

(1984) 04 DEL CK 0024

In the Delhi High Court

Case No : Letter Patent Appeal No. 134 of 1983

Union of India

APPELLANT

Vs

Ishwar Dayal Jain

RESPONDENT

Date of Decision : 17-04-1984

Acts Referred:

Citation : AIR 1986 Delhi 271 : (1984) ILR Delhi 204

Hon'ble Judges : Prakash Narain, J;Charanjit Talwar, J

Bench : Division Bench

Advocate : R.K. Anand, M.C. Bhandare and Rajender Dutt, for the Appellant;

Judgement

Charanjit Talwar, J.

(1) By this appeal under Clause X of the Letters Patent of the Punjab High Court as applicable to this Court, the appellant Union of India, seeks setting aside of the judgment passed on 7th April, 1983 by a learned Single Judge whereby the "writ petition filed by Ishwar Dayal Jain an established exporter challenging the policy imposing prohibition on the export of peacock tail feathers was allowed.

(2) The writ. petitioner's case briefly was that he was carrying on the business as an established exporter of peacock tail tea there for the last about 17 years under the name and style of Mrs. .Jain Traders at Sadar Bazar Delhi. The challenge in the writ petition was to a public notice bearing No. 32 ETC-PN| 80 issued on 27th June. 1980 whereby the export policy of peacock tail feathers and the articles made there from for the period April 1980 to March, 1981. had been declared by the Government of India, Ministry of Commerce. The said notice reads as follows: Government Of India Ministry Of COMMERCE. New Delhi the 27th June, 1980. Export Trade Control Public Notice NO. 32-ETC(PN)|80 Subject : Export policy for export of peacock tail leathers and articles made there from turn the period April 1980 March, 1981. Attention is invited to Export Policy of Peacock tail feathers as contained against S. No. 4(d) of policy statement on page 9 of Export Policy Book for 1980-81.

2. It has been decided to allow the export of peacock tail feathers and articles made there from within a limited ceiling by the following : 1.- Rajasthan Scheduled Tribes Co-operative Marketing Federation. 2. Bihar State Export Corporation. 3. Other Public Sector or Co-operative Agencies. 4. Exporters of manufactured articles handicraft in which peacock tail feathers have been used

3. Bundles of peacock tail feathers will not be exported as dusters by the Exporters of manufactured articles and the items of high added value which are labour intensive will be given preference.

4. Accordingly, the existing entry appearing in col. 3, against S.No.4(d), at page 9 of Export Policy Book for 1980-81 shall be amended to read as:

"EXPORT of only tail feathers of peacock and articles made there from will be allowed within a limited ceiling to (i) Rajasthan Scheduled Tribes Co-operative Marketing Federation; (ii) Bihar State Export Corporation; (iii) Other public Sector or Co-operative Agencies; and (iv) Exporters of manufactured articles| handicrafts in which Peacock Tail Feathers have been used. In respect of category (v) bundles of Peacock Tail Feathers must not be exported as dusters etc. Exporters of items of high added value which are labour intensive will be given preference. Crest feathers and any other part or portion of Peacock will not be allowed for export."

sd/- (Mani Narayana Swami) Chief Controller of Imports & Exports. [Issued from file No. 30(5) /80-EII. Copy Forwarded to:

(3) The grievance was that by this notice the established exporters of peacock tail feathers had been completely prohibited from exporting peacock-tail feathers. However, during the pendency of the writ petition another public notice was issued modifying the above notice. This was done after the ex parte ad interim order passed by the admitting bench had been served on the respondents in; the writ petition. Thereupon the petitioner sought amendment of the writ petition so as to incorporate the challenge to the second public notice issued on 17th July 1980.

(4) In the amended writ petition the legality of the second public notice dated 17th July, 1980 was also questioned on the ground that the conditions imposed therein were discriminatory. The view of the learned Single Judge was that it was unnecessary to consider the validity of the second public notice issued on 17th July, 1980. as according to him, the first public notice issued on 27th, June, 1980. was arbitrary per se and contrary to Article 14 of the Constitution. Accordingly, the ban imposed on the established exporters by that notice was declared to be illegal. Allowing the writ petition it was held that the writ petitioner (respondent herein) was entitled to the quota of peacock tail feathers for the year 1980-81 in terms of the order of the admitting bench passed on 9th July, 1980, and made absolute by the Single Judge on 5th September, 1980. The order passed in Civil Misc. Application No. 1327 of 1980 on 9th July, 1980, is in the following terms:

"NOTICE for 12th August, .1980. In the-meanwhile the quota claimed by the petitioner would be so dealt with by the respondents that in case rule is made absolute or stay in ultimately granted, the respondents do not find themselves in a position that they say that the quota stands exhausted.

(5) The operation of the judgment under appeal was stayed by us by an order passed on 25th October. 1983.

(6) Before advertng to the merits of the case we may notice that we found during arguments of the appeal that the counter affidavit filed by the Government respondent in the writ petition lacked details regarding framing of the policy-of export for the year 1980-81 in respect of peacock tail feathers and the amendments made thereto in June as well as in July, 1980. by the respective two public notices. On going through the record which was shown to us on 5th January, 1984. prima facie we were of the view that the return had been filed without studying the record. In all fairness therefore. we granted the request of the counsel for the appellant for filing a further I affidavit. The affidavit of Smt. Pratibha Mohan. Deputy Chief Controller of Imports and Exports has this been placed on. the record. The respondent herein has .also filed a counter-affidavit to that affidavit..

(7) In the additional affidavit relevant facts leading .to the policy announced on 27th June, 1980 (first public notice) have been averred. It has been brought out that peacock tail feathers are mostly collected in Rajasthan and Gujarat .These are gathered by members of scheduled tribes and other backward classes. A suggestion to change the policy so as to eliminate the established exporters from exporting peacock tail feathers was made by the Ministry of Agriculture. The reason was that the traders in peacock tail feathers were exploiting these backward classes inasmuch as they were being paid nominal price for the feathers Therefore export of those feathers b?arnaise through public sector and or co-operative agencies including the Scheduled Tribes Co-operative Marketing Federation of Rajasthan This led to the issuance of the first public notice. The background was that earlier the Minister of Agriculture had released quota of 50 lacs peacock tail feathers-for the licensing period, i.e., 1979-80 out of which 45 lacs pieces were earmarked for export by the established exporters and 5 lacs pieces for export of manufactured articles in which such feathers were used. No quota was earmarked for state corporations. However on examination of the representation made by one of the State agencies, namely, Bihar State Export Corporation it was felt that for the next licencing period, i.e., 1980-81, quota of 2 lacs and 50 thousand pieces of peacock tail feathers be released to this Corporation and a substantial part of the yearly quota for the next financial year be allocated to the Scheduled tribes Marketing Federation of Rajasthan. It was Therefore decided to allocate a quota of 12.5 lacs pieces to that Federation It is averred that this was clearly done in order to give benefit to scheduled castes and other backward classes. The exporters, however were permitted to export within a .limited ceiling manufactured articles and handicrafts in which peacock

tail feathers had been used. It is further submitted in the said affidavit that the Government was conscious of the.. fact that the quota was being given only to State agencies and cooperative 3 marketing federations. It was in the mind of the government that they would like to view the performance of the State Co-operative Agencies who had been allocated the quota and it was thought that in case the said agencies were not able to export or utilize the quota, the same may be re-allocated within the overall ceiling depending upon the capacity of various categories, to utilize their allotted quotas. It Is further stated that as the Scheduled Tribes Co-operative Marketing Federation was only able to utilize 75 thousand pieces feathers against the quota allocate and on examination of various representation of the established exporters the second public notice dated 7th July, 1980. bearing No. 40 of 1980 review in the position was issued.

(8) As noticed above, the learned Single Judge has quashed the first public notice bearing No. 32 of 1980 issued on 27th June, 1980, on the ground that the established exporters have been discriminated against and the policy decision as per the public notice, was per se arbitrary and thus contrary to Article 14 of the Constitution. While conceding that the grant of an export license is the realm of executive discretion if not prerogative the learned Judge has observed that there cannot be a policy to discourage export or to earn less foreign exchange. He has held that ad hoc grant of .quota license or changeability should have a definite direction and national interest of improving external trade and to earn more foreign exchange.

(9) With respect we do not agree with the reasoning which led to the quashing of the first public notice excluding the established exporters from .the export policy relating to peacock tail feathers. In our view a public polity to encourage weaker sections of the society through State or Co-operative Agencies even in a field where these agencies are not found to be equal in expertise to established exporters. cannot be held to be bad or illegal simply on the ground that these agencies would not or have not been able to earn enough-foreign exchange or have eventually not been able to export the allotted quota. The policy is not to be tasted from the hind sight It is not open to the Court to do so. It appears to be the admitted case that the feathers are collected by scheduled tribes and members of other backward classes. The decision of the Government to limit the benefits to those. person through State agencies or corporations, or through co-operative societies of the tribals for export of tail feathers only cannot, on the faces of it, said to be bad or improper. It cannot even be said that the exporters were eliminated from the trade altogether. They were permitted to export handicrafts in which peacock tail feathers are used. The authorities are not expected to divine at the take of formulation of the policy that it would partially or completely fail. In that event the Government is expected to change or modify the policy. In this case that is exactly what happened. on examination. of the policy particularly in view of the fact that only 75 thousand pieces out of the quota allotted to the Rajasthan Federation in the licensing year, 1978-79 had been utilized and further on consideration of the representations made by

exporters and others, it was changed by assurance of the public notice dated 17th July, 1980. But that fact cannot lead us to hold that the policy was bad. That it was changed within three weeks of the first public notice is also of no consequence. The question, however which survives for our consideration is whether the conditions imposed on the established exporters by the second notice are valid.

(10) As noticed above learned Single Judge did not feel it necessary to go into this question as he quashed the first public notice. We have heard learned counsel for the parties at length on this question. The public notice issued on 17th July, 1980, reads as follows:

"TO Be Published In Part I, Section 1. Of The Gazette Of India Extraordinary Dated The 17TH July, 1980. Government Of India Ministry Of Commerce New Delhi the 17th July, 1980.- Export Trade Control PUBLIC.NOTICE NO.40-ETC(IN)| 80 Subject : Export policy of Peacock tail feathers for the period April, 1980 March, 1981, honouring of performance commitment by Established Exporters of peacock tail feathers."

"ATTENTION is invited to public notice No. 32/ETC(IN)/80 dated the 17th June, 1980, on the above subject.

2. On a review of the position, it has been decided to allow export of peacock tail feathers by Established Exporters, who had entered into contracts prior to the issue of public Notice No. 32-ETC(IN)/80 dated 27-6-1980 subject to fulfillment of the following conditions : (a) Where against a specific export order an irrevocable letter of credit in the case of the exporters/exporting firm has been opened by the foreign buyer covering 100 per cent f.o.b. value of the consignment and accepted by a scheduled bank in India prior to the date of the public notice. (b) Where advance payment has been received, provided that : (i) the advance payment has been received against a specific export order and covers 100 per cent f.o.b. value of the consignment; and (ii) such advance payment has been received through an authorised dealer in foreign exchange on or prior to the date of issue of the public notice.

3. Copies of performance commitments/export contracts should be sent by the person concerned along with the documentary evidence relied upon in support of such commitments/contracts having been made. These documents should be sent to the licensing authority concerned by Registered post A.D, within a period of 15 days from the date of this public notice. Cognizance will be taken only of those cases where these documents have been thus, filed in time The submission of such evidence shall not, however, confer any right on the person concerned to the garnered any license or permission to export.

sd/- (Mani Narayanswami) Chief Controller of Imports" Exports. (Issued from file No. 30(5)|80-111).

(11) The argument of Mr.Bhandare, learned counsel for the respondent is that his

client who had entered into contract prior to the issue of the issue notice could not have secured specific export order without having been allotted any specific quota. The contract however could have been entered by an established exporter who was hoping to get the same quota as in the previous licencing year but as specific export order could not have been secured no letter of credit could be opened or advance payment received against the export order. The grievance is that relaxation of the policy in favor of established exporters is merely illusory. Learned counsel for the appellant was unable to rebut this argument excepting for relying on the averment in paragraph 14 of the additional affidavit that the licencing policy was devised to restrict the pre ban commitment in respect of established exporters to the extent of the quota which was allotted to them during 1979-80 for the licencing year 1980-81. To the question whether without allotment of quota any specific or firm order could be secured by the writ petitioner or letters of credit opened by the foreign buyer there is no reply. The further question whether any foreign buyer would pay in full for the goods by 27th June, 1980 i.e., the date on which the ban was imposed without there being any commitment till then from the petitioner to ship the consignment under the contract is also not answered. We have, therefore, no option but to: quash the conditions imposed as being arbitrary. However we make it clear that the relief is limited to the writ petitioner (respondent herein) only. On issuance of quota as per the interim order passed by this Court on 9th July, 1980, the writ petitioner be permitted to export the peacock tail feathers for which he had earlier entered into contract within a period of four months of the allotment thereof subject, however, to the usual condition, that is, that an irrevocable letter of credit has been opened by the foreign buyer covering 100 per cent f.o.b. value of the consignment and accepted by a scheduled bank in India. Accordingly while reversing the findings of the learned Single Judge qua the first public notice dated 27th June, 1980 we hold that conditions imposed in the public notice issued on 17th July, 1980, to be illegal. We thus accept the writ petition with costs for the reasons recorded by us herein before. The appeal is consequently allowed qua the point decided by the learned Single Judge but in the ultimate analysis has to be dismissed but with no order as to costs as we are accepting the writ petition in part.