

(2016) 01 KAR CK 0049

In the Karnataka High Court

Case No : Writ Petition No. 42816 of 2015 (GM-RES)

Om Traders

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 05-01-2016

Acts Referred:

Citation : (2016) 335 ELT 589

Hon'ble Judges : Anand Byrareddy, J.

Bench : Single Bench

Advocate : S/Shri Vijay Narayan, Senior Advocate and Prasad P, Advocate, for the Petitioner; S/Shri Jeevan J. Neeralgi, CGSC, Prabhulinga K. Navadgi, Senior Advocate, Chandan and Ajay J. Nandalike, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Anand Byrareddy, J.—The petitioner is said to be a registered dealer under the Karnataka Value Added Tax Act, 2003 (hereinafter referred to as the "KVAT Act", for brevity). The petitioner is said to be issued a certificate by the Joint Director General of Foreign Trade. The petitioner is said to be a dealer in spices, pepper and other food items. The certificate obtained as aforesaid enables the petitioner to import the said commodities.

It is stated that in the course of his business, the petitioner sought to import 180 tonnes of poppy seeds from Turkey on the basis of a contract entered into with their overseas suppliers dated 31-7-2015. It is stated that the Foreign Trade Policy envisaged submission of import contracts for specified quantities to the office of the Narcotics Commissioner, Central Bureau of Narcotics, Gwalior, who in turn would register the contract, pursuant to which the imports were permitted. However, it is said that the said officer, purportedly acting in terms of a judgment of the High Court of Allahabad, dated 29-11-2013 [2014 (305) E.L.T. 246 (All.)] had unilaterally changed the existing procedure for import of poppy seeds from "free import" to import on "first come first served basis". This according to the petitioner was on a misinterpretation of the said judgment.

It is stated that the Commissioner of Narcotics, the fourth respondent herein, had called for registration of sale contracts for import of poppy seeds from Turkey for the financial year 2015-16 on 10-8-2015 on the website of the said office, after office hours. It was therefore, inexplicable that applications are shown to have been received, by courier and post within 18 hours thereof, from such far flung places as Pune, Delhi, Shahajahanpur, Kanpur and Mumbai. Leading to a presumption that the said applicants obviously had prior information of the notice and the details required to be furnished.

It is stated that earlier, the High Court of Allahabad in a public interest litigation (PIL No. 22067/2013) had, by a judgment dated 29-11-2013 [2014 (305) E.L.T. 246 (All.)], 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, had communicated the following to the Commissioner of Narcotics, in February, 2014.

"The competent authority has approved the following guidelines for registering of import contracts by the Narcotics Commissioner :-

(a) For the current financial year (2013-14), in which there are less than 2 months left, imports may be permitted on the basis of valid import contracts, subject to country caps. The caps for the countries may be determined by the Narcotics Commissioner after ascertaining the production and stocks of the respective countries. No imports would be allowed from a particular country, once the cap for the said country is reached.

To implement this decision, Narcotics Commissioner will have to be in regular touch with the Customs authorities of the ports of import about the quantum of imports of poppy seeds already made in the year. He will also need to inform the ports when the cap for any particular country is reached so that no further imports from the said country take place from any port.

(b) For the FY 2014-15 onwards, the following steps will be taken by the Narcotics Commissioner :

I. He will determine the exportable surplus of the exporting countries of poppy seeds so as to arrive at the country caps.

II. Poppy seeds import contracts will be registered on first come first served basis, till the caps for the respective countries is reached.

III. The import contracts will be valid for only 3 months. If the quantity mentioned in the contract is not imported in this period, or only partly imported, the said quantity or the balance quantity will be released and can be allotted to other importers, again on first come first served basis.

IV. The Narcotics Commissioner will seek the country of origin certificate, even at the time of registering of import contracts.

(c) Receipt of this communication may please be acknowledged."

Pursuant to the above, a Public Notice dated 29-5-2014 was said to have been issued by respondent No. 1 approving the extension of validity for contracts, which were valid till 31-5-2015 to 30-6-2015.

It is stated that on 8-7-2014, respondent No. 1 is again said to have issued detailed guidelines addressed to respondent No. 4 with regard to registration of import contracts for import of poppy seeds. In terms of the said communication, the provisional country caps were said to have been fixed in respect of import of poppy seeds from Turkey, China and the Czech Republic. It was also said to have been indicated that it would be on a first come-first served basis, till the quantity of the country cap is reached, provided that the maximum quantity to be registered in respect of any particular applicant in the first instance would be 180 metric tonnes or 10 container loads. However, the said restriction of quantity for import contract was not made applicable in respect of imports from China and the Czech Republic.

It is stated that by a Public Notice dated 17-11-2014, details of white poppy seeds available in Turkey for export to India as on 30-9-2014 was indicated, while also stating that the country cap would be determined in due course. And vide communication dated 26-12-2014, respondent No. 1 had informed respondent No. 4 of the country caps for import of poppy seeds from Turkey for the financial year 2014-15 and other guidelines in relation thereto.

It is stated that two public notices were said to have been issued thereafter by the Central Bureau of Narcotics, inviting applications from importers for registration of sale contracts for import of poppy seeds into India for the year 2015-16, wherein all importers were said to have been called upon to furnish details of total quantity of poppy seeds imported by 20-5-2015, along with all documents-endorsed by the Customs officials.

It is stated that respondent No. 4 had issued a Public Notice dated 4-6-2015 calling upon 24 importers, including the petitioner, to furnish the details of the total quantity of the poppy seeds imported, duly endorsed by the Customs authorities, by 10-6-2015, failing which it was informed that the said importers would not be considered for registration. This was followed by a further Public Notice dated 3-7-2015, wherein the final country caps with regard to import of poppy seeds from China and the Czech Republic were informed.

Pursuant to the above notices, respondent No. 4 is said to have issued a further Public Notice dated 10-8-2015 calling for applications for registration of sale contracts for import of poppy seeds from Turkey and it was indicated that applications would be accepted up to a limit of 18594 metric tonnes as fixed. It was also indicated that applications received after the above limit was met would be returned.

It is claimed that the above notice dated 10-8-2015 was issued after office hours on that day and hence, the petitioner had responded to the same at the earliest, namely, on 11-8-2015. The petitioner's application had been shown to have

received by the respondents at Gwalior on 14-8-2015.

By a Public Notice dated 18-8-2015, respondent No. 4 had tabulated the applications received and the petitioner seeks to highlight that from the list, it is seen that 22 applications were received within 18 hours of the issuance of the Public Notice dated 10-8-2015. This according to the petitioner is a physical impossibility. And further the petitioner's application does not find mention in the list.

It is stated that the above action of favouring particular applicants in a shady fashion was sought to be questioned by another importer, before this Court in a writ petition in WP No. 36202/2015. This Court, by its order dated 27-8-2015, had directed the very respondents not to process the applications which had been received in response to the Public Notice dated 18-8-2015.

Further, yet another importer had also questioned the very notifications before the Madras High Court and a similar restraint order had been passed therein.

Pursuant to the above interim orders, respondent No. 4 is said to have issued a Public Notice dated 8-9-2015, to state that no further action would be taken in processing the applications received for registration of sales contracts for import of poppy seeds from Turkey for the year 2015-16.

The fourth respondent has now issued yet another Public Notice dated 14-9-2015 inviting applications for registration of sales contract pertaining to the import of poppy seeds from Turkey for the year 2015-16. This has been said to have been challenged by another importer before the Madras High Court in a writ petition in WP No. 29806/2015 and the Court had granted an interim order restraining further action by the respondents, as per its order dated 22-9-2015.

2. The present petition seeks to challenge the very same notification dated 14-9-2015. It is contended by the learned counsel for the petitioner that the procedure of accepting the earliest applications on a first come first served basis, is a procedure that is held to be bad in law by the Supreme Court in the case of *Centre for Public Interest Litigation v. Union of India*, (2012) 3 SCC 1.

It is contended that the respondents had not provided sufficient time for applicants to submit their applications in respect of imports from Turkey, unlike in respect of the imports from China and the Czech Republic. And that the entire procedure for registration of sale contracts for import of poppy seeds from those countries is completely different from the procedure adopted in respect of Turkey.

It is stated that the Public Notice dated 14-9-2015 seeks to apportion the provisional country cap of 14875 MT of poppy seeds for import from Turkey on the basis of two categories of applicants, viz., Category-A and Category-B. The former is defined as applicants who have imported poppy seeds from Turkey to India in at least three financial years during the last five years. Category-B applicants have not been defined. But would be allotted such quantity of the poppy seeds as remain after exhausting the quantity earmarked for category-A.

This according to the petitioner clearly would encourage cartels of importers who would monopolize the trade indefinitely as the Category-B importers are those who may have never imported earlier and would indefinitely remain outside the zone of consideration.

It is pointed out that the present policy adopted by the respondents, allows persons who had imported poppy seeds in the past, falling under Category-A to register sales contract for a quantity of 270 MT as against persons falling under Category-B, who are said to be eligible to register a sales contract only for a quantity of up to 180 MT. It is also pointed out that the Public Notice dated 14-9-2015 also contemplates that in the event the quantity available for allocation is insufficient, selection of applicants would be through draw of lots. This procedure is what was frowned upon by this Court as well as by the Madras High Court in having granted interim orders earlier, as stated above.

It is on the above and other incidental grounds that the petitioner seeks to challenge the action of the respondents.

3. The learned senior advocate, Shri Prabhuling Navadgi, appearing for the counsel for respondent Nos. 1 and 4, would on the other hand, contend that the petitioner had not chosen to participate in the exercise of filing any application to register sale contracts for the import of poppy seeds from Turkey to India for the period 2015-16, but has chosen to file this petition to stall the proceedings in that regard.

It is admitted that the earlier public notices calling for registration of contracts for import of poppy seeds, vide notification dated 10-8-2015 and another notification dated 18-8-2015, wherein the respondents had detailed the list of applicants eligible for registration. In view of multiple challenges to the said notifications, the same had been withdrawn.

As the Government of India had framed a new policy which provides for selection of applicants on the basis of draw of lots, the presently impugned notification was issued. It is emphasized that the delay in import of poppy seeds would lead to an increase in demand and an increase in the price, thereby affecting the common man.

It is pointed out that the several grounds raised with reference to the earlier notifications, which have now been abandoned, are no longer relevant and ought to be ignored. It is contended that there are the following issues that are sought to be urged, which may require to be met. The question regarding categorization of importers and the question regarding the concept of provisional country cap with regard to imports from Turkey and the absence of such provisional country cap with regard to imports from China and the Czech Republic.

The contention that the impugned notification could not have been issued during the pendency of the earlier writ petitions, is concerned, it is pointed out that the earlier writ petitions sought to challenge notifications, which were abandoned by

the respondents and with an honest attempt to address grievances raised by several importers and to usher in a fair policy, the present notification has been issued.

It is also pointed out that the petitioner was a defaulter. In that, he was a registered importer for the year 2014-15. The petitioner was required to submit details of imports against their registered sale contracts, which the petitioner had failed to comply with. It was only after issuance of a notice in that regard that the petitioner had sought to comply.

It is pointed out that insofar as categorization of importers is with a view to ensure that regular importers do not suffer and at the same time, new entrants also being provided an opportunity, the applicants are sought to be divided into two categories based on their past record. The policy guidelines allow registration of quantity up to 270 metric tonnes in respect of Category-A applicants and 180 MT in respect of Category-B applicants. The former category are presumably experienced and have the infrastructure for efficient import and the latter are eased into the trade by providing a reasonable allocation of the import.

It is pointed out that during the crop year 2014-15, contracts for a total quantity of 15375 MT were registered for import. However, the actual import was only 13669 MT. This short-fall had created an artificial scarcity, thereby resulting in rise in prices. It was hence justified to have a classification of assured importers and the casual importers who had obtained licence, but never imported.

As regards the fixation of a provisional country cap with respect to Turkey was for the reason that with regard to China and the Czech Republic, the availability of seeds were much higher than the demand and hence there was no need to fix any such cap. However, in respect of imports from Turkey, the concept of provisional country cap was adopted in order to ensure imports as per demand.

Further, respondent No. 4 has furnished factual particulars at the hearing, to demonstrate that there is no unfair treatment by virtue of the policy now adopted. It is said that there were 40 applicants in Category-A, importers who have imported poppy seeds from Turkey in three years out of the last five years. And that there were 183 applicants in Category-B. The category-A applicants had imported a total of 58624 MT of poppy seeds from Turkey for the last five years and the 183 importers in Category-B had imported 8845 MT of poppy seeds in the last five years. On the basis of the above import statistics, the average ratio of Category-A importers is about 86% and the average ratio of Category-B importers is about 14%.

That as per the information provided by the Turkish Embassy as to the quantity of white poppy seeds available for export to India, the Government of India has fixed the country cap for importing 23390 MT. According to the average ratio calculated above, Category-A importers would be eligible for around 20115.40 MT and only 270 MT would be allotted per importer. Hence, if all the Category-A importers are allotted the maximum allocated, it would only amount to 10800 MT

and there would be an abundant balance of 12590 MT available for Category-B importers and at least 70 or more of them would get their full quota. Hence, the argument sought to be canvassed of an unfair treatment to category-B importers is sought to be demonstrated as being untenable.

4. The learned counsel for the petitioner, however, would yet contend that the policy adopted by the respondents is wholly unreasonable and unfair and that it results in discrimination and would suggest the following options to be adopted by the respondents which would ensure a fair policy.

"Suggestions for fair policy for import of poppy seeds from Turkey

Option I

1. All importers of poppy seeds should be allowed to register their contracts with the Narcotics Commissioner, regardless of quantity.
2. Once the provisional country cap is announced, imports will be permitted up to the limit of the provisional country cap.
3. All imports should be accompanied by a certificate from the Turkish authorities that the poppy seeds have been legally grown in Turkey as per the requirements of International Narcotics Control Board. On production of the certificate the goods will be cleared.
4. The same procedure shall be adopted once the final country cap is determined.
5. The Narcotics Commissioner shall ensure that the EDI (electronic data interchange) system is set up in such a way that once the country cap is achieved, the system will not accept any further bills of entry in respect of import of poppy seeds.
6. This system will ensure that all importers get equal opportunity to import poppy seeds, without any categorization or preferential treatment.
7. This suggestion may require a clarification from the Allahabad High Court.

Option II

1. The provisional country cap is announced on the basis of legally grown poppy in Turkey.
2. Importers will be free to enter into contracts with their foreign suppliers. Once the goods are loaded onto the ship along with a Bill of lading and a certificate from the Turkish authorities that the poppy seeds are legally grown, the importer can register the contract with the Narcotics Commissioner.
3. Once the quantity of imports reach the country cap, the Narcotics Commissioner will stop registering further contracts.
4. The same procedure shall be adopted once the final country cap is determined."

5. In the light of the above rival contentions, it is an admitted fact that the petitioner is not an applicant seeking registration of any sale contracts for the import of poppy seeds from Turkey, as against the impugned notification. The mala fides urged against the respondents, in relation to the earlier public notifications are no longer relevant as the respondents have abandoned the said notifications.

6. This would only require tile limited questions of whether the policy now sought to be adopted by the respondents of categorization of importers lacks a rational basis. As has been demonstrated by the respondents in relation to the actual figures as to the number of applicants and the quantity available for allocation, it cannot be said that it leads to any imbalance or is arbitrary. It may not be the best policy that could have been adopted by the respondents, but it cannot be characterized as illegal or arbitrary.

7. The explanation offered by the respondents as to the reason and rationale in adopting a prescription of a provisional cap and a country cap, insofar as the imports from Turkey is concerned, is also acceptable. Hence, the petition lacks merit and is hereby dismissed.

8. However, the options suggested by the petitioner do not appear to be implausible of adoption, which the respondents should also take into consideration for future application and implementation in regulating the trade.