

(2016) 04 MAD CK 0057

In the Madras High Court

Case No : Writ Petition No. 5019 of 2016.

M/s. Green Globe Trading Company

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 05-04-2016

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)(g)
Foreign Trade (Development and Regulation) Act, 1992 — Section 3, 5, 6
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 5(3)

Citation : (2016) 338 ELT 696 : (2016) 4 MLJ 224

Hon'ble Judges : R. Subbiah, J.

Bench : Single Bench

Advocate : Vijay Narayan, Senior Advocate for B. Satish Sundar, Advocate, for the Appellant; G. Rajagopalan, Additional Solicitor General for B. Rabu Manohar, Advocate and P.S. Raman, Senior Advocate for Raghavan Ramabadrhan, Advocate, for the Respondent

Final Decision : Allowed

Judgement

R. Subbiah, J. - The challenge in this writ petition is to the public notice dated 27.01.2016 issued by the fourth respondent wherein and by which the fourth respondent has imposed certain conditions while inviting applications for registration of sales contract for import of poppy seeds from China into India.

2. Brief facts which are essential for determination of the disputes involved in this writ petition are as under:-

(i) The petitioner is a registered dealer under the Tamil Nadu Value Added Tax Act and holds TIN NO. 33600662611 and CST No. 1132522. The petitioner is also in possession of Import Export Code (IEC) issued by the Director General of Foreign Trade bearing IEC No. 0412024047 for the purpose of import of spices, poppy seeds and other items. According to the petitioner, during the course of their business, they have intended to import poppy seeds from China, which according to them is permitted in terms of the Foreign Trade Policy in force from

time to time. The condition prescribed in this regard is that the import contract for specified quantities has to be submitted to the fourth respondent, who would register the contract pursuant to which imports will be permitted in respect of the quantity mentioned in the contract.

(ii) The petitioner would submit that hitherto, the issue relating to import of poppy seeds was agitated before the Allahabad High Court in PIL No. 22067 of 2013 filed by Ayurveda Sevashram Kalyan Samiti, Allahabad. By an order dated 29.11.2013, the Allahabad High Court has made certain observations in respect of import of poppy seeds into India. Pursuant to the above order, the Department of Revenue, Ministry of Finance, Government of India vide communication dated Nil. February 2014 addressed to the fourth respondent informed that the competent authority has approved certain guidelines mentioned therein for registering of import contracts by the fourth respondent. On the basis of the guidelines indicated in the communication dated Nil. February 2014, the first respondent issued a public notice approving extension of validity of contracts which were initially valid till 30.05.2015 and extending it from 31.05.2015 to 30.06.2015. In this regard, the first respondent also issued another communication dated 08.07.2014 to the fourth respondent relating to registration of import contracts for import of poppy seeds into India. In terms of the said communication, the provisional country caps were fixed relating to import of poppy seeds from Turkey, China and Crezh Republic. It was further mentioned in the said communication that the provisional country caps fixed would be apportioned to various applicants by the fourth respondent on first come first serve basis till the quantity of the country caps is reached provided the maximum quantity to be registered in respect of any particular applicant in the first instance would be 180 metric tons or 10 container loads. In the affidavit filed in support of the writ petition, reference was made to various similar public notices issued by the fourth respondent in violation of the Article 14 and 19(1)(g) of The Constitution of India. In similar fashion, according to the petitioner, the impugned public notice dated 27.01.2016 was issued relating to import of poppy seeds from China in clear violation of Article 14 and 19(1)(g) of The Constitution of India.

3. Mr. Vijay Narayan, learned senior counsel appearing for the petitioner attacked the impugned public notice issued by the fourth respondent on the following grounds:-

(i) The impugned public notice issued by the fourth respondent is in excess of jurisdiction conferred on the fourth respondent besides being violative of the constitutional guarantees provided under Article 14 and 19(1)(g) of the Constitution of India. According to the learned senior counsel for the petitioner, the conditions governing import and export fall within the jurisdiction of the Ministry of Commerce and Director General of Foreign Trade and it is totally out of scope of the fourth respondent. In this context, reliance was placed on the Order passed by the Allahabad High Court in PIL No. 22067 of 2013 filed by

Ayurveda Sevashram Kalyan Samiti, Allahabad in which an order dated 29.11.2013 was passed observing that the official respondents therein must ensure that poppy seeds illegally grown should not be allowed to be imported into India. A further direction was issued to ensure that the official respondents come out with a policy in respect of import of poppy seeds ensuring that only legally grown poppy seeds are imported into India. While so, the fourth respondent, purportedly in exercise of the powers conferred with the Ministry of Commerce and Director General of Trade, has come out with the impugned public notice relating to import of Poppy Seeds from China. It is further stated that Import and Export of goods and commodities are governed by the provisions of Foreign Trade (Development and Regulation) Act, 1992, particularly Sections 3, 5 and 6. As per the said Act, the power to formulate an export and import policy is exclusively vested with the Central Government. Even the power to amend the policy is vested with the Central Government. Such power is a legislative power in the nature of subordinate legislation and such powers cannot be delegated to any authority including the Director General of Foreign Trade or the fourth respondent.

(ii) As regards the source of power on the part of the fourth respondent, the Manual of the Government of India sets out the powers and duties of the fourth respondent as per the provisions of Export-Import Policy 2002-2007 issued by the Department of Commerce, Ministry of Industry, Government of India whereby the fourth respondent is empowered to impose three conditions namely (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 has 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. According to the learned Senior counsel for the petitioner, except the above three conditions, the fourth respondent has no right, power or jurisdiction to impose any other conditions contrary to the policy framed by the Central Government. The functions of the fourth respondent is only to satisfy that the import of the poppy seeds is done from one of the designated countries, the importer has a certificate from the competent authority of the exporting country that the opium poppy has been legally grown in that country and the import contract has been registered under him prior to import. Thus, apart from the three conditions stipulated above, the fourth respondent has no authority or right to impose any other conditions. In other words, the fourth respondent has to confine himself with the above three functions that are entrusted with him. The fourth respondent has to merely register the contract and he cannot act as a controlling authority to impose conditions for import of goods. In any event, the action of the fourth respondent in exercising jurisdiction as an executing authority is clearly illegal. The fourth respondent has to only exercise administrative and clerical powers in registering the contract and he cannot decide the quantity of the import of the goods.

(iii) According to the learned Senior counsel for the petitioner, the specification of quantity of 90 MTs by each of the applicant, fixation of limits on the quantity of imports for an importer to import poppy seeds for subsequent years are clearly without jurisdiction of the fourth respondent as they fall within the realm of Ministry of Commerce and Director General of Foreign Trade. Further, poppy seeds is freely importable subject to registration of the import contract with the office of the fourth respondent, however, by imposing the conditions for registration of import contracts more particularly from China is clearly out of the jurisdiction of the fourth respondent. As regards public notices relating to import of poppy seeds from Turkey, they are preceded by communications/notices clearly specifying the total availability of harvested crop in Turkey, quantity used for local consumption, quantity for export to countries other than India and specific quantity for export to India. However, such a clear specification is absent in the impugned public notice. Further, in the impugned public notice, it was indicated that if the quantity of poppy seeds is not available for allocation to all applicants, the quantity available for import to India from China would be allocated on drawal of lot basis and in such event, those who are not successful in the drawal of lot would be put on wait list and they will be considered for allocation of import of poppy seeds from China in the order of priority list drawn at the time of allocation of country cap to registered sales contract.

(iv) The learned senior counsel for the petitioner has drawn the attention of this Court to para No.9 and 10 of the impugned public notice wherein it is indicated that the applicant, after registration of sales contract, may surrender part or full of registered quantity by communicating in writing and received by the fourth respondent within 30 days from such registration and if an importer fails to import minimum of 50% of the quantity for import, less the quantity surrendered, he shall be debarred from registration of sales contract for a period of two years.

(v) The learned Senior counsel would contend that in paragraph 3 (ii) of the impugned public notice, it was indicated that registration of contract will have to be made only upto 11.02.2016, which is an unilateral condition imposed by the fourth respondent and for imposing such condition, the fourth respondent has no source or power. Similarly, in para No. 3 (iii), the fourth respondent prescribed a maximum quantity of 90 MTs for import and by virtue of imposing such condition, the fourth respondent amended the policy of Central Government on his own. Further, the procedure relating to adopting drawal of lots and the requirement that each importer can submit only one application and if more than one is submitted such applications will be rejected etc., have been unilateral and not traceable to any delegation or authority vested with the fourth respondent by the Central Government. According to the learned Senior counsel for the petitioner, the fourth respondent, in the impugned public notice, has issued number of conditions/restrictions by which he had substantially amended the statutory policy of the Government of India and it is clearly without authority of law besides being impermissible. The power to amend the policy is only vested

with the Central Government and the fourth respondent has no right, power or authority to impose conditions in contravention of the policies of the Central Government.

4. In support of his contentions, the learned senior counsel for the petitioner relied on the order passed by the Division Bench of the Bombay High Court in (Narendra Udesb v. Union of India) 2003 (1) Mh.LJ 155 to contend that the Export-Import Policy announced by the Central Government in exercise of power under Section 5 of the Foreign Trade (Development and Regulation) Act has statutory force and the power to amend the policy is within the exclusive domain of the Central Government. It was further observed that such power cannot be usurped even by the Director General of Foreign Trade in the guise of laying down regulatory measures. If the procedural norms are in conflict with the policy, then the policy will prevail and the procedural norms to the extent they are in conflict with the policy, will be declared as bad in law. The learned senior counsel for the petitioner also brought to the notice of this Court that the order of the Division Bench of the Bombay High Court mentioned above has been upheld by the Honourable Supreme Court in the decision reported in (2003) 158 ELT A275 (SC) in (Union of India v. Narendra Udesb).

5. The learned Senior Counsel for the petitioner also placed reliance on the decision of the Honourable Supreme Court in the case of (Atul Commodities Pvt Ltd v. Commissioner of Customs, Cochin) 2009 (235) ELT 385 (SC) to contend that the power to amend the foreign trade policy is vested in the Central Government whereas the power to clarify alone is vested in the Director General of Foreign Trade. The circulars issued for any clarification are clarificatory in nature and not mandatory in nature and such circulars will not confer any power on the fourth respondent to impose the conditions in the impugned public notice.

6. The learned Senior Counsel for the petitioner also relied the decision of the Honourable Supreme Court in (Director General of Foreign Trade and another v. Kanak Exports and another) 2015 SCC 123 to contend that the public notice issued by the fourth respondent is without jurisdiction and contrary to Section 5 of the Foreign Trade (Development and Regulation) Act, 1992. As per Section 5, the Central Government alone can formulate and announce the Exim Policy and resort to amend it from time to time.

7. Countering the submissions of the learned Senior counsel for the petitioner, the learned Additional Solicitor General appearing for the respondents 1 to 4, relying on the counter affidavit of the fourth respondent, opposed the writ petition by contending that the impugned public notice has been validly issued by the fourth respondent in exercise of discharge of statutory functions which are consistent with the purpose of implementing the policies of the Union Government. According to the learned Additional Solicitor General appearing for the respondents 1 to 4, since the number of applicants for poppy seeds were likely to increase manifold, it was decided by the first respondent to allow each eligible applicant to register their sale contract for 90 metric tonnes. The idea

was to ensure that either all or maximum number of applicants should get an opportunity to import poppy seed from China. This was only to avoid the possibility of cartelization and hoarding of poppy seeds. It is no doubt that the policy for registration of sales contract for import of poppy seeds from Turkey was framed by the first respondent and it was communicated by the fourth respondent by means of the public notice. The quantity mentioned in the public notice dated 27.01.2016 was based on the estimate of poppy seeds available for export to India as communicated by the competent authority of China to the fourth respondent. The public notice caters to a situation where the unsuccessful applicants in draw of lots are kept in waiting list. If any of the successful applicant subsequently surrender a part or full registered quantity, then the quantity so surrendered will be re-allocated to unsuccessful applicants so that the shortage of poppy seeds can be avoided. The public notice impugned in the writ petition is aimed to ensure that the importer does not frivolously get contracts registered in their favour to reduce the chance of registration by other applicants. In other words, the conditions incorporated in the public notice is to dissuade frivolous importers from registering the contract and in the larger interest of the importers.

8. According to the learned Additional Solicitor General appearing for the respondents 1 to 4, the period stipulated in the public notice for surrender of part or full registration is 30 days and the validity of registration for actual import is four months from the date of registration. By this the importer, who has registered a quantity but did not import even after lapse of 4 months without surrendering within the prescribed period will be debarred. Thus, the quantity surrendered by one importer can be re-allocated to another importer who is willing to import and thereby the shortage of poppy seeds can be avoided. This, according to the learned Additional Solicitor General appearing for the respondents 1 to 4, will not in any way violate the constitutional guarantees made under Article 14 or 19 (1) (g) of the Constitution of India.

9. The learned Additional Solicitor General appearing for the respondents 1 to 4 invited the attention of this Court to the order dated 29.11.2013 passed by the Allahabad High Court to impress upon the fact that the Allahabad High Court, in the said order has clarified that it is the role of the fourth respondent not only to satisfy whether the poppy seeds are imported from designated countries but also to ensure that such imports are within the quantity as produced from the legally cultivated opium seeds. Keeping this in view, a quantitative restriction is placed on the total quantity of imports permissible from designated countries. Therefore, the conditions imposed in the public notice, which is impugned in this writ petition, are in accordance with the observations made by the Allahabad High Court in the order dated 29.11.2013 and it cannot be said that it had unreasonably imposed restriction on import of poppy seeds.

10. The learned Additional Solicitor General appearing for the respondents 1 to 4 further submitted that it is true that the earlier public notice No. 7/2015 issued

by the fourth respondent on 14.09.2015 was subjected to challenge before this Court in WP No. 29806 of 2015 and this Court quashed the same on 05.02.2016. However, a reading of the order dated 05.02.2016 would indicate that this Court quashed the earlier public notice which relates to import of Poppy Seeds from Turkey and not from China. Further, the earlier public notice was quashed by this Court only to the extent to which it categorised the importer as A and B category on the basis of the quantity of import of goods. In the present notice which is impugned in this writ petition, there is no such categorisation and therefore the order dated 05.02.2016 passed by this Court in WP No. 29806 of 2015 cannot be relied on by the petitioner in this case.

11. As regards the source and power of the fourth respondent to impose certain conditions, which are challenged in this writ petition, the learned Additional Solicitor General relied on a letter dated 22.01.2016 issued by the Government of India, Department of Revenue enclosing a copy of the revised guidelines approved by the competent authority for registration of sales contracts for import of poppy seeds from China and Czech Republic. By placing reliance on the above letter dated 22.01.2016, the learned Additional Solicitor General for the respondents 1 to 4 would contend that the fourth respondent has power and authority to impose the conditions in the public notice, which is impugned in this writ petition.

12. The learned Additional Solicitor General appearing for the respondents 1 to 4 in order to substantiate his contentions, relied on Article 39 (2) of the Constitution of India and contend that in order to effectively implement the policies of the Government, the fourth respondent is empowered to exercise certain powers to have control over the material resources of the Country and to ensure that they are equally distributed to subserve the common good. Therefore also, the learned Additional Solicitor General would contend that it is not as though the fourth respondent has to confine himself with the powers vested under EXIM Policy relating to import of poppy seeds (HS Code : 1207 91 00) and the source and power of the fourth respondent is also traceable under Article 39 (2) of the Constitution of India and exercisable by virtue of the letter dated 22.01.2016 issued by the Government of India, Department of Revenue mentioned supra.

13. The learned Additional Solicitor General appearing for the respondents 1 to 4 would further contend that in response to the public notice, which is impugned in this writ petition, 35 applications involving quantity of 2769 MT of white poppy seeds and 3 applications for 255 MT of yellow poppy seeds have been received, however, there is no application received for import of blue poppy seeds from China. Since the quantity available for allocation to all the applicants is not sufficient, the method of drawal of lots has been adopted inter alia to ensure transparent selection of applicants. As regards the petitioner, he is not an applicant for registration of contracts for import of Poppy seeds from China in response to the impugned public notice. Therefore, the petitioner has no locus

standi to file this writ petition. Even in the past also, the petitioner never applied for import of poppy seeds from Chinna. Therefore, the learned Assistant Solicitor General appearing for the respondents 1 to 4 prayed for dismissal of this writ petition.

14. Mr. P.S. Raman, learned senior counsel appearing for the respondents 5 to 7, who were subsequently impleaded in this writ petition, would contend that the respondents 5 to 7 are regularly importing White poppy seeds from China which are non-narcotic in nature. The respondents 5 to 7 are private entities engaged in the business of facilitating import and export of spices, including poppy seeds into India inter alia remain as an interface between Government and Trade. The respondents 5 to 7 have also entered into import contract for various quantities of White Poppy seeds from China. Earlier, the fourth respondent issued a Public Notice No.7 of 2015 dated 14.09.2015 and it was struck down by this Court by an order dated 05.02.2016 in WP No. 29806 of 2015. Now, in the present writ petition, this Court has granted interim stay of operation of the public notice, which is impugned in this writ petition. By virtue of the interim stay granted by this Court, the import of white poppy seeds into India has come to a grinding halt and it had a wider ramification in the trade. As regards the petitioner is concerned, the learned senior counsel appearing for the respondents 5 to 7 would contend that the petitioner has no locus standi to file this writ petition. The petitioner is not an aggrieved person because at no point of time, he had imported poppy seeds. Even in response to the present public notice, he has not made any application to register a sales contract. Even during the past, the petitioner has not registered a single sales contract with the fourth respondent for import of poppy seeds. While so, there is no cause of action for the petitioner to approach this Court with this writ petition. Unless it is established by the petitioner that the conditions imposed in the public notice has in any way infringed his fundamental right to carry on business, the petitioner is estopped from maintaining this writ petition. As regards the power or authority of the fourth respondent to impose the conditions in the public notice, which are questioned in this writ petition, the learned Senior counsel for the respondents 5 to 7 would contend that the role of the fourth respondent is to ensure effective implementation of the policies of the Central Government. By placing reliance on Section 5 of the Narcotic Drugs and Psychotropic Substances Act, 1985, in short NDPS Act, the learned Senior counsel would contend that Section 5 (ii) of NDPS Act clearly provides that the fourth respondent is empowered to exercise all powers and perform all functions relating to the superintendence of the cultivation of opium poppy and production of opium and shall also exercise and perform such other powers and functions as may be entrusted to him by the Central Government. By quoting the various other provisions of NDPS Act, the learned Senior counsel for the respondents 5 to 7 would contend that the fourth respondent is well within his power, as a regulatory authority, to impose the conditions in the public notice for effective implementation of the policies of the Government and it needs no interference by this Court.

15. The learned senior counsel for the respondents 5 to 7 would further contend that the earlier public notice No.7 of 2015 issued by the fourth respondent was subjected to challenge in WP No. 29806 of 2015 and it was quashed by this Court only on the ground that the classification of importers under category A and B was not justified. In the said order, this Court directed the fourth respondent to come up with better policy to ensure level playing field to all importers. In the present notification, which is impugned in this writ petition, there is no such classification made by the fourth respondent. The public notice in question permits all the importers to participate in the import of goods without any restriction or discrimination. The restriction on quantity prescribed would only open the doors of opportunity to more number of applicants and it would boost the import trade. It is further stated that such conditions would only ensure transparency and remove discrimination among the importers. According to the learned senior counsel for the respondents 5 to 7, already import of poppy seeds from Turkey has been stopped by reason of the order dated 14.09.2015 quashing the public notice No. 7 of 2015 issued by the fourth respondent. By virtue of such order, the import of poppy seeds has completely come to a standstill. The price of poppy seeds in India has therefore sky-rocketed. While so, if the present public notice is quashed, even though it is validly issued by the fourth respondent, it will result in causing untold hardship and inconvenience to the respondents 5 to 7. On this ground also, the learned senior counsel for the respondents 5 to 7 prayed this Court to dismiss the writ petition.

16. I heard the learned senior counsel for the petitioner, learned Additional Solicitor General appearing for the respondents 1 to 4 as well as the learned senior counsel for the respondents 5 to 7. I had gone through the entire materials placed on record.

17. On consideration of the rival submissions of the counsel on either side, the primary question that arise for consideration in this writ petition is whether the fourth respondent is empowered to issue the public notice dated 27.01.2016 by imposing certain conditions over and above the three conditions stipulated in Chapter 12 of Exim Code 1207 91 00 relating import of poppy seeds. For examining the source of power of the fourth respondent in detail, it is necessary to look into the three conditions which reads as follows:-:-

"(i) Import permitted only from Australia, Austria, France, China, Hungary, The Netherlands, Poland, Slovenia, Spain, Turkey and Czech Republic

(ii) The importer shall produce an appropriate certificate from the competent authority of the exporting country that opium poppy have been grown licitly/legally in that country as per requirement of International Narcotics Control Board, Vienna; and

(iii) All import contracts for this item shall compulsorily be registered with the Narcotics Commissioner, Gwalior prior to import.

18. It is the main contention adduced on behalf of the petitioner that except the

above three conditions, the fourth respondent has no jurisdiction or right or authority to impose any other conditions relating to import of poppy seeds and therefore the other conditions imposed in the impugned public notice are without authority of law and it amounts to altering, amending or varying the policy framed by the Central Government. In this regard, Sections 3, 5 and 6 of the Foreign Trade (Development and Regulation) Act, 1952 have to be looked into and they are extracted hereunder:-

"3. (i) The Central Government may, by order published in the official gazette, make provision for the development and regulation of foreign trade by facilitating imports and increasing exports.

(ii) The Central Government may also, by order published in the official gazette, make provision for prohibiting, restricting or otherwise regulating, in all cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the Order, the import or export of goods.

(iii) All goods to which any order under sub-section (2) applies shall be deemed to be goods the import of export of which has been prohibited under Section 11 of the Customs Act, 1962 and all the provisions of that Act shall have effect accordingly.

5. The Central Government may, from time to time, formulate and announce by notification in the official gazette the export and import policy and may also, in like manner, amend that policy.

6. (i) The Central Government may appoint any person to be the Director General of Foreign Trade for the purposes of this Act

`(ii) The Director General shall advise the Central Government in the formulation of the export and import policy and shall be responsible for carrying out that policy

(iii) The Central Government may, by order published in the official gazette, direct that any power exercisable by it under this Act (other than the powers under Section 3, 5, 15, 16 and 19) may also be exercised, in such cases and subject to such condition, by the Director General or such other officer subordinate to the Director General, as may be prescribed in the order."

19. On a reading of Section 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 delegation 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, 1952.

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.

20. A reading of Section 5 of the Foreign Trade (Development and Regulation) Act, 1952 would indicate that the Central Government may, from time to time, formulate and announce the Exim Policy. Such announcement or formulation of policy has to be made by way of publication of a notification in the official gazette. A notification in the official gazette is therefore necessary for formulating a policy or for making amendment to the existing policy. In the absence of any such notification published in the official gazette, the imposition of conditions by the fourth respondent in the impugned public notice is clearly without jurisdiction and it amount to amending the Exim Policy. Therefore, the contentions urged on behalf of the petitioner that the fourth respondent has no jurisdiction to impose the conditions relating to drawal of lots, restricting the import quantity and entertainment of only one application from the importer etc., are well founded. Therefore, I hold that the conditions imposed in the public notice in question by the fourth respondent are without jurisdiction and beyond the scope of the policies framed by the Central Government.

21. Admittedly, the three conditions imposed in Chapter 12 of Exim Code 1207 91 00 have not been amended by the Central Government by issuing a notification in the official gazette. However, the learned Additional Solicitor General placed reliance on a letter dated 22.01.2016 issued by the Government of India, Department of Revenue enclosing a copy of the revised guidelines approved by the competent authority for registration of sales contracts for import of poppy seeds from China and Czech Republic. By placing reliance on the above letter dated 22.01.2016, the learned Additional Solicitor General traces the power of the fourth respondent to impose the conditions in the public notice, which is impugned in this writ petition, as a measure of regulating and

controlling the import of poppy seeds. I am unable to accept this contention. It is well settled that circulars, administrative instructions or letters of authorisation cannot over ride the statute. The Export-Import Policy announced by the Central Government in exercise of power under Section 5 of the Foreign Trade (Development and Regulation) Act has statutory force and the power to amend the policy is within the exclusive domain of the Central Government. While so, without making any amendment to the Export Import Policy framed by the Central Government, even the Central Government cannot delegate power to the fourth respondent to exercise such powers which are not available in the Export-Import Policy. In such circumstances, the letter dated 22.01.2016 relied on by the learned Additional Solicitor General will not confer any power on the fourth respondent to impose the conditions in the impugned public notice.

22. The learned Additional Solicitor General appearing for the respondents 1 to 4 as also the learned senior counsel for the respondents 5 to 7 would contend that the power of the fourth respondent to impose the additional conditions in the public notice is traceable to Section 5 (3) of the NDPS Act and therefore it cannot be said that the fourth respondent is not empowered to impose such conditions. Such a contention cannot be accepted. The power conferred on the fourth respondent as Narcotic Commissioner exercisable under Section 5 (3) of the NDPS Act cannot be extended to or stretched to exercise powers under the Exim Code. The object with which NDPS Act has been framed is to have a statutory control over narcotic drugs through out India and to prohibit and/or regulate the trafficking of illicit drug and drug abuse at national and international level. As per the provisions of NDPS Act, even a mere possession of narcotic drugs or psychotropic substance would attract stringent punishment and as a Officer appointed by the Central Government, the fourth respondent can exercise all powers and functions relating to superintendence and production of opium. Whereas, the object with which the Import and Export policy framed by the Central Government is to enhance and boost trade relating to poppy seeds, which are nonnarcotic in nature and thereby improve the economic development of the Country. For this purpose, certain powers are vested on the fourth respondent under Exim Code to have a check and control of the goods to be imported from other foreign Countries. While so, in my considered opinion, the powers conferred on the fourth respondent under NDPS Act and the Import and Export policy framed by the Central Government operates on different fields and it cannot be said that the fourth respondent can exercise his statutory power conferred under Section 5 of NDPS Act for the purpose of restricting or regulating the import of opium seeds traceable under Exim Code.

23. In the decisions relied on by the learned Senior Counsel for the petitioner reported in (i) (Narendra Udesh v. Union of India) 2003 (1) Mh.LJ 155 rendered by the Division Bench of the Bombay High Court (ii) (Atul Commodities Pvt Ltd v. Commissioner of Customs, Cochin) 2009 (235) ELT 385 (SC) it was categorically held that the power to amend the foreign trade policy is vested only with the Central Government. The ratio laid down by the Division Bench of the Bombay

High Court and the Honourable Supreme Court in the above referred to decisions squarely applicable to the facts and circumstances of this case.

24. Similarly, in the decision of the Honourable Supreme Court in (Director General of Foreign Trade and another v. Kanak Exports and another) 2015 SCC 123 relied on by the learned Senior Counsel for the petitioner, in an identical case, it was clearly held that the public notice issued by the fourth respondent is without jurisdiction and as per Section 5 of the Foreign Trade (Development and Regulation) Act, 1992, the Central Government alone can formulate and announce the Exim Policy and resort to amend it from time to time.

25. As regards the submission of the learned Senior counsel for the respondents 5 to 7 relating to the locus standi of the petitioner to file this writ petition, it is seen from the records that the petitioner company has obtained Certificate of Importer-Exporter Code (IEC) issued by the Additional Director General of Foreign Trade on 28.09.2012 for the purpose of commencing import of spices, poppy seeds and other items. It is clearly stated in paragraph No.4 of the affidavit filed in support of the writ petition that the petitioner, during the course of his business, sought to import poppy seeds from China. However, according to the learned senior counsel for the petitioner, the petitioner could not submit the necessary application for registration of the import contract in view of the multiple conditions imposed by the fourth respondent in the impugned public notice. In such view of the matter, I am of the view that the petitioner has a genuine grievance to be ventilated as against the impugned public notice issued by the fourth respondent inasmuch as it prohibits and restricts him to carry on his import business. Therefore, in my considered view, the petitioner has a right to question the impugned public notice issued by the fourth respondent especially when it violates the fundamental rights guaranteed to the petitioner as enshrined under Article 14 and 19(1)(g) of The Constitution of India to carry on his legitimate business of import of poppy seeds and other goods.

26. The learned Senior counsel for petitioner has drawn the attention of this Court to the order dated 29.11.2013 passed by the Allahabad High Court in PIL No.22067/2013 wherein an identical public notice issued by the fourth respondent was subjected to challenge. The writ petition was filed by Ayurveda Sewashram Kalyan Samithi through its Secretary against the Government of India and others. The writ petition was disposed of by holding that import and export policy formulated by Union Government is statutory in nature and a circular or administrative instructions cannot over ride it. In this case also, the same question arise for consideration by this Court. As stated above, in the absence of any amendment to Import-Export policy framed by Central Government by publishing a notification in the official gazette, it has to be held that the fourth respondent is not empowered to impose the conditions in the impugned public notice.

27. Though it is contended by the learned Additional Solicitor General that the fourth respondent has issued the impugned notification on the strength of

communication dated Nil February 2014 sent by the Ministry of Finance, Department of Revenue, in my considered opinion, as observed above, when the Import and Export Policy formulated by the Union Government is statutory in nature, the so-called instructions issued by the Ministry of Finance, Department of Revenue will neither override the said policy nor the said communication will serve as a source of power for the fourth respondent to incorporate the conditions in the impugned public notification.

28. As regards to the reliance placed on Article 39 (2) of the Constitution of India by the learned Additional Solicitor General appearing for the respondents 1 to 4, it relates to a State subject and the power has been given to the officers of the State to ensure equal distribution of material resources to subserve the common good. While so, Article 39 (2) of the Constitution of India will not in any way be a source of power or provides a spring board to the fourth respondent to impose the conditions in the impugned public notice.

29. For all the above reasons, the writ petition is allowed by setting aside the impugned public notice dated 27.01.2016 of the fourth respondent. No costs. Consequently, connected WMP Nos. 4374 and 4375 of 2016 are closed.