

(2018) 10 MP CK 0021

In the Madhya Pradesh High Court

Case No : Writ Petition No. 21438 Of 2018

Siddhi Vinayak & Another

APPELLANT

Vs

Union of India & Others

RESPONDENT

Date of Decision : 25-10-2018

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19(1), 19(1)(g), 19(6), 21
Foreign Trade (Development and Regulation) Act, 1992 — Section 3, 5, 6, 20
Customs Act, 1962 — Section 11
Central Excise and Salt Act, 1944 — Section 5A(1)

Citation : (2018) 10 MP CK 0021

Hon'ble Judges : S.C. Sharma, J;Virender Singh, J

Bench : Division Bench

Advocate : Piyush Mathur, M.S. Dwivedi, Prasanna Prasad

Judgement

The petitioner before this Court has filed present petition being aggrieved by the order dated 30/08/2018 passed by the Director General of Foreign Trade, New Delhi by which a restriction has been placed upon importing chickpeas.

02- The petitioner's contention is that the petitioner is a Partnership Firm registered under the provisions of Indian Partnership Act and has authorized petitioner No.2 to file the present writ petition. The petitioner Firm is engaged in the business of Import - Export of agriculture produce and other commodities from International Market and a certificate to that effect has been filed by the petitioner Firm issued by Ministry of Commerce and Industry.

03- The petitioners have further stated that as per the provision as contained in Section 5 of the Foreign Trade (Development and Regulation) Act, 1992, the power has been conferred upon Central Government to frame a Export Import Policy (EXIM Policy) and consequently a policy has been framed by the Central Government known as Foreign Trade Policy, 2015-2020 in which Exim Code No.0713 10 00, Item Description - Peas finds place in the category of Free Trade.

04- The petitioners have also stated that the petitioner Firm is engaged in the

business of import of Peas since 2014 and has entered into some contract for import of Yellow Peas by executing agreements on the agreed terms and conditions between the parties by depositing part payment in the bank account of seller for supply of Yellow Peas through International Banking System / Channel between 20/03/2018 to 19/04/2018 as per prevailing Exim Policy. The petitioner Firm has entered into as many as eleven contracts.

05- The petitioner Firm has further stated that the respondent No.2 Director General of Foreign Trade has changed the Import Policy for Yellow Peas for which the respondent No.2 has issued a notification dated 25/04/2018 and has amended the policy regarding Import of Yellow Peas bearing Exim Code No.0713 10 00 from free trade to restricted by giving it retrospective effect i.e. w.e.f. 01/04/2018 to 30/06/2018. Learned counsel has further stated that by virtue of aforesaid notification, the Import Policy for Yellow Peas under Exim Code 0713 10 00 is revised from "free" to "restricted" for a period of three month only.

06- The petitioners have further stated that as per the notification dated 25/04/2018, two conditions were imposed, first that the quantity of Yellow Peas will not be extended from One Lakh metric ton and secondly the permissible mode of payment will include advance part payment through banking channel and only on fulfillment of the aforesaid conditions, persons were permitted to import Yellow Peas. The petitioner has further stated that by virtue of notification issued by the respondent No.2, the petitioner Firm was also eligible to register with the Officers of the DGFT as the petitioner Firm has already entered into the contract for import of Yellow Peas prior to issuance of notification dated 25/04/2018.

07- The petitioner Firm has thereafter, made a request to respondent No.4 for registration of transactions for import of Yellow Peas by submitting an application on 26/04/2018, requesting the registration of contracts and again submitted an application on 03/05/2018 furnishing all minute details of transactions as well as mode of payment of account along with relevant documents. The petitioner Firm has further stated that transactions entered into by the petitioner were genuine transactions and the petitioner Firm has obtained Import Licence and has paid requisite fees for the same.

08- The petitioner has further stated that another trade notice dated 09/05/2018 was issued directing implementation of notification dated 25/04/2018 and also directing the members of trade to provide information with respect of contracts for import of Peas along with all requisite information and to supply supporting documents on or before 18/05/2018 enabling the Directorate to lay down further procedure for import of remaining quantity.

09- The petitioners pursuant to the aforesaid trade notice sent an e-mail to respondent No.2 on 11/05/2018 by annexing all purchase and advance payments with acknowledgment and also stated they have already submitted all the details of import contracts along with the requisite documents. The petitioners have

further stated that another trade notice was issued on 16/05/2018, wherein clarification was made clarifying that Import Policy of item under Exim Code No.0713 10 00-Peas, which includes all Peas has been restricted and it is not restricted to Yellow Peas only and the notification will also be applicable prospectively from the date of notification.

10- The petitioner Firm has further stated that the respondent No.2 has issued further trade notice on 18/05/2018 and the same was contrary to the conditions stipulated in the notification dated 25/04/2018 but was also against the conditions mentioned in the earlier trade notice dated 09/05/2018 and 16/05/2018. By the aforesaid notification, it was made clear that the respondent No.2 will permit those contracts for registration, wherein part payment

has been made, however, in the earlier notification dated 18/05/2018, it was clarified that respondent No.2 will permit import of Yellow Peas only against the contracts, wherein full or 100% advance payment was made prior to 25/04/2018.

11- In the trade notice dated 18/05/2018, there were certain other instructions for cancellation / recall of all the registration certificates, which have already been issued. The petitioner's contention is that they were expecting that all of their trade contracts will be registered with respondent No.2 to 4 as they were fulfilling the terms conditions stated in notification dated 25/04/2018, 09/05/2018 and 16/05/2018, however, the respondents are not allowing the registration of import contracts despite the fact that import contracts of petitioner's Firm were prior to 25/04/2018.

12- The petitioners submitted various representations, various e-mails in the matter and the grievance is that nothing has been done by the respondents. It was also stated that in case of identically placed persons and other traders, who were on similar footings, registration of contract was done by the respondents. The petitioner Firm has further stated that being aggrieved by notification dated 18/05/2018, a writ petition was preferred i.e. Writ Petition No.12627/2018 and notices were issued on 11/06/2018.

13- Further contention of the petitioners is that the petitioner's shipment arrived at Nhavha Shva Port, Mumbai and the goods were not being cleared by the Custom authorities on account of non-availability of Registration Certificate and lots were divided in two parts for which request letter has been submitted by the petitioner Firm on 28/06/2018. The petitioner Firm has further stated that in the meanwhile, the original notification dated 25/04/2018 expired on 30/06/2018 and a fresh notification was issued on 02/07/2018 by which the restriction was extended up to 30/09/2018.

14- The petitioner Firm has further stated that during the pendency of the Writ Petition No.12627/2018, the respondent No.2 has issued Registration Certificates on 10/07/2018 in the name of the petitioner Firm, however, the quantity of Yellow Peas has been reduced arbitrarily to the tune of the amount paid as a part payment and not as the whole quantity as contracted by the petitioners. The

petitioner Firm has further stated that an interim order was passed in Writ Petition No.12627/2018, but no reply was filed by the respondents and interim order was passed by this Court on 18/05/2018. The petitioner after obtaining a copy of interim order dated 18/05/2018 approached the respondents for issuance of Registration Certificates on 27/07/2018 and again a fresh trade notice was issued on 17/08/2018 by which Registration Certificate for import of minimum quantity of 125 Metric Ton of Peas or less per contract irrespective of advance payment was to be entertained. 15- In the meanwhile, the petitioner Firm has received a Commercial notice from Exporter ILTA that the requisite quantity of Yellow Peas amounting to 257.510 MTs will be shipped for Kolkata Port through Invoice dated 19/08/2018 and as the petitioner Firm is not having Registration Certificate for the said quantity, it is not in a position to receive the same. The petitioner Firm again based upon notification dated 17/08/2018 requested on 25/08/2018 to the respondents to issue fresh Registration Certificate of minimum quantity of 125 Metric Tons in favour of the petitioner Firm and the respondents have issued the Registration Certificate on 29/08/2018 by which permissions were granted to rest of the quantity by deducting the quantity from the earlier Registration Certificates issued on 10/07/2018.

16- While the writ petition was pending, another notification was issued on 29/08/2018, withdrawing the earlier notification dated 02/07/2018, meaning thereby, restriction on import of Peas was withdrawn. Thereafter, the petition was listed before this Court on 30/08/2018 and as the basic notification itself was withdrawn, the petition was disposed of as infructuous. The petitioner's contention is that on the same date i.e. on 30/08/2018 a fresh notification was issued whereby again restriction has been imposed on import of Peas classified under Exim Code 0713 10 00. 17- The petitioner's grievance is that the petitioner should be permitted to import Peas in respect of all contracts entered by the petitioner prior to imposition of restriction without insisting upon the condition of 100% deposit as advance payment. The petitioner Firm has further stated that on the day the notification was withdrawn in respect of restrictions placed on import i.e. on 29/08/2018 two big operators in the field from Gujarat were permitted to lift the entire quantity and on the next day again restriction was imposed by the respondents.

18- The petitioners have raised various grounds while challenging the impugned notification dated 30/08/2018. Their contention is that the impugned action of the respondents in issuing successive notifications without there being any justification and crisis situation in the Indian market is against the aims and object of Exim Policy of 2015-2020 by which the Central Government has to achieve its aim and object by promoting the Exporter and Importer, who are engaged in the trade, however, the Central Government has failed to properly implement the policy, due to which petitioner Firm is facing hardship and huge financial loss to the tune of crores.

19- It is further contended that while issuing original notification on 25/04/2018

by which the amendments were made in the Foreign Trade Policy with respect to Peas from "Free" to "Restricted" has been given effect retrospectively, which is impermissible in the eyes of law as the same cannot be made applicable with retrospective effect without having any authority to do the same. All the notifications have been issued by the Director General of Foreign Trade, however, as per Section 5 of the Foreign Trade (Development and Regulation) Act, 1992, only the Central Government is having power and authority to amend the policy and not the DGFT and therefore, the notification issued by the DGFT is not having any force of law being without jurisdiction and on this count along the impugned notification is liable to be quashed.

20- He has further stated that it is a settled position of law that taxing statutes are to be interpreted strictly and the language of the statute is to be read as it is. The construction which requires for its support addition or substitution of words or which results in rejection of words has to be avoided and there is no scope for intendment in taxing statutes. The restriction was imposed vide notification dated 25/04/2018 for import of Yellow Peas, wherein it was stipulated that during the period from 01/04/2018 to 30/06/2018 an importer will get a licence to import the Peas and the notification further provided that for contracts against which advance payment has already been made prior to 25/04/2018, the same should be registered with the Regional Authorities and the rigors of licensing requirements will not be applicable to such contracts.

21- The contention of the learned Senior Counsel is that the phrase used in the notification is "Advance Payment" without qualifying the nature of the advance, which can be either in full or in part. He has further argued that in terms of the settled, law there is no scope of intendment in the present case to read additional conditions of the advance being in full, i.e. 100% advance, whereas the notification is clear and unambiguous in stipulating that any advance payment will suffice for compliance with the conditions of the notification.

22- It has been further contended that the erroneous understanding of the phrase advance payment will include only full or 100% advance payment is nothing but lack of understanding of the intention of introducing such a condition. The object and purpose of verifying advance payment made prior to 25/04/2018 is to check that importers are not taking advantage of the registration provisions by backdating their contracts and to obtain third party confirmation of the contract from independent agency like Bank and therefore, it is totally arbitrary to prescribe the requirement of 100% advance payment which goes against the very object of introducing such a stipulation and is in violation of the Article 14 of the Constitution of India.

23- The petitioner Firm has further submitted that it is a settled position of law that a Trade Notice / Circular cannot restrict the scope of a notification by reading into a condition which is not provided in the specific language of the said notification and by using the Trade Notice dated 18/05/2018, the DGFT is not permitted to add, alter or amend the provisions of the notification dated

25/04/2018 issued under Section 3 of the Foreign Trade (Development and Regulation) Act, 1992.

24- The notification issued by the respondent No.2 in terms of the power conferred under the Foreign Trade (Development and Regulation) Act, 1992 is statutory in nature whereas the Trade Notice issued on 18/05/2018 is of an administrative nature and therefore, no new condition condition or restriction can be added or read into the notification dated 25/04/2018 by virtue of issuance of the trade notice as having done so by the respondent No.3 by contravention of the well settled position in law, therefore, the respondents have issued the notification and trade notice against and in violation of the principles of judicial discipline by violating Article 14 and 21 of the Constitution of India.

25- The petitioners have further submitted that it is well settled principle of law that any law or rule cannot be made applicable with retrospective effect and therefore, the trade notice dated 18/05/2018 is not applicable in case of the petitioner and the action of the respondents is arbitrary, anarchic and unconstitutional because the respondents are implementing the notification and conditions of trade with retrospective effect which is not acceptable in the eyes of law. The petitioners have executed all the trade contracts before 25/04/2018 and further made part payment / advance payment against the aforesaid trade contracts and therefore, even otherwise in light of notification dated 25/04/2018, the trade contracts of the petitioner Firm are liable to be registered because the petitioner Firm had made advance payment to the other party, which is in accordance to the policy prevailing at the relevant point of time.

26- It has been further contended that it is also a matter of consideration that as per the guideline issued by the Reserve Bank of India, no trader can make payment of more than Rs.2 Lakhs U.S.D. to the other party. In the present case, the direction issued by respondent No.2 regarding 100% payment is in contravention to the guidelines of the RBI. Learned counsel has submitted that the petitioner has earned goodwill and reputation in the international market because of fair and genuine approach. Ultimately, the petitioners are representing the country in the international market and once the contract has been executed with an international trader, any hindrance or obstacle because of questionable trade policy would degrade the goodwill of country in the international business fraternity.

27- The petitioners further submitted that inspite of submission of application for registration of trade contracts along with all requisite details and information, the same has not been considered by the respondents and they have refused to issue registration certificate to the petitioners and therefore, when the shipment is about to reach at the port of respondents No.5 and 6, the petitioners are left with no other option except to prefer the present petition. The petitioners are not importing Yellow Peas beyond the prescribed limit and they have specifically mentioned in their trade contracts as well as in their application about the quantity of Yellow Peas which is permissible as per prevailing policy and

therefore, there is no reason to refuse the registration of trade contracts of petitioners. The petitioners have paid huge advance payment to the other party in the international market and petitioners are entitled for Registration Certificate in light of notification dated 25/04/2019 and trade notice dated 09/05/2018. The respondents are acting in discriminatory manner. The petitioners, who have already made advance part payment should be treated equally with other traders to whom the respondents have issued Registration Certificate. 28- A detailed and exhaustive reply filed by the respondent Union of India and it has been stated that after Inter Ministerial Consultations among Secretary, Department of Food and Public Distribution, Department of Agriculture, Cooperation and Farmers, Welfare, Department of Consumer Affairs, Department of Commerce, Department of Revenue, Director General of Foreign Trade and Food Corporation of India, it was decided to restrict the import of Peas (*Pisumsativum*), under Exim Code No.0713 10 00. Accordingly, the Government vide notification No.4 dated 25/04/2018 amended the import policy of Peas (*Pisumsativum*), under Exim Code 0713 10 00, from "Free" to "Restricted" for the period from 01/04/2018 to 30/06/2018 subject to the following policy condition 4 of Chapter 7 of ITC (HS), 2017 Schedule-I (Import Policy):-

"During the period from 01st April to 30th June, 2018 total quantity of one lakh MT of yellow peas minus the quantity already imported from 01/04/2018 till date will be allowed against license as per procedure to be notified by DGFT.

"Already Imported" will include shipment already arrived from 01/04/2018 till 25/04/2018 and those shipments backed by Irrevocable Commercial Letter of Credit (ICLC) and Advance Payment made through Banking Channel before 25/04/2018. Both these categories will be required to be registered with Jurisdictional Regional Authority as per Para 1.05 of Foreign Trade Policy, 2015-2020."

29- The contention of the respondent is that the background to the above notification is to safeguard the interests of the farmers. The farmers are one of the most important stakeholders in matters related to import / export of agricultural goods and the Government is required to strike a balance between the interests of domestic producers and importers. Whenever, it is observed that large scale imports of an item is adversely impacting the interest of the domestic producers, due to fall in prices in the local market, the Government in consultation with all the stakeholders tries to protect the interests of the domestic producers by way of putting various kind of restrictions viz. Port restrictions, imposition of Minimum Import Price (MIP) and Quota Restrictions.

30- Considering that despite imposition of import duty of 60% and reward of 7% under MEIS, the average domestic prices of gram in major producing states namely Madhya Pradesh, Maharashtra and Karnataka was below MSP of Rs.4,400/- quintal and that the current average domestic prices of gram in Madhya Pradesh, Maharashtra and Karnataka were Rs.3,452/- quintal, Rs.3,425/- quintal and Rs.3,662/- quintal respectively, which was leading to considerable

distress among Chana / Gram growing farmers in these States, the Government was constrained to take steps to protect the interest of the farming community.

31- The Government has also noted that flour of Peas / Yellow Peas being cheaper is frequently used to mix with flour of Gram for preparing Besan. Significant quantities of Peas / Yellow Peas are imported into the country and used as an alternative to Gram for preparing Besan. Peas constitute nearly 45-50% of total pulses imported by India and unit value of import of Peas works out to be much below that of Chana / Gram despite the 50% duty, which acts as an incentive to blend Pea Flour with Gram Flour for preparing Besan.

32- Consequently, in order to boost the mandi prices of Chana / Besan Gram the Government decided to restrict the import of Yellow Peas (HS Code 1713 10 00) upto one lakh tons for three months from the date of issuance of notification, to restrict supply of Peas and to create demand for Chana / Gram, which is currently being harvested in various part of the country. Based upon the demands from the trading community and keeping in view the trade impact, the Government took a conscious decision to review the situation and the Inter - Ministerial Committee under the Chairmanship of Secretary, Department of Food and Public Distribution with Members of Department of Agriculture, Cooperation and Farmers, Welfare, Department of Consumer Affairs, Department of Commerce, Department of Revenue, Director General of Foreign Trade and Food Corporation of India, decided to relax the provisions so that the traders, who had made the advance payments to the suppliers do not lose their money.

33- It is also mentioned that vide Trade Notice No.10 dated 16/05/2018, it has been clarified that the Import Policy of item under Exim Code 0713 100 00-Peas (Pisumsativum) includes all Peas i.e. Yellow Peas, Green Peas, Dun Peas and Kaspas Peas and the effect is not restricted to only "Yellow Peas", but to all items classified under Exim Code 0713 100 00. It has been further stated that in cases where the import shipment of Peas are dated 01/04/2018 till 24/04/2018, no registration with DGFT is required for shipments with B/L prior to 25/04/2018 (i.e. 01/04/2018 - 24/04/2018), as the notification No.4 restricting import of Peas was issued only on 25/04/2018.

34- It has been further contended that the Government considered the representations / applications received from various associations / importers with a request for allowing the imports which are backed by part advance payments and considering the hardship faced by the trade, the Government vide Trade Notice No.19/2018-19 dated 05/07/2018 decided to allow imports of Peas under Exim Code 0713 10 00 against advance payments for that much quantity proportional to the part advance payment made before 25/04/2018.

35- Considering that the clarification on inclusion or all kind of Peas under 0713 10 00 was issued on 16/05/2018, the issue as to how to treat the Peas (other than Yellow Peas) imported during the period 25/04/2018 to 15/05/2018, was clarified vide Trade Notice No.21/2018-19 dated 06/07/2018 clarifying that

consignments of Peas (other than Yellow Peas) imported during the period 25/04/2018 to 15/05/2018 and awaiting clearance at Customs or consignments of Peas (other than Yellow Peas) with Bill of Lading prior to 16/05/2018 are permitted freely.

36- It has been further stated that considering the representations / applications from various small importers, the Government vide Trade Notice No.25/2018-19 dated 17/08/2018 decided to allow import of minimum 125 MT (5 FCL) of Peas (under Exim Code 0713 10 00) per contract or less (entire quantity as applied), irrespective of the advance payment made before 25/04/2018. On the recommendation of the Inter - Ministerial Committee, the Government extended the restriction on import of Peas classified under Exim Code 0713 10 00 (including Yellow Peas, Green Peas, Dun Peas and Kaspas Peas), for a further period of three months i.e. till 30/09/2020 till notification No.15/2018-19 dated 02/07/2018.

37- It has been further stated that in pursuance of the order dated 28/06/2018 of the High Court of Judicature at Madras in Writ Petition Nos.15921 to 15924 of 2018 and W. M.P. Nos.18916, 18917, 18919, 18920, 18922, 18923, 18925 and 18926 of 2018 and in compliance with the directions dated 24/08/2018 in W. P. No.21083 and 21084 of 2018 filed by M/s. AMRR Maharaja Dhalla Mill, the notification No.15 dated 02/07/2018 extending the restriction on import of Peas classified under Exim Code 0713 10 00 (including Yellow Peas, Green Peas, Dun Peas and Kaspas Peas) till 30/09/2018, was withdrawn, purely on technical reasons, vide notification No.31/2015-202 dated 29/08/2018.

38- In order to remove the technical lacunae, the Central Government, with the approval of Ministry of Commerce and Industry, issued a Trade Notice No.29/2015-2020 dated 30/08/2018, clarifying the following:-

"It has been observed that there is a confusion about the notification signed by Director General of Foreign Trade (DGFT) and published in the Gazette of India Extraordinary Part-II, Section - 3, Sub-Section (ii) as having no approval of the Central Government and as a result stay orders are being obtained from various Courts across the Country on the operation of such notifications.

2. In this regard, it is clarified that the notification published in the Gazette of India Extraordinary Part-II, Section 3, Sub-Section (ii), by the Directorate General of Foreign Trade, Department of Commerce, Ministry of Commerce and Industry, Government of India are issued with the approval of the competent authority, i.e. Central Government through Commerce & Industry Minister exercising powers conferred under Section 3 of FR (D&R) Act, 1992 read with paragraphs No.1.02 and 2.01 of the Foreign Trade Policy, 2015-2020, as amended from time to time.

3. It is further clarified that these notifications are being signed by the Director General of Foreign Trade as the authenticating officer on behalf of the President of India under Government of India Authentication (Orders and Other

Instruments) Rules, 2002 issued vide notification S.O. 211(E) dated 16/02/2002 and in pursuance of the Order No.A-11013/1/91-E.III dated 24/03/1993 by the Ministry of Commerce."

39- Thereafter, the Central Government vide notification No.32/2015-2020 dated 30/08/2018 notified that import policy of Peas classified under Exim Code 0713 10 00 (Yellow Peas, Green Peas, Dun Peas and Kaspia Peas) is "Restricted" till 30/09/2018. Respondents have contended that the measures taken by the Government is an endeavour to strike a balance between the farmers and the importers and the policy has been framed in the larger interest of the public safeguarding the interests of both the domestic farmers / producers and the importers.

40- The contention of the learned counsel for the respondent is that in a similar matter the Bombay High Court in W.P.(L) No.1810/2018 with Chamber Summons (L) No.239/2018 in its order dated 24/07/2018 in paragraphs No.38 and 39 has clarified the Trade Notice as under:-

"However, what we find is that the impugned trade notice refers to certain clarifications, which were sought by the Regional Authorities. The Regional Authorities were of the view that whether advance payment in the above paragraph will include part advance or the full advance payment be clarified and for that the DGFT had to step in. It stepped in not to amend the notification, as is wrongly understood and argued before us. It is only to remove the doubts expressed by the Regional Authorities and issue the clarification that this trade notice was issued. Its language and particularly that of para 3 is consistent with the notification itself. The argument that the earlier trade notice of 9th May, 2018 makes reference to payment in advance (full or in part) does not cause any confusion and the expression "advance payment" was always understood to be so is without any merit. What has been provided by the Notification No. 4 is that the expression "already imported" will include shipment already arrived from 1st April, 2018 till 25th April, 2018 and those shipments backed by irrevocable commercial letter of credit and advance payment made through banking channel before 25th April, 2018. Both these categories will be eligible to be registered with jurisdictional Regional Authority as per para 1.05 of the FTP. In the sense, if the contracted quantity and in terms of a contract between the local importer and the person abroad is specified, in relation to that, if the entire payment has been secured in terms of this ICLC or full advance payment, irrespective of whether the delivery of the goods will be made in part, would, therefore, be covered by the expression or words "already imported". This is what Policy Condition No. 4 speaks of. It is only, therefore, to take care of the quantity between 1st April, 2018 till 25th April, 2018 and for enabling the deduction or subtraction of that quantity from the total permissible 1 lakh MT that this Notification was issued. This Notification amends Chapter 7 of the ITC (HS) 2017, Schedule-I (Import Policy). The condition, subject to which the existing policy has been revised and the import is restricted, also specifies the period. The

period is 1st April, 2018 to 30th June, 2018. The total quantity is one lakh metric ton of yellow peas. There was a quantity already imported from 1st April, 2018 to 25th April, 2018, which is the date of issuance of the Notification. How that quantity, which is already imported, has to be dealt with is provided in this policy condition and because that condition employs the words "already imported", the ambit and scope of these words and expression had to be clarified. If that is clarified in unequivocal, clear and unambiguous terms, as held above, then, we do not see how we can accept the argument that the impugned trade notice amends the Notification. It does not do anything of that kind, but removes the confusion in the minds of the Regional Authorities. It is not that there was confusion throughout, but some Regional Authorities entertained doubts. Else, the trade has clearly understood that condition. If there is a ICLC, then, the shipments backed by such ICLC and already imported between 1st April, 2018 to 25th April, 2018 would be registered under the jurisdictional Regional Authorities as per paragraph 1.05 of the FTP 2015-20. In relation to those where advance payments have been made, but to the extent of 100% of the contracted quantity, they would also qualify to be registered by the Regional Authorities of the DGFT. It is quite likely that taking advantage of the fact that the contracted quantity has to be delivered in part or the contracted quantity is agreed, but there are separate or distinct contracts under which the contracted quantity is sold, there is a party delivery and yet, the benefit would be taken by insisting that such contract should also be registered by the jurisdictional Regional Authorities, then, confusion to that extent has been removed by the impugned trade notice. We do not see how we can accept the argument that this amends the Notification and it is a substantive exercise carried out in terms of the statutory powers. We see nothing of this kind resulting from the issuance of the trade notice dated 18th May, 2018 and impugned in this petition. It is but a clarification issued during the implementation of the Notification dated 25th April, 2018.

39. In these circumstances, the transitional arrangement, which has been clarified by this trade notice does not contravene the substantive provisions of the notification or section 3 of the FTDR Act in the Central Government."

The Bombay High Court in the aforesaid order, while examining the difference of notification and circular has observed as under:-

"The issue has been examined in several cases by the Hon'ble Supreme Court and the settled principle was reiterated that a circular cannot take away the effect of the Notification statutorily issued. This principle is also not applicable in the facts and circumstances of the present case."

41- The respondents with regard to powers of the respondent No.3 submitted that the role of the respondent is restricted to the extent of issuing the notification as per the decision of Government of India and the implementation of the notification is ensured by the Customs Authorities. It has been further stated that the respondents by themselves generally do not make or change a policy on this subject, without an order of the Central Government. He further contended

that para 1.02 of Foreign Trade Policy, 2015-2020 prescribes that "Central Government, in exercise of powers conferred by Section 5 of FT (D&R) Act, 1992, as amended from time to time, reserves the right to make any amendment to the FTP, by means of notification, in public interest" and the amended Section 5 of the FT (D&R) Act, 1992 prescribes that "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 the like manner amend that policy".

42- It has been further contended that the appointment and powers of DGFT is defined in Section 6 of the FT (D&R) Act, 1992 and the same reads as under:-

"Appointment of Director General and his functions:

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

(b) 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.

(c) 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 Sections 3, 5, 15, 16 and 19) may also be exercised, in such cases and subject to such conditions, by the Director General or such other officer subordinate to the Director General, as may be specified in the order."

43- It has been further contended that the the DGFT's power is already spelt out as above in the FT (D&R) Act, 1992 (as amended). It has been contended that the amendments in the Foreign Trade Policy is carried out by the Central Government and DGFT carries out the decision taken by the Central Government by signing the notification for publication in the Gazette of India as per Section 5 of the FT (D&R) Act, 1992 read with paragraph No.1.02 and 2.01 of the Foreign Trade Policy, 2015-2020. He has further submitted that the notification is always issued by the Central Government and not by DGFT. DGFT is only signing the notification on behalf of the Central Government and in support of his contention he has referred to the following wordings of the first paragraphs of the notification No.35/2015-20 dated 17/01/2018 and the same reads as under:-

"..... the Central Government hereby amends....."

His contention is that DGFT, the respondent is merely conveying the decision of the Central Government.

44- Shri Piyush Mathur, learned Senior Counsel for the petitioner has drawn the attention of this Court towards interim orders passed by Jaipur Bench of Rajasthan High Court in S. B. Civil Writs No.12042/2018 (Ganesh Overseas Vs. Union of India and Others) dated 01/06/2018 as well as the interim orders passed by the Gujarat High Court in R/Special Civil Application No.8433/2018 (Kinshuk Overseas Pvt. Ltd. Vs. Union of India) and in R/Special Civil Application

No.8492/2018 (Megha Futures Pvt. Ltd. Vs. Union of India) and his contention is that various interim orders have been passed in identical circumstances.

45- This Court has carefully gone through the various notifications issued on the subject from time to time. The last notification i.e. notification dated 30/08/2018, which is impugned in the present petition reads as under:-

"Government of India

Ministry of Commerce & Industry

Department of Commerce

Udyog Bhawan, New Delhi

Notification No.32/2015-202

Dated the 30 August, 2018

Subject:- Amendment in the import policy of Peas under Chapter 7 of the ITC (HS) 2017, Schedule-I (Import Policy).

S. O. (E): In exercise of powers conferred by Section 3 of FT (D&R) Act, 1992, read with paragraph 1.02 and 2.01 of the Foreign Trade Policy, 2015-202, as amended from time to time, the Central Government hereby, make the following amendment in ITC (HS) 2017, Schedule I (Import Policy):

Import of Peas classified under Exim Code 0713 10 00 (including Yellow Peas, Green Peas, Dun Peas and Kaspas Peas) is "Restricted" till 30.09.2018.

Effect of this Notification: Import of Peas classified under Exim Code 0713 10 00 including 'Yellow peas, Green peas, Dun peas and Kaspas peas) is "Restricted" till 30.09.2018.

This issues with the approval of the Commerce and Industry Minister.

(ALOK VARDHAN CHATRUVEDI)

Director General of Foreign Trade & Ex-Officio Additional Secretary to the Government of India Email : dgft@nic.in"

46- The Division Bench of Bombay High Court in the case of Taj Agro Commodities Pvt. Ltd. Vs. Union of India and Others (Writ Petition (L) No.1810/2018 and other connected matters, decided on 03/07/2018) has dealt with the similar issue of restriction on import of Peas and the restriction imposed in the matter from time to time. The Division Bench of Bombay High Court by a detailed and exhaustive order has upheld the restriction imposed by Government of India. Relevant paragraphs of the aforesaid judgment i.e. paragraphs No.33 to 43 reads as under:-

"33. At the outset, we have clarified to the learned senior counsel as also the learned counsel appearing for the respondents that having heard all the parties

and counsel at great length, it would not be now proper to pass only some interim or tentative orders. We have, with their consent, disposed of the petitions finally by this judgment and order.

34. It is no doubt that the principle, which is settled as far as administrative law is concerned, in unequivocal terms says that the statutory notifications, if required to be altered or amended in future, then, the same route has to be adopted and no administrative orders/executive instructions and circulars can then be issued so as to interfere with, much less amend the statutory prescriptions. A Notification in this case, according to the learned senior counsel appearing for the parties, has been issued in exercise of the statutory powers conferred by section 3 of the FTDR Act. Therefore, an amendment to the Notification has to be in like manner. Section 3 of the FTDR Act falls in Chapter II. Sub-section (1) says that 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. The Central Government, by subsection (2) is empowered to make provision for prohibiting, restricting or otherwise regulating in all cases or in specified classes of cases and subject to such exception, if any, as may be made by or under the order, the import or export of goods or services or technology. Sub-section (3) says that all goods to which any order under sub-section (2) applies shall be deemed to be goods, the import or 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. Then, sub-section (4) says that without prejudice to anything contained in any other law, rule, regulation, notification or order, no permit or licence shall be necessary for import or export of any goods, nor any goods shall be prohibited for import or export except, as may be required under this Act or rules or orders made thereunder. Thus, by subsection (2) of section 3, there is a power conferred in the Central Government to publish an order making prohibition or prohibiting or otherwise regulating the import or export of goods or services or technology. This can be subject to exceptions.

35. Section 4 continues the existing orders made under the Imports and Exports (Control) Act, 1947, which is an Act repealed by section 20 of the FTDR Act. Section 5 provides for formulating and pronouncing FTP. If it is formulated and announced by a Notification in the Official Gazette, it can also be amended by the Central Government. In the instant case, what we have on record is the FTP of 2015-2020. The relevant para of this is contained in Chapter 1A titled as Legal Framework And Trade Facilitation. Clause 1.00 provides for legal basis of foreign trade policy (FTP) and says that it is traceable to section 5 of the FTDR Act. Para 1.01 sets out the duration of FTP. The amendment to FTP is provided by para 1.02 and the right to amend the FTP, by means of notification in public Gazette, is reserved in the Central Government. The Handbook of Procedure (HBP) can be issued in terms of para 1.03. Then, para 1.04 sets out that the specific provision will prevail over the general. Transitional provisions are to be found in para 1.05. This para is reproduced for ready reference:-

"1.05 Transitional Arrangements

(a) Any License / Authorisation / Certificate / Scrip / instrument bestowing financial or fiscal benefit issued before commencement of FTP, 2015-20 (as updated) w.e.f. 5-12-2017 shall continue to be valid for the purpose and duration for which it was issued, such Licence/Authorisation/Certificate/Scrip/any instrument bestowing financial or fiscal benefit Authorisation was issued, unless otherwise stipulated.

(b) In case an export or import that is permitted freely under FTP is subsequently subjected to any restriction or regulation, such export or import will ordinarily be permitted, notwithstanding such restriction or regulation, unless otherwise stipulated. This is subject to the condition that the shipment of export or import is made within the original validity period of an irrevocable commercial letter of credit, established before the date of imposition of such restriction and it shall be restricted to the balance value and quantity available and time period of such irrevocable letter of credit. For operationalising such irrevocable letter of credit, the applicant shall have to register the Letter of Credit with jurisdictional

Regional Authority (RA) against computerized receipt, within 15 days of the imposition of any such restriction or regulation."

36. A perusal of this para would indicate as to how clause

(a) provides for continuation of a licence/ authorisation, certificate etc bestowing financial or fiscal benefit issued commencement of FTP, 2015-20. Clause (b) says that in case of an export or import that is permitted freely under FTP is subsequently subjected to any restriction or regulation, such export or import will ordinarily be permitted, notwithstanding such restriction or regulation, unless otherwise stipulated. This is subject to the condition that the shipment of export or import is made within the original validity period of an irrevocable commercial letter of credit, established before the date of imposition of such restriction and it shall be restricted to the balance value and quantity available and time period of such irrevocable letter of credit. For operationalising such irrevocable letter of credit, the applicant shall have to register the Letter of Credit with jurisdictional Regional Authority (RA) against computerized receipt within 15 days of the imposition of any such restriction or regulation.

37. It is, therefore, very apparent that it is the FTP vide its paras, which is stipulating certain measures and when there is any restriction placed on the imports, which are otherwise stated to be free. "Unless otherwise stipulated" are the words and expressions appearing in clause (b) of para 1.05, which would enable us to understand that it is not because there is a blanket provision made in para 1.05 that the restriction or regulation notwithstanding the export or import will ordinarily be permitted. If there is a stipulation otherwise, then, these wide or general words will not be of any assistance. As far as the subject Notification is concerned, it is apparent from a bare reading thereof that it is issued in exercise of the powers conferred by section 3. There is a clear

stipulation therein and in that regard, the language of the same is important. The FTP, as amended from time to time, contains stipulations with regard to import. Now the import policy of certain items of Chapter 7 of the ITC (HS) 2017 stands amended. The revised import policy is restricted, which was free. The revised policy condition says, it is restricted for the period from 1st April, 2018 to 30th June, 2018 and subject to Policy Condition 4 of the Chapter. Thus, the policy condition 4 appearing in this very notification cannot be ignored. If the revision of the import policy results in import of peas being restricted, then, the restriction subject to policy condition would have to be understood and construed as a whole. Policy Condition 4 says that from 1st April, 2018 to 30th June, 2018, total quantity of one lakh metric ton of yellow peas minus the quantity already imported from 1st April, 2018 till 24th April, 2018, will be allowed against licence as per procedure to be notified by the DGFT. There was never any intent, therefore, to allow any quantity to be imported exceeding this one lakh metric ton. This is the total quantity which is allowed to be imported between the period from 1st April, 2018 to 30th June, 2018. From this, what is to be subtracted is the quantity already imported from 1st April, 2018 till 25th April, 2018. That will include shipment already arrived and with regard to that part, there was never any dispute nor any confusion in understanding the condition. Thus, the shipment, which has arrived containing this deducted quantity between this 1st April, 2018 till 25th April, 2018, would be understood as the quantity already imported. The next aspect of this is shipments, which are backed by irrevocable commercial letter of credit and advance payment made through banking channel before 25th April, 2018. We do not understand what could be the confusion for a irrevocable commercial letter of credit would back those shipments in regard to which the price has been stipulated in the contract and the price in full is secured by this ICLC. If it is so secured and backed up or it is a shipment backed by advance payment made through banking channel, then, that will be understood as complying with the Policy Condition 4. That would be taken as quantity already imported from 1st April, 2018 to 25th April, 2018.

38. One could not have, therefore, found any fault nor any confusion is resulting from this clear wording. No doubts should be entertained by the Regional Authorities. However, we leave the matter at that and possibly some vested interests have been able to persuade the Regional Authorities to seek a clarification resulting in issuance of a circular dated 9th May, 2018. That circular refers to Notification No. 4 dated 25th April, 2018 and para 2 of this trade notice refers to the Policy Condition No. 4. Para 3 of the same enables assessing the remaining balance. With regard to that, importers who have already contracted the import of peas before the date of issuance of the Notification and have paid any advance (full or part) for the same or have furnished irrevocable commercial letters of credit, before 25th April, 2018, were allowed to forward documents indicating the quantity contracted and the amount paid so as to enable the DGFT to lay down further procedure. We do not see how from this paragraph any benefit can be derived, much less additional advantage, by the parties like the

petitioners or importers placed on par with them. It is only to assess the remaining balance that the Regional Authorities could have sought the details in terms of para 3. However, what we find is that the impugned trade notice refers to certain clarifications, which were sought by the Regional Authorities. The Regional Authorities were of the view that whether advance payment in the above paragraph will include part advance or the full advance payment be clarified and for that the DGFT had to step in. It stepped in not to amend the notification, as is wrongly understood and argued before us. It is only to remove the doubts expressed by the Regional Authorities and issue the clarification that this trade notice was issued. Its language and particularly that of para 3 is consistent with the notification itself. The argument that the earlier trade notice of 9th May, 2018 makes reference to payment in advance (full or in part) does not cause any confusion and the expression "advance payment" was always understood to be so is without any merit. What has been provided by the Notification No. 4 is that the expression "already imported" will include shipment already arrived from 1st April, 2018 till 25th April, 2018 and those shipments backed by irrevocable commercial letter of credit and advance payment made through banking channel before 25th April, 2018. Both these categories will be eligible to be registered with jurisdictional Regional Authority as per para 1.05 of the FTP. In the sense, if the contracted quantity and in terms of a contract between the local importer and the person abroad is specified, in relation to that, if the entire payment has been secured in terms of this ICLC or full advance payment, irrespective of whether the delivery of the goods will be made in part, would, therefore, be covered by the expression or words "already imported". This is what Policy Condition No. 4 speaks of. It is only, therefore, to take care of the quantity between 1st April, 2018 till 25th April, 2018 and for enabling the deduction or subtraction of that quantity from the total permissible 1 lakh MT that this Notification was issued. This Notification amends Chapter 7 of the ITC (HS) 2017, Schedule-I (Import Policy). The condition, subject to which the existing policy has been revised and the import is restricted, also specifies the period. The period is 1st April, 2018 to 30th June, 2018. The total quantity is one lakh metric ton of yellow peas. There was a quantity already imported from 1st April, 2018 to 25th April, 2018, which is the date of issuance of the Notification. How that quantity, which is already imported, has to be dealt with is provided in this policy condition and because that condition employs the words "already imported", the ambit and scope of these words and expression had to be clarified. If that is clarified in unequivocal, clear and unambiguous terms, as held above, then, we do not see how we can accept the argument that the impugned trade notice amends the Notification. It does not do anything of that kind, but removes the confusion in the minds of the Regional Authorities. It is not that there was confusion throughout, but some Regional Authorities entertained doubts. Else, the trade has clearly understood that condition. If there is a ICLC, then, the shipments backed by such ICLC and already imported between 1st April, 2018 to 25th April, 2018 would be registered under the jurisdictional Regional Authorities as per paragraph 1.05 of the FTP 2015-20. In relation to

those where advance payments have been made, but to the extent of 100% of the contracted quantity, they would also qualify to be registered by the Regional Authorities of the DGFT. It is quite likely that taking advantage of the fact that the contracted quantity has to be delivered in part or the contracted quantity is agreed, but there are separate or distinct contracts under which the contracted quantity is sold, there is a party delivery and yet, the benefit would be taken by insisting that such contract should also be registered by the jurisdictional Regional Authorities, then, confusion to that extent has been removed by the impugned trade notice. We do not see how we can accept the argument that this amends the Notification and it is a substantive exercise carried out in terms of the statutory powers. We see nothing of this kind resulting from the issuance of the trade notice dated 18th May, 2018 and impugned in this petition. It is but a clarification issued during the implementation of the Notification dated 25th April, 2018.

39. In these circumstances, the transitional arrangement, which has been clarified by this trade notice does not contravene the substantive provisions of the notification or section 3 of the FTDR Act in the Central Government.

40. To such an exercise, the principles pressed into service by Mr. Thorat and Mr. Dewani have no application. In the case of Tata Teleservices Ltd. (supra), the Customs Notifications exempting the goods from duty and the issue of their interpretation was under consideration. The circular impugned has imposed a limitation on the exemption Notification, which the exemption Notification itself did not provide. Thus, this was a clear attempt to overreach/override or amend the exemption notification. If an exemption Notification had to be amended, then, the amendment must follow in like manner, namely, by issuing another notification and a circular could not have purported to amend it. Such is not the case in the present matter and this principle, therefore, does not apply at all.

41. In the case of Sandur Micro Circuits Limited (supra), the argument was that a circular was issued by the Central Board of Excise and Customs. There was a Notification of 4th January, 1995 as amended by Notifications of 11th April, 1997, 2nd June, 1995 and 1st July, 1996. It was held that these Notifications override the circular. Therefore, 50% of the aggregate Customs duty on the goods cleared to the domestic tariff area would not mean that the payment of the tax has been made. The circular was issued on the basis of representation of the assessees and thus, the Notification could not have, therefore, stood in the way of the assessee. On the other hand, it was argued that the Notification is statutorily issued and that has overriding effect by virtue of the power conferred by sub-section (1) of section 5A of the Central Excise and Salt Act, 1944. The issue has been examined in several cases by the Hon'ble Supreme Court and the settled principle was reiterated that a circular cannot take away the effect of the Notification statutorily issued. This principle is also not applicable in the facts and circumstances of the present case.

42. In the end, we must refer to the orders passed by the High Court of

Rajasthan and the High Court of Gujarat. These are but interim orders. We have taken a final view of the matter. At best, these interim orders, which are tentative and, prima facie, have a persuasive value. They have no binding effect.

43. Mr. Dewani sought to press before us and equally Mr. Nankani additional materials. The argument was that there are trade notices, which have been issued and on the same subject, namely, revised policy condition. It submitted that the import policy of yellow peas has been restricted, but the import policy of items, includes all peas. The policy is not restricted to only yellow peas. Mr. Dewani would argue that what is imported is not yellow peas and what has been argued and considered by us refers only to yellow peas. This argument is stated only to be rejected. There is no question of the trade notices referring to any restricted items. Each of these documents, which we have extensively referred, contain the item description as peas. Hence, no bifurcation such as yellow peas, green peas, dun peas and kaspera peas is then permissible. The item description was clear and this item was freely importable. However, the revised import policy restricts the imports of all peas and therefore, the bifurcation, as desired by Mr. Dewani cannot be made."

As the controversy involved in the present case stands concluded by a detailed and exhaustive judgment of the Bombay High Court, the interim orders passed by the other High Courts on the subject does not entitle the petitioner for grant of any relief.

47- The apex Court in the case of Modern Dental College and Research Centre and Others Vs. State of Madhya Pradesh and Others reported in (2016) 7 SCC 353 in paragraph No.60 has held as under:-

"60. Another significant feature which can be noticed from the reading of the aforesaid clause is that the State is empowered to make any law relating to the professional or technical qualifications necessary for practicing any profession or carrying on any occupation or trade or business. Thus, while examining as to whether the impugned provisions of the statute and Rules amount to reasonable restrictions and are brought out in the interest of the general public, the exercise that is required to be undertaken is the balancing of fundamental right to carry on occupation on the one hand and the restrictions imposed on the other hand. This is what is known as 'Doctrine of Proportionality'. Jurisprudentially, 'proportionality' can be defined as the set of rules determining the necessary and sufficient conditions for limitation of a constitutionally protected right by a law to be constitutionally permissible. According to Aharon Barak (former Chief Justice, Supreme Court of Israel), there are four sub-components of proportionality which need to be satisfied[13], a limitation of a constitutional right will be constitutionally permissible if:

(i) it is designated for a proper purpose;

(ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfillment of that purpose;

(iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally

(iv) there needs to be a proper relation ('proportionality stricto sensu' or 'balancing') between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right."

In the aforesaid case the apex Court has dealt with the theory of proportionality and restriction, scope of Article 19(6) of the Constitution of India and in light of the aforesaid keeping in view the plight of the Indian farmers and other factors, this Court is of the opinion that the Government of India was justified in imposing restriction from time to time in the matter of import of Peas. The doctrine of proportionality has to be looked into while carving out the balance upon the restrictions imposed on fundamental rights and in the considered opinion of this Court, the restrictions imposed upon fundamental rights of the petitioner guaranteed under Article 19(6) of the Constitution of India are certainly reasonable restrictions.

48- A similar view has been taken by Hon'ble the Supreme Court in the case of Binoy Vishwam Vs. Union of India and Others reported in (2017) 7 SCC 59. Paragraph No.122 of the aforesaid judgment reads as under:-

"122. In this context, when 'balancing' is to be done, doctrine of proportionality can be applied, which was explained in the case of Modern Dental College & Research Centre⁴⁹, in the following manner:

"Doctrine of proportionality explained and applied

59. Undoubtedly, the right to establish and manage the educational institutions is a fundamental right recognised under Article 19(1)(g) of the Act. It also cannot be denied that this right is not "absolute" and is subject to limitations i.e. "reasonable restrictions" that can be imposed by law on the exercise of the rights that are conferred under clause (1) of Article 19. Those restrictions, however, have to be reasonable. Further, such restrictions should be "in the interest of general public", which conditions are stipulated in clause (6) of Article 19, as under:

"19. (6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law insofar as it relates to, or prevent the State from making any law relating to-

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the

State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise."

60. Another significant feature which can be noticed from the reading of the aforesaid clause is that the State is empowered to make any law relating to the professional or technical qualifications necessary for practising any profession or carrying on any occupation or trade or business. Thus, while examining as to whether the impugned provisions of the statute and rules amount to reasonable restrictions and are brought out in the interest of the general public, the exercise that is required to be undertaken is the balancing of fundamental right to carry on occupation on the one hand and the restrictions imposed on the other hand. This is what is known as "doctrine of proportionality". Jurisprudentially, "proportionality" can be defined as the set of rules determining the necessary and sufficient conditions for limitation of a constitutionally protected right by a law to be constitutionally permissible. According to Aharon Barak (former Chief Justice, Supreme Court of Israel), there are four sub- components of proportionality which need to be satisfied [Aharon Barak, Proportionality: Constitutional Rights and Their Limitation (Cambridge University Press 2012).], a limitation of a constitutional right will be constitutionally permissible if:

- (i) it is designated for a proper purpose;
- (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose;
- (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally
- (iv) there needs to be a proper relation ("proportionality stricto sensu" or "balancing") between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right.

61. Modern theory of constitutional rights draws a fundamental distinction between the scope of the constitutional rights, and the extent of its protection. Insofar as the scope of constitutional rights is concerned, it marks the outer boundaries of the said rights and defines its contents. The extent of its protection prescribes the limitations on the exercises of the rights within its scope. In that sense, it defines the justification for limitations that can be imposed on such a right.

62. It is now almost accepted that there are no absolute constitutional rights and all such rights are related. As per the analysis of Aharon Barak, two key elements in developing the modern constitutional theory of recognising positive constitutional rights along with its limitations are the notions of democracy and the rule of law. Thus, the requirement of proportional limitations of constitutional rights by a sub- constitutional law i.e. the statute, is derived from an interpretation of the notion of democracy itself. Insofar as the Indian Constitution

is concerned, democracy is treated as the basic feature of the Constitution and is specifically accorded a constitutional status that is recognised in the Preamble of the Constitution itself. It is also unerringly accepted that this notion of democracy includes human rights which is the cornerstone of Indian democracy. Once we accept the aforesaid theory (and there cannot be any denial thereof), as a fortiori, it has also to be accepted that democracy is based on a balance between constitutional rights and the public interests. In fact, such a provision in Article 19 itself on the one hand guarantees some certain freedoms in clause (1) of Article 19 and at the same time empowers the State to impose reasonable restrictions on those freedoms in public interest. This notion accepts the modern constitutional theory that the constitutional rights are related. This relativity means that a constitutional licence to limit those rights is granted where such a limitation will be justified to protect public interest or the rights of others. This phenomenon of both the right and its limitation in the Constitution-exemplifies the inherent tension between democracy's two fundamental elements. On the one hand is the right's element, which constitutes a fundamental component of substantive democracy; on the other hand is the people element, limiting those very rights through their representatives. These two constitute a fundamental component of the notion of democracy, though this time in its formal aspect. How can this tension be resolved? The answer is that this tension is not resolved by eliminating the "losing" facet from the Constitution. Rather, the tension is resolved by way of a proper balancing of the competing principles. This is one of the expressions of the multi-faceted nature of democracy. Indeed, the inherent tension between democracy's different facets is a "constructive tension". It enables each facet to develop while harmoniously coexisting with the others. The best way to achieve this peaceful coexistence is through balancing between the competing interests. Such balancing enables each facet to develop alongside the other facets, not in their place. This tension between the two fundamental aspects- rights on the one hand and its limitation on the other hand -is to be resolved by balancing the two so that they harmoniously coexist with each other. This balancing is to be done keeping in mind the relative social values of each competitive aspects when considered in proper context.

63. In this direction, the next question that arises is as to what criteria is to be adopted for a proper balance between the two facets viz. the rights and limitations imposed upon it by a statute. Here comes the concept of "proportionality", which is a proper criterion. To put it pithily, when a law limits a constitutional right, such a limitation is constitutional if it is proportional. The law imposing restrictions will be treated as proportional if it is meant to achieve a proper purpose, and if the measures taken to achieve such a purpose are rationally connected to the purpose, and such measures are necessary. This essence of doctrine of proportionality is beautifully captured by Dickson, C.J. of Canada in *R. v. Oakes*, in the following words (at p. 138):

"To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective,

which the measures, responsible for a limit on a Charter right or freedom are designed to serve, must be "of" sufficient importance to warrant overriding a constitutional protected right or freedom ... Second ... the party invoking Section 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test..." Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of There are, in my view, three important components of a proportionality test. First, the measures adopted must be ... rationally connected to the objective. Second, the means ... should impair "as little as possible" the right or freedom in question

... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance". The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society."

64. The exercise which, therefore, is to be taken is to find out as to whether the limitation of constitutional rights is for a purpose that is reasonable and necessary in a democratic society and such an exercise involves the weighing up of competitive values, and ultimately an assessment based on proportionality i.e. balancing of different interests.

65. We may unhesitatingly remark that this doctrine of proportionality, explained hereinabove in brief, is enshrined in Article 19 itself when we read clause (1) along with clause (6) thereof. While defining as to what constitutes a reasonable restriction, this Court in a plethora of judgments has held that the expression "reasonable restriction" seeks to strike a balance between the freedom guaranteed by any of the sub-clauses of clause (1) of Article 19 and the social control permitted by any of the clauses (2) to (6). It is held that the expression "reasonable" connotes that the limitation imposed on a person in the enjoyment of the right should not be arbitrary or of an excessive nature beyond what is required in the interests of public. Further, in order to be reasonable, the restriction must have a reasonable relation to the object which the legislation seeks to achieve, and must not go in excess of that object (see *P.P. Enterprises v. Union of India* [*P.P. Enterprises v. Union of India*, (1982) 2 SCC 33]). At the same time, reasonableness of a restriction has to be determined in an objective manner and from the standpoint of the interests of the general public and not from the point of view of the persons upon whom the restrictions are imposed or upon abstract considerations (see *Mohd. Hanif Quareshi v. State of Bihar* AIR 1958 SC 731). In *M.R.F. Ltd. v. State of Kerala*, (1998) 8 SCC 227, this Court held that in examining the reasonableness of a statutory provision one has to keep in mind the following factors:

(1) The directive principles of State policy.

(2) Restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interest of the general public.

(3) In order to judge the reasonableness of the restrictions, no abstract or general pattern or a fixed principle can be laid down so as to be of universal application and the same will vary from case to case as also with regard to changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances.

(4) A just balance has to be struck between the restrictions imposed and the social control envisaged by Article 19(6).

(5) Prevailing social values as also social needs which are intended to be satisfied by the restrictions.

(6) There must be a direct and proximate nexus or reasonable connection between the restrictions imposed and the object sought to be achieved. If there is a direct nexus between the restrictions, and the object of the Act, then a strong presumption in favour of the constitutionality of the Act will naturally arise."

49- In light of the aforesaid and keeping in view the parameters laid down by the Hon'ble Supreme Court and the principles in mind, we are of the opinion that restrictions imposed by Government of India were justified. The farmers of the country were not getting the price in respect of Peas produced by them and large quantity of exports was affecting the farmers of the country adversely. We are all aware that in our country, there are large number of suicides by farmers, they still belongs to lower strata of society. It has become very difficult for them to meet both the ends and therefore, the restriction so imposed can never said to be in violation of Article 19(6) of the Constitution of India.

50- Similar preposition of law regarding judicial review has been considered by the Hon'ble Supreme Court in the case of State of Madhya Pradesh Vs. Rakesh Kohli reported in (2012) 6 SCC 312 and Transport and Doc Worker Union and Others Vs. Mumbai Port Trust and Others reported in (2011) 2 SCC 576 and keeping in view the parameters laid down by the apex Court, the restriction can never said to be unreasonable restriction and does not deserve to be quashed by this Court.

51- This Court is of the considered opinion that that the respondents were justified in imposing restrictions by issuing notifications and this Court in light of the Division Bench Judgment of Bombay High Court on the subject, does not find any reason to interfere with the notifications issued by the Government of India from time to time. Resultantly, the admission is declined.