

**(2016) 03 KL CK 0050**

**In the High Court Of Kerala**

**Case No :** Writ Petition (C) Nos. 13728 and 31960 of 2015 (M) and 5034 of 2016

Marine Fins

APPELLANT

Vs

Union of India

RESPONDENT

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**Date of Decision :** 09-03-2016

**Acts Referred:**

**Citation :** (2016) 337 ELT 378 : (2016) 3 KHC 33 : (2016) 4 KLT 40

**Hon'ble Judges :** A. Muhamed Mustaque, J.

**Bench :** Single Bench

**Advocate :** Shri M.A. Abdul Hakhim, Advocate, for the Petitioner; S/Shri N. Nagaresh, ASG and John Varghese, SC, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

A. Muhamed Mustaque, J.—These batch of writ petitions are filed challenging a notification issued by the Ministry of Commerce and Industry, Central Government under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (for short, the "Act") prohibiting export of Shark fins of all species of Shark. The notification was issued on 6-2-2015.

2. The petitioners are exporters of Shark fins. They challenge the notification on the ground that the notification issued is without any application of mind or without any basis. They also challenge it on the ground that the notification is issued by the Director General of Foreign Trade, who is not the competent authority to issue such notification.

3. The Central Government under Section 5 of the Act has necessary power to formulate Foreign Trade Policy. It appears that complaints were raised from certain quarters against Shark finning. A meeting was held on 13-1-2015 under the Chairmanship of the Commerce Secretary. The meeting discussed about restriction on capture/export of all species of Sharks/Shark products. Various stake holders have taken part in the meeting. Though different concerns were expressed, it appears that after the discussion, the Commerce Secretary took the

view that trade in Shark Fins (both exports and imports) should be banned. This was with the ecological aspects related to finning of Sharks in Indian EEZ. In fact, on an earlier occasion, in another meeting held under the Chairmanship of the Commerce Secretary on 26-11-2014, the Commerce Secretary was of the view that action cannot be taken against those exporters, who have exported Shark fins which do not fall under the prohibited category under the Wild Life (Protection) Act.

4. The learned counsel for the petitioners argued that there is no ban on use of Shark fins at domestic level. It is further argued that there is no ban on fishing of Sharks. The learned counsel points out that Sharks are not captured on targeted fishing, as Sharks do not travel in a group. It is further submitted that it is impossible to avoid capture of Sharks by fishermen. Therefore, since there is no ban on capture of Sharks, and there is no ban on consumption of Sharks at domestic level, prohibition of Shark finning alone is without any basis. It is also submitted that the ban imposed is without any application of mind, at the instance of Smt. Maneka Sanjay Gandhi, a Minister in Union Government and a well-known Animal Activist. The learned counsel also submits that since the ban has been imposed by the Director General of Foreign Trade, and not by the Central Government, notification has to be set aside.

5. The following judgments were relied on by the petitioners to substantiate their contentions :

Union of India and others v. Dinesh Engineering Corporation and Another [(2001) 8 SCC 491], Federation of Railway Officers Association and Others v. Union of India [(2003) 4 SCC 289] and Union of India and Another v. International Trading Co. and Another [(2003) 5 SCC 437].

6. On the other hand the learned Assistant Solicitor General of India submits that Shark fins, both in terms of quantity and value are very small and there is no much domestic consumption of Sharks. It is pointed out that fishermen are involved in gruesome practise of finning of Sharks, resulting in decline in number of Sharks and the decision was taken to prevent degradation of marine environment. The learned Assistant Solicitor General also relied on a Division Bench Marine Products Exporters Association v. Union of India judgment of the Madras High Court [2016 (331) E.L.T. 193 (Mad.)], dismissing a similar challenge made to the notification.

7. The learned senior standing counsel for the Central Board of Excise and Customs, Shri John Varghese relied on the following judgments :

Liberty Oil Mills and Others v. Union of India and Others [(1984) 3 SCC 465], M/s. D. Navinchandra and Co., Bombay and Others v. Union of India and Others [(1987) 3 SCC 66 = 1987 (29) E.L.T. 492 (S.C.)], Subhash Photographics and Others v. Union of India and Others [(1993) Supp. 3 SCC 323 : 1993 (66) E.L.T. 3 (S.C.)], S.B. International Ltd. and Others v. Asstt. Director General of Foreign Trade and Others [(1996) 2 SCC 439 : 1996 (82) E.L.T. 164 (S.C.)], Indian

Handicrafts Emporium and Others v. Union of India and Others [(2003) 7 SCC 589], [2009 KHC 4571], Maine v. Robert J. Taylor and United States [477 US 131, 91 L Ed 2d 110, 106 S Ct 2440], Census Commissioner and Others v. R. Krishnamurthy [(2015) 2 SCC 796], Parisons Agrotech (P) Ltd. v. Union of India [(2015) 9 SCC 657 : 2015 (323) E.L.T. 3 (S.C.)].

8. The learned senior standing counsel submits that there is no fundamental right to export any commodities by a citizen and therefore, the Court cannot interfere with the policy of the Central Government.

9. Before proceeding further, one needs to consider the powers conferred on the Central Government under Section 5 of the Act. Section 5 enables the Central Government to formulate its Foreign Trade policies from time-to-time. The notification produced and challenged before this Court would clearly show that the notification is issued by the Central Government and not by the Director General of Foreign Trade. Therefore, what remains to be decided is whether the policy framed by the Central Government suffers from any infirmity with the decision making process.

10. It is well-settled principle of law by umpteen decisions, that the Court must respect the executive wisdom to formulate a policy and the Court must understand the latitude of the executive wisdom to formulate such a policy.

11. In Liberty Oil Mill's case [(1984) 3 SCC 465], it was observed by the Hon'ble Supreme Court as follows :

"6. Before considering the questions at issue, it will be useful to refer to our Import Policy and to take a cursory look at the various statutory and non-statutory instruments embodying the policy. The import policy of any country, particularly a developing country, has necessarily to be tuned to its general economic policy founded upon its constitutional goals, the requirements of its internal, and international trade, its agricultural and industrial development plans, its monetary and financial strategies and last but not the least the international political and diplomatic overtones depending on `friendship, neutrality or hostility with other countries" (Glass Chotans Importers and Users" Association v. Union of India. There must also be a considerable number of other factors which go into the making of an import policy. Expertise in public and political, national and international economy is necessary before one may engage in the making or in the criticism of an import policy. Obviously courts do not possess the expertise and are consequently incompetent to pass judgment on the appropriateness or the adequacy of a particular import policy."

12. In Census Commissioner's case [(2015) 2 SCC 796], the Hon'ble Supreme Court held that the domain of the Courts to embark upon enquiry as to whether particular public policy is wise and acceptable or whether better policy could be evolved is beyond the interference by the Courts.

13. In a recent judgment of the Hon'ble Supreme Court in Parisons Agrotech (P)

Ltd."s case [(2015) 9 SCC 657 : 2015 (323) E.L.T. 3 (S.C.)], It was held as follows :

"Held, once it is found that there is sufficient material for taking a particular policy decision, bringing it within the four corners of Article 14 of the Constitution, power of judicial review would not extend to determine the correctness of such a policy decision or to indulge into the exercise of finding out whether there could be more appropriate or better alternatives - Court will not ordinarily interfere with policy decisions that are taken based on expert knowledge of the persons concerned - When a policy decision is taken in the public interest, courts ought not to tinker with the same."

14. In the case in hand, the Central Government appears to have been moved by the concern, to stop depletion of the Sharks in the marine environment, especially, in Indian waters to protect the marine eco-system. The Shark appears to be considered as an apex of the marine food chain. Certainly, this is a relevant factor for formulating any policy by the Central Government. The petitioners' challenge is mainly on the ground that there is no ban on capture of Sharks and there is no ban on domestic consumption of Sharks and therefore, the policy is irrational inasmuch as the relevant factors required to protect marine environment have not been taken into account by the policy makers. This argument is further attempted to be justified on the ground that there is no targeted fishing of Sharks by fishermen.

15. The deliberations of various stake holders preceding decisions are produced as Exts.P10 and R2(e) in W.P. (C). No. 13728/2015. Ext.P10 is dated 26-11-2014 and Ext.R2(e) is dated 13-1-2015.

16. In the meeting held on 26-11-2014 (Ext.P10), the following decision was minuted :

"Summing up the discussion, CS told that as per the discussions, there are 50 to 60 varieties of Sharks out of which only 9 are prohibited as per the provisions of Wildlife (Protection) Act. Hence, legally, action cannot be taken against those exporters who have exported the Shark fins, parts, etc., not covered under the prohibited category. However, there is a need to educate/spread awareness among the fishermen not to indulge in fishing of Shark which are covered under the prohibited category. CS told that MPEDA/MoEF and D/o AHD&F may undertake this exercise of educating/spreading awareness among the fishermen and others involved in fishing/finning of Shark about the prohibited variety of Shark and the penal provisions so as to dissuade them from indulging in such illegal activities. CS also asked JDWL and FDC to take appropriate action for stopping finning of Shark in the high seas."

17. Thereafter, in the meeting held on 13-1-2015 [Ext.R2(e)], the Commerce Secretary summed up the discussion as follows :

"7. After further discussions, the CS directed that in so far as Department of

Commerce is concerned, the trade in shark fins (both export and imports) should be banned, keeping in view the ecological aspects resulting out of the fishing and finning of sharks in the Indian EEZ. He further stated that in so far as capture of sharks/shark fins, and issue of permits to foreign vessels for shark fishing in the EEZ, Ministry of Agriculture, and Department of Fisheries may take a call on whether to ban capture of sharks for shark fins/shark oil, etc., for domestic consumption."

18. While exercising the power of judicial review under Article 226 of the Constitution questioning policy decision, this Court cannot convert its power as that of an Appellate Authority to reappraise the assessment of finding of facts leading to the above decisions. This Court cannot also review the decisions because of the possibility to have a different determination. The Court must concede the dominant authority of the executive over the policy making. Therefore, the legality of the policy rests on the factors relating to the decision making process. It is to be noted that the Central Government deliberated the issue and the relevant factors have been taken into account for the decision. The rationality of the decision cannot be adjudged on a proof of validity as a pre-requisite. The decision makers need not establish or demonstrate that the decision would secure its objectives. The ultimate decision by passage of time may prove the decision was right or wrong. The freedom of the decision makers to have the choice must be left to their discretion.

19. It is also possible for the executive authority to have policy experiment provided such exercise is made bona fide accentuated to promote the State interest. The policy makers might have thought that consequent upon ban, the necessity of capturing Sharks would dwindle and they may achieve its objectives to protect marine environment. These objectives cannot be termed as irrational. This Court cannot embark upon any enquiry to find out whether this would yield to any desired results or not. As already noted, the Central Government has taken into account the relevant factors. Therefore, there is no scope for this Court to sit upon the wisdom of the policy making. In the light of discussions as above, these writ petitions must fail. However, the respondents shall consider the request of the petitioners, if any made, to fulfil any pending export obligations till such period they deem fit to grant. Accordingly, all the writ petitions are dismissed. No costs.