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$~14 to 19

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

Date of Decision: 11th January, 2021

\+ **W.P.(C) 8668/2020**

M/S AMRUT IMPEX ..... Petitioner

Through: Mr. Darpan Wadhwa, Sr. Advocate with Mr. Shlok Chandra, Mr. Gaurav Barathi & Ms. Mansie Jain, Advocates. (M-9999670588)

versus

UNION OF INDIA & ANR. ..... Respondents

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

15 WITH

\+ **W.P.(C) 8669/2020**

M/S ASTRA BUILD TECH PRIVATE LIMITED THROUGH: M.B. MATHUR, AUTHORIZED REPRESENTATIVE ..... Petitioner

Through: Mr. Darpan Wadhwa, Sr. Advocate with Mr. Shlok Chandra, Mr. Gaurav Barathi & Ms. Mansie Jain, Advocates.

versus

UNION OF INDIA & ANR. ..... Respondents

Through: Mr. Vivek Goyal, CGSC for UOI.

16 WITH

\+ **W.P.(C) 8670/2020**

M/S WHARTON ENGINEERS P AND DEVELOPERS PVT. LTD THROUGH: M.B. MATHUR, AUTHORIZED REPRESENTATIVE ..... Petitioner

Through: Mr. Darpan Wadhwa, Sr. Advocate with Mr. Shlok Chandra, Mr. Gaurav Barathi & Ms. Mansie Jain, Advocates.

versus

UNION OF INDIA & ANR. .....Respondents

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Through: Mr. Vinod Diwakar, CGSC with Mr. Vishal Kumar Singh, Adv. for R-1&2.

WITH

17

\+ **W.P.(C) 8671/2020**

M/S AJIT EXIM ..... Petitioner

Through: Mr. Darpan Wadhwa, Sr. Advocate with Mr. Shlok Chandra, Mr. Gaurav Barathi & Ms. Mansie Jain, Advocates.

versus

UNION OF INDIA & ANR. ..... Respondents

Through: Mr. Amit Mahajan, CGSC with Mr. Kritagya Kumar Kait, Advocate.

18 WITH

\+ **W.P.(C) 8676/2020**

M/S NILESH TRADERS ..... Petitioner

Through: Mr. Darpan Wadhwa, Sr. Advocate with Mr. Shlok Chandra, Mr. Gaurav Barathi & Ms. Mansie Jain, Advocates.

versus

UNION OF INDIA, THROUGH: REVENUE SECRETARY, MINISTRY OF FINANCE & ANR. .....Respondents

Through: Mr. Amit Mahajan, CGSC with Mr. Kritagya Kumar Kait, Advocate.

19 AND

\+ **W.P.(C) 9625/2020**

MAHARANI ENTERPRISES ..... Petitioner

Through: Mr. Pradeep Jain & Mr. Aakarsh Srivastava, Advs. (M-9212023661)

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr. Anil Soni, CGSC with Mr. Sahaj Garg & Mr. Devesh Dubey, Advocates for UOI.

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CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through video conferencing.

2. The Petitioners have approached this Court seeking grant of extension of two months to enable them to complete the import of "poppy seeds", for which registration certificates have been issued by the Central Bureau of Narcotics (*hereinafter, 'CBN'*). The Petitioners also pray for quashing and setting aside the impugned order dated 21st October, 2020, passed by the Director, Department of Revenue, Ministry of Finance, Government of India, by which the representation of the Petitioners seeking an extension for completing the imports was also rejected.

3. The brief background in these cases is that the Petitioners are importers of "poppy seeds". The Petitioners in *W.P.(C) 8668/2020*, *W.P.(C) 8669/2020, W.P.(C) 8670/2020, W.P.(C) 8671/2020* and *W.P.(C) 8676/2020* had entered into sales contracts for import of poppy seeds with one M/s Gansu Puankang Pharmaceutical Co. Ltd., - a Chinese exporter. In terms of the contracts, the importers have paid 80% of the consideration in advance in some petitions and 30% advance in some petitions. Some portion of the goods have already been imported. However, the entire quantum is yet to be imported. The details of the sales contracts qua each of the Petitioners is set out in the table below:

Writ Petition No.	Name of the Company	Type of Poppy Seed	Registration No.	Quantity	Advance paid	Date of Impugned Order
8670/2020	M/s Wharton Engineer & Developers Pvt. Ltd.	White Poppy Seeds	240/CBN/PS/2019-20	102 MT	80%	20.10.2020

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8669/2020	M/s Astra Build Tech Pvt. Ltd	White Poppy Seeds	242/CBN/PS/2019-20	102 MT	80%	20.10.2020
8676/2020	M/s Nilesh Traders	White Poppy Seeds	236/CBN/PS/2019-20	170 MT	Contract complete	21.10.2020
		Yellow Poppy Seeds	248/CBN/PS/2019-20	85MT	30%	
8668/2020	M/s Amrut Impex	White Poppy Seeds	231/CBN/PS/2019-20	170 MT	Contract complete	21.10.2020
		Yellow Poppy Seeds	247/CBN/PS/2019-20	85MT	30%	
8671/2020	M/s Ajit Exim	White Poppy Seeds	235/CBN/PS/2019-20	170 MT	Contract complete	21.10.2020
		Yellow Poppy Seeds	246/CBN/PS/2019-20	85MT	30%	

4. The imports, in accordance with the sales contracts and the licenses issued by the Respondents, were to be completed by 17th March, 2020. However, the Chinese exporter informed the Petitioners, vide letters sent around mid-February, that they would be unable to export the consignment, in view of various problems caused due to the outbreak of the COVID-19 pandemic, including transportation issues, non-availability of labour and non-availability of containers. The Chinese company sought time up till 30th June, 2020, for fulfilling its obligations under the said sales contracts.

5. The Petitioners then wrote letters in the latter half of February, to the Respondents, in view of the Chinese exporter's letters, seeking extension of the validity of the sales contracts, up to 30th June, 2020. The Petitioners are

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stated to have received no replies to the same. The Petitioners, thereafter wrote further letters in May, June, August and September, however no positive response was forthcoming. During this period, the Chinese exporter also continued to communicate with the Petitioners and repeatedly sought instructions for shipping the consignment. Owing to the complete silence on behalf of the Respondent- Government, the Petitioners had moved writ petitions before this Court which were disposed off vide orders dated 25th September, 28th September, 2020 and 29th September. In the said orders, this Court had directed that the Union of India would give an opportunity of hearing to the Petitioners, and decide their representation in accordance with law. The operative portion of one of the said orders, is set out below:

> *"2. It is the case of the petitioner that the registration granted to the petitioner under the Guidelines dated 25.09.2019 was to expire on 17.03.2020. Due to the outbreak of COVID-19 Pandemic, the exporter in China expressed its inability to make the supplies of the poppy seeds within the time granted. The petitioner accordingly filed an application seeking extension of the time for import with the respondent no. 1. Such representation is stated to be still pending with the respondent no.1. On the other hand, the exporter from China has now issued a communication dated 14.09.2020, informing the petitioner that in case the petitioner is unable to get an extension of the registration on or before 30.09.2020, it shall forfeit the advance paid as also blacklist the petitioner from future dealings.*
>
> *3. Keeping in view the submissions made, the respondent no. 1 is directed to grant an opportunity of hearing to the petitioner on its application seeking extension of the validity of the registration, on 29.09.2020 at 12.30 noon. The Officer before*

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> *whom the petitioner has to appear shall be informed by the respondent no. 1 to the learned counsel for the petitioner well in advance.*
>
> *4. On hearing the petitioner, the Competent Authority shall pass an order, in accordance with law, within a period of two days and communicate the same to the petitioner."*

Similar orders were passed by this court in all the other petitions as well.

6. Mr. Darpan Wadhwa, ld. Senior Counsel appearing for the Petitioners, submits that the writ petitions which were filed earlier, having been treated as representations, have now been rejected vide the impugned order dated 21st October, 2020. He submits that the Central Government itself has issued circulars, clearly recognizing the outbreak of the COVID- 19 pandemic as a force majeure event. He further relies upon the office memorandum dated 19th February, 2020, issued by the Ministry of Finance, to submit that disruptions have been caused by the Pandemic and accordingly extensions may be sought in lieu of the same, without financial repercussions on either side. Mr. Wadhwa further submits that the impugned order, rejecting the extension of time, fails to recognize that the COVID-19 pandemic had commenced sometime around December-January in China and the date of the lockdown in India is irrelevant to the outbreak in China. He submits that the Chinese company having made it clear that it was unable to supply in February, despite repeated requests for extensions by the Petitioners, the same was not granted. Since the Petitioners have paid huge advances to the Chinese exporter, Mr. Wadhwa submits that if the extension is not granted, apart from the financial repercussions there is also a threat that the Petitioners may not be able to do further business with the said Chinese company, which is the sole exporter of poppy seeds from China, duly recognized by CBN. Reliance is placed upon,

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by ld. counsel, on the judgment of the Supreme Court in ***Indian Oil Corporation v Shashi Prabha Shukla and Ors., (2018) 12 SCC 85.***

7. Mr. Pradeep Jain, ld. Counsel appearing for the Petitioner in *W.P.(C) 9625/2020* submits that in this petition, the import was to be done from a foreign supplier of poppy seeds in Turkey, and more than 2/3rd of the consignment amount has already been imported and only 1/3rd is outstanding. The deadline for import of the same was June, 2020. It is also stated that the Petitioner in this case, has also paid the entire amount of consideration to the exporter.

8. On the other hand, Mr. Anil Soni, ld. CGSC, appearing for the Government submits that the Government has considered the representations of the Petitioners. A fair hearing has already been given and the reasoning of the Government does not deserve interference inasmuch as poppy seeds are a regulated commodity, and due to the import of the same being a controlled measure, this would solely be a policy decision of the Government.

9. Mr. Amit Mahajan, ld. CGSC, appearing on behalf of the Respondents submits that there are quotas which are usually fixed for importing of limited quantities of poppy seeds, and any out of turn extension granted would interfere with the quota which is already fixed. He submits that though the affidavit already filed may not be satisfactory, he is willing to file a further affidavit to explain this position. Mr. Mahajan finally submits that the rationale adopted by the Government in regulating the import of poppy seeds ought not be interfered with.

10. Heard counsels for the parties. A perusal of the impugned order dated 21st May, 2020, shows that the Union of India has considered merely factual circumstances to decide that in February, 2020, there was no outbreak of

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COVID-19 pandemic, and, therefore, the plea of extension in light of the Chinese exporter being unable to supply the consignment, is not justified. Further, the impugned order records that there was no obligation under the guidelines to pay any advance for the said consignments and that making advance payment is completely as per the convenience of the importers. Hence, the payment of advances would not constitute a reason for any extension to be granted. Finally, the reasoning that has been adopted in the impugned order is that since 1802 metric tons out of 2499 metric tons had already been imported by the end of February, 2020, there is no justification to not have had imported the remaining portion of the said consignment. The relevant portion of the impugned order is extracted below:

> *"3. The sales contract of the Petitioner was registered on 18.11.2019 as such validity of sales contracts was upto 17.03.2020 i.e., four months from the date of registration as per the guidelines. The petitioner has submitted that their Chinese manufacturer/ supplier through their letter dated 11.02.2020 conveyed that they are not in position to process poppy seed due to circumstances created by COVID-19 pandemic. It may be seen that till 11.2.2020 also nearly three months of the validity of sales contract was passed and mere 85 MT of quantity of the applicant could not be processed by the Chinese supplier. Therefore, the plea that supplier could not process the poppy seed due to COVID-19 pandemic does not appear justified by the Chinese supplier. Therefore, the plea that the supplier could not process the poppy seed due to COVID-19 pandemic does not appear justified. Moreover, Lockdown in India was imposed only with effect from 24.03.2020 which is beyond the date of expiry of registration of sales contract of Petitioners therefore it also cannot be said that June*

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> *to lockdown imposed by Government of lndia import of poppy seed co1.1ld not take place. The petitioner has pleaded that they have paid substantial amount as an advance to their Chinese supplier. However, it may be seen that as per guidelines issued by Department it was not obligatory for making advance payment for registration of sales contract for import of poppy seeds from China therefore the said arrangement was made by importer and exporter as per their convenience.*
>
> *4. Further, it appears that there was adequate time available to the petitioner to import the poppy seeds from China even before impact of COVID- 19 Pandemic. It is further mentioned that 1802 MTs of poppy seeds were imported by the various importers by the end of Feb, 2020 out of registered quantity of 2499 MTs of Poppy seeds. Therefore, the reasons attributed by petitioners for non import of poppy seeds within validity period of four months i.e 17.03.2020, are not adequate. It is also not obligatory on the part of Government of India to extend the period of registration of sales contract for import of poppy seeds.”*

11. A perusal of the guidelines for the registration of sales contracts for import of poppy seeds from China, issued on 25th September, 2019, shows that there is a country cap which is fixed by the Narcotics Commissioner on the basis of the figures supplied by the respective competent authority in China. However, what is important is that as per the guidelines, the only recognized company for the supply of poppy seeds is M/s Gansu Puankang Pharmaceutical Co. Ltd. The relevant portion of the guidelines is extracted herein below:

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> *"I* ***DETERMINATION OF COUNTRY CAP***
> *The country cap should be fixed by the Narcotics Commissioner on the basis of figures supplied by the respective Competent Authority of China as soon as the same are available.*
>
> ***II APPLICATION FOR REGISTRATION OF SALES CONTRACT***
> *xxx*
>
> *(v) Applicant will have to produce sales contract issued by **Gansu Puankang Pharmaceutical Co. ltd** in original. In case the exporter in China is other than Gansu Puankang Pharmaceutical Co. ltd. then a letter of commitment from Gansu Puankang Pharmaceutical Co. ltd. in original will have to be annexed with the sales contract to the effect that Gansu Puankang Pharmaceutical Co. ltd. agrees to provide contracted quantity of poppy seeds so such exporter within a maximum period of four months from the date of registration of such sales contracts by CBN."*

12. As per Clause IV of the said guidelines, the sales contracts are valid only for a period of four months after registration and the penalty for non-performance is that if a minimum of 50% is not imported, the company can be disbarred from registration of sales contracts for a period of two years from China. The said clause reads:

> ***"IV VALIDITY OF SALES CONTRACT REGISTERED***
>
> *The sales contracts registered by the Narcotics Commissioner shall be valid for a period of four (4) months from the date of communication of such registration to the applicants"*

13. The Petitioners, in all these petitions, are registered importers. The

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outbreak of the pandemic around early 2020 is a matter of fact which cannot be disputed. The period when the outbreak may have taken place in China, as per the Chinese exporter's letter, ought not be doubted in the manner in which the impugned order doubts the same. It is a matter of which judicial notice can be taken. The COVID-19 pandemic originated in China, and hence the adverse effects and problems due to the outbreak could have been much earlier in China, than in India. The Chinese exporter has repeatedly contacted the Petitioners and has expressed its willingness to complete the contract and to supply the product. However, despite repeated letters and reminders requesting an extension by the Petitioners, the Government has not responded to the same, leading to the filing of these writ petitions.

14. These are the second round of writ petitions which have been filed by the Petitioners. The only reasoning which the impugned order provides is that there is no justification for not having completed the supplies prior to March, 2020. This court is of the opinion that this reasoning is not acceptable, as it seeks to completely ignore the fact that the outbreak had begun earlier in China, as compared to India, and COVID-19 related problems were present in China in February, leading to the non-supply of the said consignments.

15. The sales contracts in these petitions also show that substantial advance amounts have been paid by the Petitioners to the Chinese exporter and the total value of the contracts range between USD 106,250 – USD 273,700. The Petitioners being Indian importers, who have paid huge sums of money to the Chinese company, which is the only recognized company for the import of poppy seeds from China, would be put to severe financial difficulties if the extension is not granted. They may not be able to recover the advances paid. Considering that the pandemic has had a debilitating effect on Indian

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businesses, including Indian importers and exporters, there seems to be no rationale whatsoever to refuse extension. Moreover, the threat that the Chinese company may not enter into further transactions with the Petitioners, cannot be said to be devoid of merit. Even a reasonable apprehension that the said Company may either refuse to export in future or impose stringent conditions would be sufficient to consider the case for extension.

16. A perusal of the counter affidavit shows that the main reason for which the non-grant of extension is stated to be justified is that the lock-down in India was imposed from 24th March, 2020. The Government seeks to ignore the fact that the lock-down and the impediments caused due to the outbreak, could have been earlier in China and hence in the opinion of this Court, the non-grant of extension is not tenable.

17. The Supreme Court in ***Indian Oil Corporation (supra)*** held as under:

> *"Jurisprudentially thus, as could be gleaned from the above legal enunciations, a public authority in its dealings has to be fair, objective, non-arbitrary, transparent and non-discriminatory. The discretion vested in such an authority, which is a concomitant of its power is coupled with duty and can never be unregulated or unbridled. Any decision or action contrary to these functional precepts would be at the pain of invalidation thereof. The State and its instrumentalities, be it a public authority, either as an individual or a collective has to essentially abide by this inalienable and non-negotiable prescriptions and cannot act in breach of the trust reposed by the polity and on extraneous considerations. In exercise of uncontrolled discretion and power, it cannot resort to any act to fritter, squander and emasculate any public property, be it by way of State largesse or contracts etc. Such outrages would clearly be*

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> *unconstitutional and extinctive of the Rule of law which forms the bedrock of the constitutional order*."

Following, the above rationale of the Supreme Court, this court is of the opinion that the impugned order is not rational or logical, and also completely ignores the harsh realities of the commercial world, especially during the pandemic.

18. The submission of the Respondents relating to limited quotas being available for the import of poppy seeds is devoid of any merit inasmuch as no such argument has been raised in the counter affidavit. Moreover, the quantity sought to be imported is already part of the licensed quantities and not beyond that. This is a case where the authorities have been completely oblivious to the difficulties being faced by the importers in India.

19. Under these circumstances, this Court directs that the Petitioners, in all these petitions, are permitted to import the permitted and licensed quantity of poppy seeds in accordance with the guidelines on or before 31st March, 2021. It is made clear that no further extension shall be granted.

20. The CBN is accordingly directed to validate the registration certificate issued in favour of the Petitioners in order to ensure that the imports can be executed and effected on or before 31st March, 2021. The said extension shall be granted by 20th January 2021. If there is any delay in grant of the validation by CBN, liberty to approach the Court.

21. All the present petitions and applications are disposed of in these terms.

PRATHIBA M. SINGH
JUDGE

JANUARY 11, 2021/*Rahul/Ak*