IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT NAGPUR

WRIT PETITION NO.2278 OF 2024
(M/S. SHAH NANJI NAGSI EXPORTS PVT. LTD....VS..DIRECTOR GENERAL OF FOREIGN TRADE, MINISTRY OF COMMERCE & OTH.)

Office Notes, Office Memoranda of Coram, appearances, Court's orders of directions and Registrar's orders	Court's or Judge's orders

Shri Sahil Shyam Dewani a/w Ms Disha Fulwani, Advocates for Petitioner.
Shri Nandesh S.Deshpande, ASGI for Respondent Nos.1 to 3.
Shri Arjun Bobde, Adv. a/w Ms Shubhangi A. Jadhav & Shubham Shukla, Advocates for Intervener.

CORAM : NITIN W. SAMBRE AND ABHAY J. MANTRI, JJ.

DATED : JULY 02, 2024.

1. Heard respective counsel.

2. A declaration is sought by the petitioner that the act of the respondents in not granting the application of the petitioner for licence to import 10000 Metric Tons (MT) Maize(Corn) is arbitrary and illegal and consequently sought directions to grant such licence. The petitioner has also made other ancillary prayers.

3. From the "State Trading Enterprises" List to "Free", item Maize was removed vide Notification No.93 in the Import Policy against EXIM Code-1005-Maize (Corn). The petitioner has applied on 05/06/2023 for Import Authorization for Restricted Items, which was followed by the Deficiency Letter by the respondent No.2 on 15/09/2023.

4. The respondent authorities, as against the claim for issuance of licence for 10000 MT quantity of 'Popcorn Maize' granted licence only to the extent of 2000 MT, which has promoted the petitioner to file the instant writ petition.

5. It is urged by Shri Dewani, learned counsel for the petitioner, that the petitioner is importing Maize (Corn) since couple of years and the respondent authority has always acceded to the request of issuance of the licence for a particular quantity. According to him, by arbitrary exercise of powers the respondents have granted import licence only for 2000 MT as against 10000 MT.

6. The restrictions of the permitting import of 2000 MT is by virtue of an executive fiat, that is pursuant to the order of the respondent No.3. This Court had an occasion to consider the powers of the respondent Nos. 1 to 3 as regards regulating the quantity of the export the Government of India is empowered to frame the regulations in regard to import and export and also to frame Foreign Trade Policy and Quantitative Restrictions, as provided under Section 9A of the Foreign Trade (Development and Regulation) Act, 1992. This Court, accordingly, in the case of *Narendra Udeshi ..vs.. Union of India*, reported in **2003(1) Mh.L.J. 155** has observed thus :

> "*4. Section 5 of the Foreign Trade (Development and Regulation) Act, 1995 ('Act' for short) empowers the Central Government to announce the export-import*

policy (EXIM Policy) and also amend that Policy form time to time. Section 6 of the Act empowers the Central Government to appoint any person as DGFT to advice the Government in the formulation of the policy, to carry out the policy and to exercise such powers as is conferred upon him by the Central Government in implementing the EXIM policy. However, Section 6(3) of the said Act provides that the power to amend the policy cannot be delegated to the DGFT and it is the prerogative of the Central Government only, to amend the policy. Section 7 of the said Act provides that no person shall make any import or export except under the importer and exporter code number granted by DGFT or any other officer authorised by him in accordance with the procedure specified in that behalf by the DGFT.

5 to 10 …

11. After hearing Counsel on both sides and after perusing the records placed before us, we are of the opinion that the A.L.C. circulars and the public notice dated 20th May, 2002 issued by the DGFT, cannot be sustained as they are wholly inconsistent with the EXIM policy framed by the Central Government and in fact they purport to amend the EXIM Policy provisions which power is exclusively vested in the Central Government and not with the DGFT. It is pertinent to note that the EXIM policy announced by the Central Government in exercise of the powers vested in it under Section 5 of the said Act has statutory force. It is not in dispute that under the EXIM policy prevalent in 1997-2002 as well as 2002-2007, natural rubber could be imported duty free under an advance licence (except for the period when the Central Government had banned import of natural rubber under an advance licence). Under these circumstances, the implementing agency namely, the DGFT who is empowered to prescribe the norms and the procedures for implementing the EXIM policy could not prohibit import of natural rubber under advance licence, when the EXIM policy specifically permits import of natural rubber under an advance licence. The impugned Circulars and the public notice issued by DGFT, in fact, nullify the express provisions of the EXIM Policy framed by the Central Government. Power to amend the policy being within the exclusive domain of the Central Government the said powers cannot be usurped by the DGFT in the guise of laying down regularly measures. By prohibiting import of natural *rubber under the advance licence in the Hand Book of procedures, the DGFT has encroached upon the powers of the Central Government and purported to amend the EXIM policy 2002-2007 which power is not conferred upon the DGFT. As stated hereinabove Section 6(3) of the Act expressly prohibits the DGFT from exercising the power of amending the EXIM Policy. Therefore, in the absence of any power under the statute, the A.L.C. circulars and the public notice dated 20th May, 2002 to prohibit import of natural rubber under Advance licence could not be issued by the DGFT. The said circulars and public notice being wholly contrary to the police provisions of the Central Government, cannot be sustained and are liable to be quashed and set aside."*

7. The aforesaid view, expressed by the Division Bench of this Court at Principal Seat, has been upheld by the Apex Court in Special Leave to Appeal No. 5717 of 2003. The said view is also expressly followed by the High Court of Madras in the case of *Green Globe Trading Co. ..vs.. Union of India*, reported in **2016 SCC OnLine Mad 33863**. The Madras High Court has observed thus :

"*18. On a reading of Sections 3, 5 and 6 mentioned above, it is evident that even for regulating or effectively implementing the policy of the Central Government, the fourth respondent has no power to impose any other conditions other than the one prescribed in EXIM Code 1207 91 00 relating import of poppy seeds. There is no delgation of power in favour of the fourth respondent to impose the conditions in the impugned public notice. There is no order passed by the Central Government by publishing it in the official gazette specifically authorising the fourth respondent to exercise such power as are necessary for prohibiting, restricting or otherwise regulating the import of poppy seeds in compliance with Section 5 of the Foreign Trade (Development and Regulation) Act, 1992. Therefore, I hold that the fourth respondent has to confine the exercise of his power only in relation to the duties and responsibilities spelt out in Chapter 12 of Exim Code 1207 91 00 relating to import of poppy seeds and they* *are i) whether the import of the poppy seeds is from one of the designated countries ii) whether the importer has a certificate from the competent authority of the exporting country to the effect that opium poppy seeds have been legally grown in that country as per the requirements of International Narcotic Control Bureau and iii) whether the import contract is registered with him prior to import. Except imposition of the above three conditions, the fourth respondent is estopped from imposing any other conditions as it will run contrary to the policies framed by the Central Government under the EXIM Code. It is needless to mention that the fourth respondent has overstepped and exceeded his jurisdiction in imposing the conditions over and above the conditions which are stipulated in Chapter 12 of Exim Code 1207 91 00 mentioned above, in the impugned public notice relating to drawal of lots, restricting the quantity of import, prescribing time frame for receipt of applications etc., and such conditions would only amount to varying, modifying and virtually amending the policies of the Central Government to which the fourth respondent is not empowered to."*

8. In the aforesaid backdrop, it is the contention of the counsel for the petitioner that though in past the respondents were generous enough in permitting the quantity asked to be imported, he would claim that in an arbitrary manner the respondent Nos.1 to 3 without there being any reasonable cause and that too in absence of any powers granted permission to export only 2000 MT against the request of 10000 MT.

9. As against above, Shri Deshpande, learned ASGI, would urge that the petitioner is enjoying the privilege in the licence issued to him and such privileges the petitioner cannot ask for as of right. Shri Deshpande would urge that, in such eventuality, the trade of the petitioner in this background, is required to be regulated

by adopting the principle of equity. He would invite our attention to the affidavit sworn by Dr. Praveen Kumar, Joint Director General, Foreign Trade, Nagpur, particularly to paragraph No.6. Paragraph 6 of the affidavit reads thus:

> "*6. It is submitted that Import under ITC (HS) Code 10059030 Popcorn (Zea mays var. everta) is subject to Policy Circular No. 27/2015-2020 dated 26.07.2019. Hence, the import of maize popcorn is subject to Import Authorisation from DGFT in compliance with the Order dated 09.07.2018 of the Hon'ble High Court of Judicature at Hyderabad in IA No. 1 of 2018 and as extended. Accordingly, the Directorate receives and disposes suitably the applications for the import of maize popcorn.* ***While deciding on the application for import authorisation of restricted items, relevant factors such as domestic availability, demand and supply, and the impact of import on domestic industries are taken into due consideration****. A level playing field is ensured to provide equitable opportunities and fair competition amongst other classes of importers. The Hon'ble Supreme Court in* ***Union of India & Ors. Vs. M/s Raj Grow Impex LLP & Ors. Civil Appeal No(s). 2217-2218 of 2021 (Arising out of SLP(C) Nos. 14633-14634 of 2020)*** *has duly observed that,*
> *"Para 82.6, In our view, meeting with the requirements of demand and supply is essentially a matter for policy decision of the Government. No equity could be claimed with such submissions by the importers. "*
> *The application of the petitioner was decided as per the aforementioned varying factors. The petitioner has been one of the major importer of the maize (popcorn) and has been getting maximum allocation for the import in the past. However, as the demand increased, new importers were also considered for grant of authorisation for import of maize popcorn to ensure unbiased trade practices.* ***Additionally it is submitted that even in the present instance, petitioner has been granted the maximum quantity of 2000 MT as compared to maximum of 1000 MT to past importers and up to 500 MT to new importers based on the processing capacity.****"*

10. Even if Shri Deshpande is justified in claiming that the petitioner is enjoying his right to trade under a licence issued by the Central Government, this Court is required to be sensitive to the fact that the respondents, in such an eventuality, cannot exercise the powers in an arbitrary manner. It is a settled principle of law that even if a party is exercising his right to trade under a licence issued by the Government, the protection provided under Article 14 of the Constitution of India is very much available. As a sequel of this, the respondents, in our opinion, cannot be said to be permitted to act arbitrarily, thereby putting unreasonable restrictions on the right of the petitioner to carryout the trade.

11. At this juncture, Shri Deshpande seeks some time to prepare and address the issue properly before this Court.

12. At his request stand over to **04/07/2024**.

(ABHAY J. MANTRI,J) (NITIN W.SAMBRE, J)

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