

(2016) 02 MAD CK 0076

In the Madras High Court

Case No : W.P. No. 29806 of 2015, M.P. Nos. 1 to 3 of 2015 and W.M.P. Nos. 75 and 76 of 2016

Sri Adinath Traders

APPELLANT

Vs

The Union of India and Others

RESPONDENT

Date of Decision : 05-02-2016

Acts Referred:

Constitution of India, 1950 — Article 14, Article 19(1)(g), Article 21

Citation : (2016) 02 MAD CK 0076

Hon'ble Judges : M.M. Sundresh, J.

Bench : Single Bench

Advocate : Vijayanarayanan, Sr. Counsel for B. Sathish Sundar, for the Appellant; Rajnish Pathiyal, Sr. C.G.S.C., for the Respondent

Final Decision : Disposed Off

Judgement

M.M. Sundresh, J.—1. Though two vacate stay applications have been filed in W.M.P. Nos. 75 and 76 of 2016, by consent, the writ petition itself is taken up for hearing and the learned counsels have been heard at length.

2. The petitioner is a registered dealer under Tamil Nadu Value Added Tax Act. He was also issued IEC number by the Office of the Director General of Foreign Trade. He deals with spices, dry fruits, chemicals and other similar items. The poppy seeds are not Narcotic substance, though comes out of poppy plant. They are called ""Khas Khas"" and used widely for cooking in the country. In order to regulate import of poppy seeds, a country cap has been fixed. Accordingly, 50% of the estimated production from Turkey has been determined for cooking for the financial year 2015-2016. This total permissible country cap has to be apportioned between various importers. It is needless to state that all of them sell the imported poppy seeds for the same purpose - cooking. As there were numerous importers, a policy was evolved to allot specified quantities of imported poppy seeds on ""first come first serve basis"".

3. A challenge was made to the procedure aforesaid, being arbitrary and offending Article 14 of the Constitution of India. Interim orders have also been obtained. Thereafter, the said policy was changed by dividing all the applicants into two categories. Category -A consists of the importers, who have imported poppy seeds from Turkey to India for atleast three financial years during the last five financial years. They would be allotted a quantity from the provisional country cap, which is the average ratio of the import by Category "A" and Category "B" of importers in the last 5 financial years. Other importers shall be categorized under Category "B" and allotted the balance amount of provisional quota after the allocation is done to the category A as aforesaid.

4. As per the said public notice No. PS-7/2015 issued from File No. F. No. XVI/13/13/N/PS/CC/2015 dated 14.09.2015, applicants in category "A" shall be allowed to register sale contracts for the quantity applied for or two hundred and seventy MT (270 MT), which ever is less, whereas an applicant in Category "B" shall be allowed to register sale contracts for the quantity applied for, or one hundred and eighty MT (180 MT) which ever is less. All the applicants are requested to register by submitting their sale contracts in original to the Central Bureau of Narcotics along with applications for the quantities applied for. It was made clear that the registration of sales contract will be only issued for import to the extent of provisional country cap fixed for the financial year 2015-16. If the quantity available for allocation to applicants under category "A" is insufficient, the selection would be made through "draw of lots". Similar is the procedure for Category "B". Importers under Category "B" will have to wait for their chance, subject to the availability after exhausting Category "A" as aforesaid. The public notice also speaks about the consequences that would follow on the failure of an importer to import a minimum of 50% of the quantity registered for import, less the quantity surrendered, he shall be debarred from registration of sales contract for a period of two years. The applicants, who have violated condition of minimum of 50% of import of registered quantity are also not eligible for registration of sales contract in pursuant to the impugned public notice dated 14.9.2015.

5. The petitioner, who had applied earlier under the earlier policy of ""first come first served"" has challenged the impugned public notice as violative of Articles 14 and 19(1)(g) of the Constitution of India. It has also been brought to the knowledge of this Court that a similar challenge has been made before the Karnataka High Court in W.P. No. 42816 of 2015, which was also repelled. Writ Appeals are stated to be filed in W.A. Nos. 4857 of 2015 and 132 of 2016 and W.A. No. 4857 of 2015 was dismissed and W.A. No. 132 of 2016 is pending, though without any interim order.

6. Learned Senior Counsel appearing for the petitioner submitted that the impugned notice is total in violation of Article 14 of the Constitution of India. There is no level playing field and it will lead to trading by the category "A" importers with the category "B" importers, inclusive of those who may not get

any allotment. There is no justifiable classification having nexus to the object sought to be achieved. All the parties are using the poppy seeds for the very same purpose. There is no differentiation in the eye of law, which could be justified. Merely because some of the importers are doing business for more years, they cannot be given a higher benefit. Of the 180 Category "B" importers, only 22 of them have been given, that too, by way of lots. A Category "B" importer can never come to category "A". The public notice itself has got an in-built mechanism to take care of defaulters. Therefore, it cannot be said that only such persons, who are doing business for more number of years, would honour the commitment of import. Even in Category "B", more imports have been made as against category "A" in many cases. In other words, some of the importers in Category "A" have imported less over the years as against the others in Category -B. Thus, merely based upon number of years of import, the classification made cannot be sustained. In the above said decision, The Karnataka High Court has not considered the scope of Article 14. In support of his contention, the learned Senior Counsel has made reliance upon the following citations:

"1. Delhi Development Authority v. Joint Action Committee, Allottee of SFS Flats and others, (, (2008) 2 SCC 672);

2. Subramanian Swamy v. Director, Central Bureau of Investigation and another, (, (2014) 8 SCC 682);

3. Union of India v. N.S. Rathnam and Sons, (, (2015(322) E.L.T. 353 (SC) and

4. Reliance Energy Ltd. v. Maharashtra State Road Development Corporation Limited, (, (2007) 8 SCC 1)."

7. Mr. Rajnish Pathiyal, learned Senior Central Government Standing Counsel appearing for respondents No. 1 to 3, Mr. G. Rajagopal, Additional Solicitor General appearing for respondent No. 4 and the learned counsel appearing for the private respondents made the following submissions:

"Since the petitioner has not even made the application, he cannot challenge the impugned notice and as such, the writ petition is not maintainable. The classification is perfectly valid in the eye of law. The provisional cap has been increased subsequently and the object is to make sure that the seed is supplied. It is also meant for import obligation being complied with. The above said decision of the learned Single Judge of the Karnataka High Court would govern the field. Even assuming the said decision may not be absolutely perfect, certain latitude is required to be made. Reliance has been made to the said decision of the Karnataka High Court in W.P. No. 42816 of 2015 dated 5.1.2016."

8. The question for consideration in this case is, as to whether the classification as sought to be made by the official respondents can be justified in the eye of law or not?

9. The poppy seeds or ""khas khas"" are being used by the general public covering whole of this country. Therefore, it is immaterial from whom they buy.

There is no public interest by allowing to sell only based upon the classification of three years of import for the preceding five financial years. As there is no dispute that all the importers are catering to the needy persons for the very same purpose, such a classification is illusory, artificial and evasive. A classification has to be reasonable. A differentiation must distinguish a group of persons, relatable to the object. There has to be an element of rationality. Therefore, the reasonable relation must be to the object meant for. A differentiation forming basis of a classification must be sound.

10. By the impugned classification, the new entrants and the importers having less than three financial years during the last five financial years are substantially prejudiced. They get their chance only after Category "A". Therefore, there is an element of speculation involved. Either they would be driven out of the market or forced to buy from the traders of importers of Category "A". The impugned public notice also provides for debarment and eligibility criteria, when an importer has failed to honour the commitment of import. Therefore, it cannot be said that only category "A" importers alone would continue the supply. Merely because Category "A" is importing for more number of years that will not go as an added advantage. They would not become a regular traders as against the others. Such a classification as regular traders against non-regular on such a basis cannot stand to scrutiny of law. A new entrant may not even dream of going into the category "A" and he is not even sure of getting an allotment of Category "B" before getting an entry into Category "A". There is no concept of merit come in the classification merely based upon the years of import. Such a classification cannot be termed as a valid discrimination. There is no difficulty in appreciating the decision to fix the country cap. In the impugned order, majority of the importers would be under the mercy of the few. The classification sought to be made would lead to monopoly, which in turn, would create an atmosphere of hostile discrimination. The impugned notice also does not reveal any reasons. There is no material to hold that there is a proper distribution of poppy seeds only through category "A" exporters. Therefore, there is no public interest involved. It appears that the impugned notice is only an attempt to distribute the country cap in view of the large number of applications. Therefore, the object is only commercial. It could be seen that even an importer, who continuously imports for a period of two years, would be in a disadvantageous position than the one who did it for the preceding three financial years out of the total five financial years. Therefore, even though there was no import for two financial years out of five financial years, such an importer will gain predominant position as against others.

11. As submitted by the learned Senior Counsel appearing for the petitioner, a perusal of the list of concerns contained in category "A" and B also would show the discrepancy in the total quantity imported. In some cases, the concerns with lesser import are found in category "A" for the sole reason of having imported for three financial years as against the others, who have undertaken the same exercise for lesser years. The impugned notice does not restrict the import, but

in effect totally puts an end to an importer coming under Category "B", who fails to get any allotment. It is a duty of the official respondents to see to it that there is a platform for level playing field between the importers. A right to life includes ""opportunity"". A decision of an authority shall take in its sweep ""non-discrimination"". When a decision becomes unreasonable, affecting the rights of the parties, then, it would certainly affect Article 14 of the Constitution of India. The scope and ambit of Article 14 is well known through the various judgments rendered by the Constitutional Courts.

12. In *Hotel & Bar (FL.3) Association of Tamil Nadu v. The Secretary to Government & another*, (2015-2-L.W.497), a Division Bench of this Court culled out the principle governing Article 14 in the following manner:

"19. When a challenge is made to an enactment on the ground of Article 14 being violated, it must be demonstrated that there is an element of negation of equality. A mere discrimination per se cannot be termed as arbitrary, as a classification is meant for providing benefits to a group of persons. A differentiation must distinguish a group of persons or things identified as such from the things left out. While dealing with the classification, an accurate one is not possible. Revenue and economic considerations in taxing statute are permissible classifications. An objective must be a just one. It is a sine qua non for classification. A valid classification is a valid discrimination. A classification without reference to the object sought to be achieved would be hit by Article 14. Such a classification should not be arbitrary, artificial or evasive. In other words, it must confine to rationality.

20. While dealing with the classification qua the constitutional validity of a statute, a Court of law is required to deal with the facts which made the legislation in classifying a group. However, when the object of the classification itself is discriminatory, then there is no need to go into the classification. Court are required to afford larger latitude to the legislature in its exercise of classification. In other words, what is reasonable is a question of practical approach. While testing the policy underlying the statute, the intended object is to be ascertained."

13. In *Subramanian Swamy v. Director, Central Bureau of Investigation and another*, (, (2014) 8 SCC 682), the Apex Court has held as follows:

"58. The Constitution permits the State to determine, by the process of classification, what should be regarded as a class for purposes of legislation and in relation to law enacted on a particular subject. There is bound to be some degree of inequality when there is segregation of one class from the other. However, such segregation must be rational and not artificial or evasive. In other words, the classification must not jointly be based on some qualities or characteristics, which are to be found in all persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. Differentia which is the basis

of classification must be sound and must have reasonable relation to the object of the legislation. If the object itself is discriminatory, then explanation that classification is reasonable having rational relation to the object sought to be achieved is immaterial."

14. Coming to the doctrine of level playing field, it has been held by the Apex Court in *Reliance Energy Ltd. v. Maharashtra State Road Development Corporation Limited*, (, (2007) 8 SCC 1) in the following manner:

"36. We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of "non-discrimination". However, it is not a free- standing provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to "right to life". It includes "opportunity". In our view, as held in the latest judgment of the Constitution Bench of nine-Judges in the case of *I.R. Coelho v. State of Tamil Nadu* , (2007) 2 SCC 1, Article 21/14 are the heart of the chapter on fundamental rights. They cover various aspects of life. "Level playing field" is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1) (g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of "level playing field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalization, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally-placed competitors are allowed to bid so as to subserve the larger public interest. "Globalization", in essence, is liberalization of trade. Today India has dismantled licence-raj. The economic reforms introduced after 1992 have brought in the concept of "globalization". Decisions or acts which results in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforesaid doctrine of "level playing field". According to Lord Goldsmith - commitment to "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is legal certainty. Article 14 applies to government policies and if the policy or act of the government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional."

15. Therefore, in the light of the above said decisions and applying the same to the facts of the case on hand, this Court is of the view that the impugned public notice cannot be sustained in the eye of law.

16. The submission made by the learned counsel for respondents on the question of maintainability also cannot be countenanced. For challenging the impugned public notice No. PS-7/2015 issued from File No. F. No. XVI/13/13/N/PS/CC/2015 dated 14.09.2015 of the 4th respondent, the petitioner need not make an application. On the contrary, the petitioner challenges the very basis of the impugned notice. Perhaps, it can be said that the writ petition may not be maintainable in the event of the petitioner having participated and not allotted any quantity. It is also not in dispute that the petitioner had applied earlier under the earlier policy, which was subsequently withdrawn. Therefore, this Court holds that the writ petition is certainly maintainable.

17. Much reliance has been made by the learned Senior counsels for the respondents on the decision of the Karnataka High Court. As rightly submitted by the learned Senior counsel appearing for the petitioner, the said decision does not deal in the perspective of Article 14 and 19(1)(g) of the Constitution of India. The only passage, which deals with the merits of the case, is as under:

"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 malafides urged against the respondents, in relation to the earlier public notifications are no longer relevant as the respondents have abandoned the said notifications.

This would only require the 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.""

18. Therefore, this Court is unable to persuade itself to accept the decision rendered therein. While there is a permissibility of latitude, it cannot be said that exclusion of importers on artificial classification can be justified in the eye of law. It is further to be seen that the very purpose of classification itself is for the reason that it is impossible to satisfy all the importers. This Court is also of the considered view that the decision aforesaid has not taken into consideration of the concept of ""level playing field"".

19. Having found that the impugned notice cannot be sustained in the eye of law, this Court is not inclined to undertake the role of the 4th respondent. It is for the said respondent to evolve a better procedure, which could be sustained in the eye of law, providing for a level playing field to the importers. It is further to be seen that the impugned notice in effect puts an end to the agreement entered between the importers and the exporter from Turkey and therefore a better policy is certainly needed as it involves civil consequences.

20. Accordingly, writ petition is allowed and the impugned public notice PS-7/2015 issued from File No. F. No. XVI/13/13/N/PS/CC/2015 dated 14.09.2015 insofar as the classification A and B are concerned, is hereby set aside and respondent No. 4 is at liberty to issue a fresh notice as per law. However, there is no order as to costs. Consequently, the connected miscellaneous petitions are closed.