordance with guidelines for registration laid down by Ministry of Finance, Government of India. The CBN shall upload the details of sales contract so registered by it on the online system. TMO shall allow the export in respect of only those contracts so registered by CBN."

31. In view of the above, it is can be seen that the respondent no.2 is to verify the fact of registration of the sales contract by the TMO through the online system maintained by the TMO. The submission of the respondents that the contract of the petitioners were not found as registered on the online system maintained by the TMO, has not been controverted by the petitioners by production of any document. The only submission made is based on the document which shows that a registration number has been granted to the petitioners. Incase, even after the grant of such registration, the sale contracts are not being shown on the online system, the petitioners should have approached the TMO for the due reflection of such contracts on its online system. However, again, no document has been filed by the petitioners to show any such attempt by the petitioners or the result thereof. The reasons for non-reflection of the contracts of the petitioners on the online system are therefore, not discernable as a fact, however, only on basis of assumption.

32. It is also to be noted that in terms of Clause 1 and Clause 2 of the Guidelines, it is the exporting company in Turkey which has to get the

sales contract registered with the TMO and only upon such registration, the Indian importer can approach the respondent no.2 for seeking registration of the sales contract. Therefore, registration of the Agreement by TMO is a matter between the exporter and the TMO, with which the respondents cannot be concerned or in any manner influence. The TMO shall be bound by its own procedures and law applicable in Turkey. This Court cannot examine the procedure followed by the TMO or issue any directions thereagainst. This court also cannot ask TMO to explain how, if at all, and on what basis only the contracts that were registered prior to notification of the Country Cap got re-registered thereafter.

33. As far as the respondents are concerned, once the sales contracts of the petitioners were not found on the online system as being registered by the TMO, the respondents have rightly refused to register such contracts and no fault can be found in such an exercise.

34. In this light, the submission of the learned counsel for the petitioners of 'first cum first serve' principle having been followed by the respondents or the registration being made by the respondents in some arbitrary manner, cannot also be sustained.

35. I may only note that Clause 3 of the MOU between the Government of India and Government of Turkey casts a responsibility on the TMO not to register sales contract in excess of the Country Cap declared by the Government of India. It would be for the TMO therefore, to determine in what manner and following what procedure such contracts shall be registered by it. It can also not be said that the

respondents have failed to discharge any duty by not inquiring from the TMO about the non-registration of petitioners' contracts. In any case, the occasion for the respondents to adopt 'first cum first serve' principle would never arise.

36. In view of the above, I find no merit in the present petitions. The same are dismissed. There shall be no order as to costs.

NAVIN CHAWLA, J

July 14, 2020
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