(2014) 06 KL CK 0042

In the High Court Of Kerala

Case No : W.A. Nos. 617, 630, 648, 649/2012 and 1653 of 2013

Union of India APPELLANT

Vs

Maliakkal Industrial Enterprises RESPONDENT

Date of Decision : 03-06-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 162
Customs Act, 1962 — Section 11, 151
Insecticides Act, 1968 — Section 13, 17, 2, 21, 22

Citation : (2014) 3 ILR 387

Hon'ble Judges : K.M. Joseph, J;A. Hariprasad, J

Bench : Division Bench

Advocate : John Varghese, SC for CEN. Board of Customs, Advocate for the Appellant; E.K. Nandakumar, Sr. Adv., Sri P. Gopinath, Sri Kuryan Thomas, Advocates for R1, Sri P.J. Philip, C.G.C. for R2, Sri Sathish Ninan, Sri Santhosh Mathew, Sri Govil Tarun Kumar Devi Prasad, Advocates for R3, Sri Bechu Kurian Thomas, Sri Joy Thattil Ittoop and Sri A.G. Aditya Shenoy, Advocates for R4-6, Advocate for the Respondent

Final Decision : Allowed

Judgement

K.M. Joseph, J.—As the appeals raise common questions, we are disposing of the same by a common judgment. The questions, which arise for our consideration, essentially would appear to us as follows:

i). Whether an insecticide, which has non-insecticidal uses, can be regulated in view of Section 38 of the Insecticides Act 1968 (hereinafter referred to as ''the Act'' for short).

ii). Whether the policy of the Government as manifested in Ext. P5 produced in these cases issued under Foreign Trade (Development and Regulation) Act 1992 (hereinafter referred to as ''the Foreign Trade Act) is ultravires the provisions of the Act.

iii). Whether the imposition of condition that persons, who wish to import insecticide for non-insecticidal purposes, must obtain an import permit from the Central Insecticide Board and Registration Committee is unworkable.

iv). Whether there is any discrimination practised against the petitioners and similar importers of other insecticides.

2. These questions appear to arise in the following factual matrix. Boric acid is an insecticide which is included in the schedule to the Act. The writ petitioner in W.P. (C) Nos. 11388/2005, 1577/2006 and 4168/2007 is a trader who imports boric acid as part of its trade, whereas the other writ petitioner (in W.P. (C) No. 28432/2006 and W.P. (C)10934/07) is a manufacturer who uses boric acid as raw material. The writ petitioners originally approached this court by filing W.P. (C) Nos. 11388/2005 and 1577/2006 and 26432/06. In the writ petitions the writ petitioners sought to challenge administrative instructions. By Ext. P1 they were asked to get themselves registered under the Act (Ext. P1 circular). Subsequently, the Central Board of Excise and Customs modified the terms of Ext. P1 Circular clarifying that import of boric acid for non-insecticidal use could be allowed only on the basis of an import permit issued by the Board and Registration Committee (Ext. P4 in W.P. 26432/06). We will deal with the circulars in greater detail as we progress further in the judgment. The last of the two writ petitions were filed by the very same 31-40 parties who have filed the earlier writ petitions. The said writ petitions were apparently instituted when there was further development in the form of amendment to the notification issued u/s 5 of the Foreign Trade Act, by which while import of boric acid is free, in respect of non-insecticidal use, import permit is to be obtained from the Board and Registration Committee in the Ministry of Agriculture.

3. A learned Single Judge allowed the writ petitions (four in number). The writ petitions have been allowed on two grounds. It was firstly found that subordinate legislation should not only be in conformity with the Constitution and parent legislation, but it also must conform to any other law made by the legislature. It was accordingly found that imposition of condition of registration under the Act, in respect of insecticides which were imported for non insecticide purposes, was contrary to the Act in view of Section 38 of the Act, which exempted insecticides which were imported meant to be used for non insecticidal purposes. The next ground on which the writ petitions were allowed was that requiring the importers to get themselves registered under the Act was arbitrary and it was unworkable since the Act did not apply to insecticides imported for non insecticidal purposes. Registration was not contemplated in respect of such insecticides and it could also be refused by the authorities. Another learned Single Judge allowed one of the writ petitions (W.P. (C) No. 11388/2005) following the judgment of the learned Single Judge in the batch of writ petitions.

4. It is feeling aggrieved by the same, that the Union of India and other authorities have joined in appeals (five in number) against the judgments of the learned Single Judges as aforesaid.

5. The learned counsel appearing for and on behalf of the appellants Sri. John Varghese would submit that boric acid can be regulated. Learned counsel drew support from Section 2 of the Act. He would contend that Section 2 of the Act makes it clear that Act is in addition to any other Law for the time being in force (In this case the Foreign Trade Act). In fact, the expression ''time being in force'' takes in future law, he submits. In this regard, he relies on the decision in M/s. Indian C. & P. Works v. State of A.P. (AIR 64 (AP) 430). He would contend that there are incidental powers available with the authorities. He would further contend that the condition imposed under Foreign Trade Act is not unworkable. He would point out that in policy matters interference by the Court must be limited to well established grounds. He would further submit that actually what the notification under the Foreign Trade Act insists is not registration but import permit and this aspect has been lost sight of by the learned Single Judge. The learned counsel relies on the following decisions in support of his arguments; Liberty Oil Mills v. Union of India (AIR 1984 (3) SCC 465), Sultana Begum Vs. Prem Chand Jain, , Commissioner of Income Tax Vs. Hindustan Bulk Carriers, , Manohar Lal Sharma Vs. Union of India and Another, , Subhash Photographics and Others Vs. Union of India (UOI) and Others, , G. Sundarrajan Vs. Union of India (UOI) and Others, , P.T.R. Exports (Madras) Pvt. Ltd. and others Vs. Union of India and others, , Savitri Rawat Vs. Govind Singh Rawat, , Conscientious Group Vs. Mohammed Yunus and Others, . He would submit that there is no absolute legal right to import.

6. In the appeals certain persons, who are domestic manufacturers of boric acid, have got themselves impleaded and they support the appellants. On behalf of one of them Sri. Santhosh Mathew learned counsel would address us and would also submit that imposition of condition of import permit is what remained under import policy for the years 2004-2009 and the learned Single Judge has not considered the distinction between registration and import permit. He drew our attention to large batch of the orders issued, which according to him, govern the field. According to him, the matter was always regulated and the regulation could not be found fault with.

7. The learned counsel Sri. Devan Ramachandran who appeared in support of the appellants, would also submit that the learned Single Judge has erred in not bearing in mind that in view of the amendment brought in the policy, requirement to be satisfied is procuring of import permit. He also placed before us the judgment of the Apex Court in Union of India (UOI) and Others Vs. Pesticides manufacturing and Formulators Association of India,

8. Sri. Paul Jacob, who appeared on behalf of the respondents who were impleaded in the appeal supported the case of the importer. He would submit that there is a fundamental right to import. He relied on Union of India (UOI) and Others Vs. Asian Food Industries, .

9. Learned counsel for the writ petitioners Sri. P. Gopinath Menon, on the other hand, supports the judgment of the learned Single Judge. He would point out

that it is a clear case where there is parliamentary legislation in the form of Act. The notification, which was impugned, was clearly ultra vires the Act. The learned counsel would also submit that, as found by the learned Single Judge, procuring registration/permit is clearly unworkable in view of Section 38 of the Act as is clear with reference to cases where the permit was refused despite fulfillment of the requirements. He would also submit that when there are provisions in the Act, which enable the authorities to check illegal activities indulged in by persons who may have imported boric acid purporting to import it for non-insecticidal purposes but diverting it for being used as insecticides, such provisions are more than sufficient to ensure that there is no abuse by any unscrupulous importer. He would further submit that even assuming that some restriction is required to check the possibility of abuse by any unscrupulous traders or importers, some documents can be obtained from the District Industries Centre which would suffice for the purpose of checking the possible misuse. Learned counsel would point out that there is no restriction on traders to freely import boric acid. He would then pose the question that when free import policy is in place, how permits could be contemplated having regard to the fact that the traders may not be in a position to produce end use certificate as sought to be demanded. He would contend that as the Act in this case governs the field and certain authorities are created under the Act for performing certain functions which are provided in the Act, the Executive could not confer additional functions on them by way of clothing them with authority as it were to issue import permit. In this regard he drew our attention to the judgment of the Apex Court reported in P.H. Paul Manoj Pandian Vs. Mr. P. Veldurai, . Of course, he reiterated the others decision of the Apex Court in Kerala Samsthana Chethu Thozhilali Union Vs. State of Kerala and Others, for the proposition that, a rule is not only required to be made in conformity with the provisions of the Act under which it is made, but the same must be in conformity with the provisions of any other Act, as a subordinate legislation cannot be violative of any legislation made by parliament or the State legislature. He would further submit, with regard to the administrative orders which have been relied on by some of the domestic manufacturers, that no guidelines are present in the executive orders so as to guide them in the matter of allowing applications for import permit and declining the same. In this regard he would draw our attention to the decision in State of Rajasthan and Others Vs. Basant Nahata, . He would reiterate further that it is a clear case where there is hostile discrimination of importers of boric acid. According to him, so far as it relates to boric acid alone, permit is said to be a must, whereas in respect of other insecticides, which are also imported for being used for non-insecticidal purposes, there is no such requirement. He would in fact point out that the matter is beyond the pale of controversy that there is a strong and powerful lobby of domestic manufacturers, as is evident from the answer given under the Right to Information Act, as admittedly they sought for restriction to be placed on import of boric acid. He would also point out Circular dated 22/6/2011 which would indicate that the Central Board of Excise and Customs, which has the power to issue statutory directions u/s 151 of the

Customs Act has itself understood, the law as meaning that insecticides imported for non insecticidal purposes go outside the purview of the Act and, therefore, registration/permit cannot be demanded of them. However, he would point out that the same document established the hostile discrimination which is practised against the writ petitioners/importers as it is stated therein that the restriction so far as it relates to boric acid importers will continue.

10. Per contra, learned counsel for the appellants would place before us the provisions of Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989. He would submit that other insecticides covered by the Act are also brought under the ambit of said rules. This is an attempt to rebut the complaint of the writ petitioners that there is hostile discrimination. He also drew our attention to the Hazardous Wastes (Management Handling And Trans boundary Movement) Rules 2008. Sri. Santhosh Mathew drew our attention to the judgment Paramjit Kaur Vs. State of Punjab and Others, for the proposition that authority under the statutory body could be asked to perform duties beyond the purview of its statutory jurisdiction/functions.

11. As already noticed, the learned Single Judge interfered with the matter on the basis of two grounds which we have already indicated. In our view following questions arise for our consideration;

i). What is the effect of Section 2 of the Act and Sections 3 and 5 of the Foreign Trade Act. (ii) Whether this is a case whereby insistence of the Authority, under the Foreign Trade Act for production of import permit, is ultra vires its powers. (Iii). Whether it could be said that there is no legislation covering topic of imported insecticides used for non-insecticidal purposes. (iv), Whether the executive others power, if it is available, is bad since it is uncanalised without any proper policy/guideline being indicated. (v) Whether the condition imposed is unworkable. (vi) Whether the impugned requirement is discriminatory as contended by the learned counsel for the petitioners.

12. The Act was enacted in the year 1968. Apparently the Act came to be framed in the context of death of human beings and animals caused from the use of insecticides. Section 2 of the Act reads as follows;

2. Application of other laws not barred:-The provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being in force.

Section 9 provides for registration of insecticides.

9. Registration of Insecticides:-

(1). Any person desiring to import or manufacture any insecticide may apply to the Registration Committee for the registration of such insecticide and there shall be separate application for each such insecticide.:

Provided that any person engaged in the business of import or manufacture of any insecticide immediately before the commencement of this section shall make an application to the Registration Committee within a period of (seventeen months) from the date of such commencement for the registration of any insecticide which he has been importing or manufacturing before that date:

(Provided further that where any person referred to in the preceding proviso fails to make an application under the proviso within the period specified therein, he may make such application at any time thereafter on payment of a penalty of one hundred rupees for every month or part thereof after the expiry of such period for the registration of each such insecticides.)

(2). Every application under sub-section (1) shall be made in such form and contain such particulars as may be prescribed.

(3). On receipt of any such application for the registration of an insecticide, the Committee may, after such enquiry as it deems fit and after satisfying itself that the insecticide to which the application relates conforms to the claims made by the importer or by the manufacturer, as the case may be, as regards the efficacy of the insecticide and its safety to human beings and animals, register on such conditions as may be specified by it and on payment of such fee as may be prescribed, the insecticide, allot a registration number thereto and issue a certificate of registration in token thereof within a period of twelve months from the date of receipt of the application:

Provided that the Committee may, if it is unable within the said period to arrive at a decision on the basis of the materials placed before it, extent the period by a further period not exceeding six moths;

Provided further that if the Committee is of opinion that the precautions claimed by the applicant as being sufficient to ensure safety to human beings or animals are not such as can be easily observed or that notwithstanding the observance of such precautions the use of the insecticide involved serious risk to human beings or animals, it may refuse to register the insecticide.

(3A). In the case of applications received by it prior to the 31st day of March, 1975, notwithstanding the expiry of the period specified in sub-section (3) for the disposal of such applications, it shall be lawful and shall be deemed always to have been lawful for the Registration Committee to dispose of such applications at any time after such expiry but within a period of one year from the commencement of the Insecticides(Amendment) Act, 1977:

Provided that nothing contained in this sub-section shall be deemed to make any contravention before the commencement of the Insecticides (Amendment) Act, 1977, of a condition of a certificate of registration granted before such commencement, an offence punishable under this Act.

(3B) Where the Registration Committee is of opinion that the insecticide is being introduced for the first time in India, it may, pending any enquiry, register it provisionally for a period of two years on such conditions as may be specified by it.

(3C). The Registration Committee may, having regard to the efficacy of the insecticide and its safety to human beings and animals, vary the conditions subject to which a certificate of registration has been granted and may for that purpose require the certificate holder by notice in writing to deliver up the certificate to it within such a time as may be specified in this notice).

(4). Notwithstanding anything contained in this section, where an insecticide has been registered on the application of any person, any other person desiring to import or manufacture the insecticide or engaged in the business of, import or manufacture thereof shall on application and on payment of prescribed fee be allotted a registration number and granted a certificate or registration in respect thereof on the same conditions on which the insecticide was originally registered.

13. Section 13 contemplates grant of licence for any person who desires to manufacture, sell, or distribute any insecticides. Section 17 reads as follows;

17. Prohibition of import and manufacture of certain insecticides-

(1) No person shall, himself or by any person on his behalf, import or manufacture-

a) any misbranded insecticide;

b). any insecticide the sale, distribution or use of which is for the time being prohibited u/s 27;

c). any insecticide except in accordance with the conditions on which it was registered;

d). any insecticide in contravention of any other provision of this Act or of any rule made thereunder;

Provided that any person who has applied for registration of an insecticide(under any of the provisos) to sub-section (1) of section 9 may continue to import or manufacture any such insecticide and such insecticide shall not be deemed to be a misbranded insecticide within the meaning of sub-clause (vi) or sub-clause (vii) or sub-clause (viii) of clause (k) of section 3, until he has been informed by the Registration Committee of its decision to refuse to register the said insecticide.

(2). No person shall, himself or by any person on his behalf, manufacture any insecticide except under, and in accordance with the conditions of, a licence issued for such purpose under this Act.

Section 21 of the Act deals with the powers of the Insecticide Inspectors. Section 22 says about the procedure to be followed by insecticide inspectors. Section 27 deals with prohibition of sale, etc. of insecticides for reasons of public safety. Section 38 reads as follows:

38. Exemption:-

(1) Nothing in this Act shall apply to-

(a). the use of any insecticide by any person for his own household purposes or for kitchen garden or in respect of any land under his cultivation;

(b). any substance specified or included in the Schedule or any preparation containing any one or more such substances, if such substance or preparation is intended for purposes other than preventing, destroying, repelling or mitigating any insects, rodents, fungi, weeds and other forms of plant and animal life not useful to human beings.

(2). The Central Government may, by notification in the Official Gazette, and subject to such conditions, if any, as it may specify therein, exempt from all or any of the provisions of this Act or the rules made thereunder, any educational, scientific or research organization engaged in carrying out experiments with insecticides.

14. Now we must consider the effect of Sections 3 and 5 of the Foreign Trade Act which reads as follows:

3. Powers to make provisions relating to imports and exports:-

(1). 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.

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

Provided that the provisions of this sub-section shall be applicable, in case of import or export of services or technology, only when the service or technology provider is availing benefits under the foreign trade policy or is dealing with specified services or specified technologies.

(3). 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 u/s 11 of the Customs Act, 1962(52 of 1962) and all the provisions of that Act shall have effect accordingly.

(4). 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.

5. Foreign Trade Policy:-

The Central Government may, from time to time, formulate and announce, by notification in the Official Gazette, the foreign trade police and may also, in like manner, amend that policy:

Provided that the Central Government may direct that, in respect of the Special Economic Zones, the foreign trade policy shall apply to the goods, services and technology with such exceptions, modifications and adaptations, as may be specified by it by notification in the Official Gazette.

Prior to the enactment of the Foreign Trade Act, Imports and Exports, were regulated under the Imports and Exports (Control) Act 1947. In the decision in Glass Chatons Importers and Users'' Association Vs. Union of India (UOI), , the Apex Court had occasion to deal with the challenge to an order issued under the Imports and Exports Act on the grounds inter alia that there is "violation" of Article 19(1)(g) in empowering the state to deny licence on the ground that canalisation was contemplated. The Apex Court considered the challenge and upheld it by holding that there was no violation of the fundamental right. In The Deputy Assistant Iron and Steel Controller and Another Vs. L. Manickchand, Proprietor, Katrella Metal Corporation, Madras, , the Apex court was dealing with the case again under the Imports (Control) Order 1955. The court took the following view;

An applicant has no absolute vested right to an import licence in terms of the policy in force at the time of his application because from the very nature of things at the time of granting the licence the authority concerned may often be in a better position to have a clearer overall picture of the various factors having an important impact on the final decision on the allotment of import quota to the various applicants

In Andhra Industrial Works Vs. Chief Controller of Imports and Others, , petition under Article 32 was maintained by a firm challenging rejection of its application for issue of import licence. It is also a case under the Import(Control) Order and Imports and Exports (Control) Act 1947. Therein the Court took the view that the policy statement as distinguished from an order issued u/s 3 of the Act was not a statutory document and no person can merely on the basis of such statement claim a right to the grant of an import licence enforceable at law. Thereafter, the Court, after referring to the decision in The Deputy Assistant Iron and Steel Controller and Another Vs. L. Manickchand, Proprietor, Katrella Metal Corporation, Madras, held as follows:

15. Be that as it may, on the basis of an Import Trade Policy an applicant has no absolute right, much less a fundamental right, to the grant of an import licence. The nature of such a claim came up for consideration before this Court in The Deputy Assistant Iron and Steel Controller and Another Vs. L. Manickchand, Proprietor, Katrella Metal Corporation, Madras,

The above principle is also referred to in the decision in J. Fernandes and Co. Vs. Deputy Chief Controller of Imports and Exports and Others, . In P.T.R. Exports (Madras) Pvt. Ltd. and others Vs. Union of India and others, , no doubt, the Apex Court was dealing with the question whether it is open to the Government to change the policy relating to quota restriction with another policy. In the said decision the Apex Court took the view that an applicant has no vested right to have export or import licences in terms of the policies in force at the date of making application. It was held that for obvious reasons, granting of licences depends upon the policy prevailing on the date of the grant of the licence or permit. The court a took the view that the grant of licence depends upon diverse factors.

15. The learned counsel Sri. Paul Jacob refers to the decision in Union of India (UOI) and Others Vs. Asian Food Industries, . That is a case under the Foreign Trade (Development & Regulation) Act, 1992. The Apex Court took the view that vested or accrued right cannot be taken away. In paragraph 26 of the Judgment, the Court held as follows:

26. A citizen of India has a fundamental right to carry out the business of export, subject, of course to the reasonable restrictions which may be imposed by law. Such a reasonable restriction was imposed in terms of the 1992 Act.

16. From the above cited decisions, we arrive at the following conclusions:

An executive instruction or a policy, which is not a statutory document, cannot form the basis for creation of an enforceable legal right. This obviously is based on the principle of law that executive instructions by themselves are ordinarily not enforceable. Such an executive instruction or policy, which could be amended at any time, could not form the basis to claim fundamental right under Article 19(1)(g) of the Act. As far as notification u/s 5 of the Foreign Trade Act is concerned, it is not mere executive instructions, but it is a subordinate legislation and it is law. It can form the basis of a legal right. A person carrying on trade or business in import can complain about the violation of fundamental right to carry on trade or business. After the Foreign Trade Act, the matter is governed on the basis of the notification issued u/s 3 or u/s 5.

17. As far as import of boric acid is concerned, going by the policy, it was free. The word free means that import could be made without licence. It is only by the amendment that from 7/4/2006, the impugned condition was imposed viz. to the 2004 policy that if it is imported for non insecticidal uses, there must be an import permit obtained. Therefore, after 7/4/2006, at any rate, it is clear that even proceeding on the basis that there is a fundamental right which is subject only to law imposing reasonable restriction, as there is no case for the writ petitioners that there is violation of Article 19(1) (g), we need not pursue the matter further.

Effect of Section 2 of the Act

18. As far as Section 2 of the Act is concerned, it provides that the provisions of the Act are in addition to any other law for the time being in force. The Foreign Trade Act was enacted after the Act in the year 1992. The Foreign Trade Act repeals the Import and Export Control Act 1947. Going by M/s. Indian C. & P Works State of A.P. (supra) words "Law in force" will take in future law also. In

this regard it must be noticed that if the Foreign Trade Act applies, it inter alia provides power u/s 3 for regulating imports or export of goods. The Central Government may issue Foreign Trade Policy from time to time. The argument of the learned counsel for the appellant is that by virtue of Sections 3 and 5 of the Foreign Trade Act, there is power with the Central Government to regulate import which would apparently include the power to allow the import subject to the conditions. Therefore, when conditions are imposed, as in the case of boric acid, it must be understood as being done on the basis of law in force referred to Section 2 of the Act. From the reading of Ext. P5, import of boric acid is free. It is made however subject to the condition of production of import permit in case of non insecticidal purposes to be issued by the Board and the Committee under the Ministry of Agriculture. If boric acid is imported for insecticidal purposes, there is no restriction under the Foreign Trade Act. That is apparently taking note of the fact that the import of boric acid for insecticidal purpose would certainly require registration under the Act. In that sense, no doubt, it could be said that merely because there is registration obtained u/s 9 of the Act or because Section 17 of the Act provides that import can be done in terms of the Registration, it would still be a matter which is regulated in terms of the law relating to import and export which at the time of the enactment of the Act was contained in the Import and Export Act 1947 and after 1992 the Foreign Trade Act. Insecticides not intended to be used as insecticides and therefore exempted u/s 38 will not come under the Act. Therefore, there cannot be much significance to the effect of Section 2 in respect of insecticides not intended for insecticidal purposes. Of course, even in respect of insecticides which are not intended for insecticidal purposes, they can be regulated like any other goods under the terms of the Foreign Trade Act. The only issue would be whether any such restrictions contained therein is otherwise legal or ultra vires.

Whether the condition imposed is ultra vires the Act?

19. The foremost question is whether it is ultra vires the Act. We have already referred to the relevant provisions viz. import of boric acid is free but it is made subject to certain conditions. We notice that after the imposition of condition in the import policy document by way of notification order issued u/s 3 read with Section 5 of the Foreign Trade Act, the imposition is no longer by way of executive order, but it becomes a command of delegated legislation. Then the question would be whether it is ultra vires as understood by the learned Single Judge. The foundation on which the plea of ultra vires is premised is undoubtedly the existence of the Act and Section 38 thereof. We must further pose the question as to whether it is a case where there is no Law at all in which case there could be no question of ultra vires. The question which arises in view of Section 38 of the Act is as to whether the Parliament intended to cover the entire field of issues relating to insecticides by way of parliamentary legislation as contained in the Act. u/s 38 of the Act Parliament has expressed its intention to exempt insecticides covered by clauses (a) and (b) thereof from the purview of all the provisions of the Act. If we take the example of Section 9, could it be said

that in view of Section 38 of the Act, the intention of the Parliament is to confer a statutory right on those who are exempted u/s 38 of the Act to do things which are mentioned in Section 9 without registration or is it a case of immunity from the provisions of the Act in regard to various restrictions and regulations in the insecticides covered by Section 38 of the Act.

20. The jurisprudential division of legal rights into various categories can be considered. A legal right must necessarily mean the existence of a legal duty in some other person. In regard to liberty there must be corresponding No-right, a concept which was the contribution of Hofner. As far as power is concerned, the corresponding correlative is liability. As far as immunity is concerned, it means there is a corresponding disability cast on the other person.

21. In this case by virtue of Section 38 of the Act, is there an intention on the part of Parliament to confer legal right on the persons covered by Section 38 to do activities mentioned in Section 9 without taking out registration? The other way to look at the issue would be that Parliament did not intend to place restrictions to be found in the Act as such on those insecticides covered by Section 38 of the Act, but, at the same time it could not be said that the intention of the Parliament is that it should be completely unregulated. When Parliament makes the law, several aspects would be taken into consideration. Parliament knows best the needs of its people. Parliament knows which are those commodities and persons which must be regulated and the extent in which they should be regulated. The theory of Laissez faire states that the ideal state leaves its people free. But, then it becomes the duty of the Parliament to make Laws from time to time to deal with various situations where laws are found necessary. Death of both human beings and animals activated the legislative process culminating in enactment of the Act. Primary concern of the Act appears to be ensuring safety of both human beings and animals from the use of insecticides and protecting them from the use of insecticides as insecticides. There are insecticides which have multiple uses and Section 38 of the Act indeed exempts such insecticides which are intended for non insecticidal uses from the Act. We would think that parliament intended that restrictions and regulations in the Act were not meant to apply to insecticides covered by Section 38 of the Act. Apart from Section 9, there are various other restrictions. Restrictions to be found u/s 13 contemplate taking out licence for the purpose of manufacture and sale of insecticides. Still further restrictions are found u/s 17 of the Act which prohibits import, manufacture and sale of insecticides. Insecticides once registered under the Act can be imported in terms of the registration granted. It is those restrictions inter alia which cannot apply to insecticides covered by Section 38.

22. In fact in the counter affidavit of the 2nd respondent in W.A. No. 648/2012, it is inter alia stated as follows:

5. An import permit is granted as an exemption from such registration, wherein no such data as mentioned above is required. For issuance of import permit, an Application in a specifically devised simplified proforma is to be made to the

Registration Committee along with an end-use certificate issued by an identified nodal ministry/department, also recommending the quantity to be permitted.

22. Registration Committee never made it compulsory to register an insecticide which is used for non-insecticidal purposes. However, in order to monitor their actual use, issuance of Import Permits was introduced on the directions of the Administrative Ministry. Issuance of import permits is a kind of exemption, wherein no data on Chemistry, bio-efficacy, toxicity or packaging is required to be generated and submitted as in case of registration. Hence, import permits are issued based on an end-use certificate, which certify the end-use of pesticides after their import.

23. Those insecticides having multi-use viz. Potassium Cyanide, Sodium Cyanide, Ethylene Dibromide etc. some of which are even banned/restricted for use in Agricultural need, to be regulated by import permit. Otherwise, they shall become free for import and it would not be possible to monitor their fate after import and likelihood of their diversion to agriculture also cannot be ruled out;

23. Learned counsel for the appellant points out Section 4 of the Act.

4. The Central Insecticides Board. - (1). The Central Government shall, as soon as may be, constitute a board to be called the Central Insecticides Board to advice the Central Government and State Governments on technical matters arising out of the administration of this Act and to carry out the other functions assigned to the Board by or under this Act.

Section 5(ii) also provides for performance of other functions assigned to it by under the Act. 3) Rule (3(f) of Insecticides Rules, 1971 inter aia provides as follows;

3. Functions of the Board: The Board shall, in addition to the functions assigned to it by the Act, carry out the following function, namely;

xxx

xxx 3 (f). carry out such other functions as are supplemental, incidental or consequential to any of the functions conferred by the act or these rules.

24. There is a like provision in regard to the Committee. Undoubtedly, it is true that u/s 38 insecticides not intended for insecticidal uses are not covered by the Act. The purport of the Insecticides Act is to prevent danger to human and animal life from the use of insecticides. It is also intended to ensure registration of insecticides which are found to be efficacious. Some insecticides have multiple uses. There is no dispute that boric acid is one such insecticides. When such insecticides are intended for use for non insecticidal use no doubt the provisions relating to registration u/s 9 and various other provisions including taking out licence/storage would not apply. But, could it not be said that there must be some authority which will be able to ascertain whether there is misuse and whether the insecticides which are purported to be used for non insecticidal

purposes are actually diverted for insecticidal purposes. As contended by the 2nd respondent by considering and granting import permit where scope of the enquiry is only to ascertain whether the import is made for genuine non insecticidal purposes it becomes an exemption from the Act, thus obviating the need for registration. There is considerable merit in the said line of argument. We have already referred to the incidental powers available to both the Board and the Committee.

25. Also at any rate, the executive power of the Government of India under Article 73 could be available to it so long as of course it is used in accordance with law. The argument of the learned counsel for the writ petitioners, Sri. Gopinatha Menon is that the problem which is faced by the petitioners and the local manufacturers could easily be resolved with reference to the provisions in the Act itself in so far as Insecticides Inspectors are appointed under the Act and if the insecticides inspectors are doing their job well as they are intended to do, if there is any case of violation of the Act, in the sense that a person imports insecticides claiming that he is doing it for non-insecticidal purposes without taking out registration under the Act and he misuses it, he could be proceeded against under the Act and his illegal activities can be curtailed. The other view is that if insecticides have multiple uses, end user could be identified. Then subject to a certain procedure being followed import of insecticide having multiple use could be provided for. This would ensure on the one hand that import of such insecticides are permitted without taking the registration as such under the Insecticides Act and at the same time, it could be ensured that there is no misuse. We do not think that it is for the Court to limit the exercise of powers by the State to achieve various goals which it is bound to achieve. The executive power of the State enables the Government to discharge various duties under the Constitution and Laws. Every Welfare State would necessarily expect the Government to enact policies and implement it in a most effective manner. If it is not an area covered by legislative enactment, then certainly, unless it in any way affects the rights of its people or fundamental rights, executive must be free as long as it exercises it inconformity with the Constitution. In this regard we are of the view that if a person intends to import insecticides for non insecticidal purposes, then there should some checks and balances to ensure that it is not mis-used. The issue as to how the executive power should be exercised would essentially be left to the executive. The question which is apposite in this regard would be this. Can, in exercise of the executive powers, the Government provide a system of checks and balances which is identical to the regime of the Registration u/s 9 of the Act. If that is admitted and established, that it is absolutely similar to the system of registration as such, it may be bad.

26. The Form which is relevant for the registration under the Act is Form 6. The statutory authorities have a duty to ascertain whether the claim made by the applicant in the written application form is tenable and to verify whether the safety aspects are taken care of and the registration is granted (Section 9(3)). The grant of registration, as already noticed, entitles the applicant to import

goods which are registered in terms of Section 17, subject to the condition that the person is having right to import under import policy. Person who gets himself registered u/s 9 is not obliged to take out any further licence u/s 13 of the Act. There are various other provisions in the Act which relate to aspects like storing, etc. of insecticides which are made to be used as insecticides. In this case, as already noticed, for import of insecticides for non insecticidal purposes the authority under the Foreign Trade Act has declared that freedom is attached to import of insecticides (whether it is for insecticidal purposes or for non insecticides purposes). As far as insecticides which are imported for insecticidal purposes are concerned, they would fall under the four corners of Section 9 of the Act. In other words, such insecticides must be registered under the Insecticides Act. As far as insecticides which are intended for non insecticidal purposes, further condition imposed is that the importer must obtain an import permit.

27. We notice the modalities for granting registration/import permit for insecticides to be used for non agricultural/health purposes was introduced in the year 1991. Subsequently, by Ext. R3(f) letter dated 15/6/2004 the Secretary of the CIB & RC wrote to Borax Manufacturers Association of India informing that the Committee has evolved guidelines/data for grant of registration/import permit for boric acid. It is indicated that boric acid stands included in the Schedule to the Insecticides Act 1968 and the addressee was asked to advise the members to seek registration permission for indigenous manufacture of boric acid. Subsequently by Annexure R2(c) it is inter alia ordered that if boric acid is proposed to be imported for an identified non insecticidal use, then such imports would be exempted from the requirements of registration under the Act on the basis of a certificate of end-use issued by the concerned administrative Ministry/ Department of the Government of India. By Annexure R2(c) 2 dated 17/12/2004 it is inter alia reiterated that such imports as aforesaid of boric acid is exempted from registration subject to the certification of such non insecticidal end use by the administrative Ministry/Department concerned of the Central Government. The insecticidal and non insecticidal use of boric acid have been given in the Annexure R2(c) order. It is by communication dated 1/8/2005 it is ordered that in super cession of all previous instructions issued, import of boric acid for non insecticidal use may be allowed as per the same procedure and guidelines in regard to the import of other insecticides for non insecticidal use i.e. on the basis of import permit issued by the Registration Committee on the recommendation of the nodal Department/Ministry. Annexure R2 (i)8 is the application for grant of permit for import of insecticides for non insecticidal use. R2(i) 8 is as follows:

Application for Grant AOF Permission for Import of Insecticides for Non insecticidal Use

1. Name of the importer along with complete address.:

2. Address of premises where the imported material shall be used.:

3. Name of the insecticide to be imported:

4. Annual quantity required to be imported.:

5. Name and address of the source of origin from which the material is proposed to be imported.:

6. Purpose of imported

(specify the use and enclose valid licence to work, a factory licence issued by Chief Factories inspector showing the chemical as input):

7. Quantity of the chemical (classified as insecticides as per the schedule to the Insecticides Act 1968). imported and consumed during the last five years (certified by Excise Authority):

8. Quantity recommended for imported by the Nodal Ministry

(enclose recommendation in original not older than one year):

9. Standard safety data or alternate authentic literature (enclose) to prove that chemical being imported is safe to human beings, animals and environment preferably related to India Climate data.:

10. State

(i). whether the imported materials:

is for domestic consumption or export.

(ii). If for export,

(a). name & address of the importer to whom the finished products is to be exported and copy of advance: licence, etc. for export.

(b). Indicate chemical composition: of the finished product to be exported.

Date:

Signature of the applicant with seal.

I............. S/o................ in may capacity as........ do hereby solemnly verify that I am competent to make this application and that the information given in the application and the annexure (s) and statements, accompanying it, is correct and complete. I further undertake that imported material is not for sale but for use as per our own requirement. I clearly understand that in the event of any information, or part thereof, being found incorrect, the import permit shall be liable to be cancelled without any notice.

Place

Date

Signature of the applicant with seal

28. Annexure R3(g) seems to be published in the newspaper "Economic Times" dated 26/7/2004 by the Borax Manufacturers Association of India. Manufacturers of boric acid are required to seek registration for its manufacture as per the directives of the Agriculture Ministry and if they were indigenous manufacturers they have to apply for registration latest by 31/8/2004. Annexure R3(g) contains further such information inserted by the Borax Manufacturers Association of India. Annexure. R3(h) is produced purporting to be an application for registration of insecticides under Rule 6. Annexure R3(i) purports to be a letter addressed by the Under Secretary to the Government of India, the Ministry of Agriculture to the Secretary (CIB & RC), which reads as follows:

(i). A simplified registration procedure be put in place by the RC within the next 6 months by applying, with necessary modifications, as may be required, the same data and related requirements for registration of multi use pesticides which are already in use and are being manufactured/imported without registration, as are being applied to cases of registration for export. All manufacturers/importers who intend to use such insecticides for insecticidal end use may be informed of such simplified/relaxed registration requirements by the Registration Committee by 31/12/2006 and they be given an opportunity to generate the date and apply for registration so as to complete the registration process within a period of 2 years thereafter.

(ii). Status-quo ante be maintained in respect of the mode of regulation of all unregistered multi=pesticides, including boric acid, being manufactured indigenously for the intervening period, i.e. the period after the manufacturers/ importers apply for registration until the grant of the registration certificates. Further during this interning period, the indigenous manufacturers of such pesticides be required to declare to the CIB and the DAC particulars regarding the annual quantum of such pesticides manufactured and sold by them to ascertain/verify the end-use of the pesticide concerned at the end of each financial year For 2005-06 indigenous manufacturers may be asked to provide this information to CVIB and the DC latest by 30/11/2006.

(iii). RC should identify all such hitherto unregistered multi use pesticides and subject them to the same import requirements as made applicable to boric acid for uniformity in policy.

(iv). The present system of end use certificate based grant of import permits for import of multi-use pesticides, including boric acid, be retained for a period of 3 years.

(v). In cases where multi use pesticides are already governed by a health and safety law, such as Sodium Cyanide which is governed under the Poisons Act, the licenses (and quantities mentioned therein) issued by such statutory authorities may be accepted as end use certificate for issue of import permits.

(vi). Registration Committee will request Department of Health to either fix MRLs on the basis of CODEX/other intentionally accepted norms or to adopt relaxed/

simplified requirement of data for fixation of MRLs in respect of Boric acid (and other multi-use pesticides) which are already in use and are being manufactured/ imported without registration at present.

(viii). R.C. Will explore the possibility of appointing consultants/experts or take the help of specialized institutions in order to generate the required dated for registration of these multi-use pesticides.

(viii). R.C. Will keep DAC informed of the progress of implementation of the various steps outlined in this policy of regulation of multi-use-pesticides.

29. Ext. R3(k) purports to be the minutes of 259th meeting of the Registration Committee dated 22/12/2005. The Committee inter alia decided that the import permit be issued as per the present guidelines and that it may include certain further information. It is further stated that the committee took up list of applicants for grant of import permit for import of boric acid and dual use chemicals (other than boric acid). We notice therein that mention is made about Sodium Cyanide/Potassium Cyanide for electroplating and head treatment of metals in respect of M/s. M.B. Sales Corporation, and they are not seen approved as recommendation of the Nodal Ministry has not been submitted. Likewise in respect of Barium Carbonate, Benzo, etc. among other chemicals decisions are seen taken. Ext. R3(k) purports to be form of application for grant of permit for import of insecticide for non insecticidal purposes.

30. The writ petitioners seek to draw support from the Circular dated 22/6/2011 issued by the Central Board of Excises and Customers therein after referring to Section 38 of the Act, it is stated as follows:

As may be seen, the aforementioned provisions of the said Section 38 of the insecticides Act, 1968 are unambiguous and leave no scope interpretation. Essentially, the exemption from the provisions of the said Act would apply to those insecticides that are used for house hold purposes, etc. or for other than insecticidal purposes. Thus import of items listed under schedule 3 of the said Act that are intended to be used for these purposes that are specified in the said Section 38 would be outside the ambit of the provisions contained in Insecticides Act, 1968. The implication is that the clearance of such imported items would not be subject to the requirement of registration/import permit from CIB & RC.

4. Board desires that for the sake of uniformity the Customs Houses shall immediately align their local procedures in line with the above clarification. It is, however, clarified that the import of Boric Acid would continue to be governed by the specific instructions on the item that are currently in force.

31. In this regard, learned counsel for the local manufacturers would draw our attention to the Circular dated 9/8/2011. Therein, it is inter alia stated as follows:

4. Further, Rule 9(1) of the Insecticide Act, 1968 requires importers of insecticides to apply to the Registration Committee, Ministry of Agriculture for the registration of such goods. In case of pesticides in the Schedule to the said

Act, registration and permit from Secretariat of CIB & RC is required. The certificate of registration and/import permit for import issued by the CIB & RC should also be properly checked at the time of import.

32. It is contended by the learned counsel the local manufacturers by virtue of the subsequent circular, the earlier circular will not hold good. The learned counsel for the writ petitioners would submit that there is no reference to the circular dated 22/6/2011 and it is not expressly overridden. We must notice that Circular dated 22/6/2011 is issued at a time when under the statutory Foreign trade Policy import of boric acid is permitted provided in respect of non insecticidal use, the condition attaches that import permit be obtained. We are concerned with the question relating to import permit for the year 2004-09 in these cases, for which a notification is issued u/s 5 of the Foreign Trade Act providing for production of import permit as a condition. In such circumstances, we cannot accept the contention of the writ petitioners.

33. Sri. Gopinatha Menon would point out the situation arising from a person getting the registration u/s 9 who can then import under the import policy without restriction and then divert part of its import for non insecticidal purposes. In this regard, we may notice that if there is diversion for non insecticidal purposes, apparently the object of the Insecticide Act being to prevent the use of insecticide as insecticide it may not cause danger to life and such diversion would not be objectionable. If it is meant to be used as insecticides on the other hand on obtaining registration the Law apparently permits it.

34. u/s 38 of the Act what is provided is that when insecticides are intended to be used for non insecticidal purposes, the provisions in the Act will not apply. It is certainly open to the government to put in place sufficient safeguards to ensure that actually only insecticides which are genuinely intended for non insecticidal purposes are taken out of the purview of the Act and the restrictions and controls are which are provided therein. It is in this context when the importer of boric acid is not able to establish the end use it is not open to the trader to say that he should be allowed to import boric acid ostensibly for non insecticidal purposes. It is fraught with the danger that the imported quantity is diverted for insecticidal purposes. If such diversion happens, certainly it could lead to a situation where the purpose of the Act itself would be defeated as there could be large quantities of insecticides having multiple uses being imported in the guise of being employed for non insecticidal purposes but falling into the hands of those who use it as insecticides. Insecticides being used as insecticides forms the subject matter of the Act. It is such insecticides which are sought to be brought under the control of the Act. As far as the multiple use of insecticides are concerned, since they are capable of being used both as insecticides and for other purposes, control over their import is found necessary by the Government. When such control is exercised and on the basis of such regulations, it is found that only genuine importers who intend to use boric acid for non insecticidal purposes can import the boric acid, certainly it leads to a situation where the

policy of the Government is fulfilled, high public purpose is subserved and infact the objective of the Act itself is also fulfilled. The object is fulfilled for the reason that by providing for safeguard of a import permit whereby only boric acid genuinely intended for non insecticidal purposes is allowed to be imported, possibility of boric acid being imported for non-insecticidal purpose presumably but being diverted for insecticidal purposes is defeated. We find ourselves unable to accept that when a traders imports large quantities of boric acid it could be said to be a case where he intends to use it for non-insecticidal purposes. The intention to use boric acid for non insecticidal purposes must be determined at a point of time when he actually carries out the import. It may transpire that when a trader imports, he may have the general intention to sell it to customers who may use it for non-insecticidal purposes. It may also be true that if, after the import of boric acid for non insecticidal purposes, he uses it for insecticidal purposes either by himself or by sale to those who do not use it for non-insecticidal purposes the Law may catch up with him. But that is not to say that if the Government thought it fit to put in place the safeguards that only those who are able to show that they have an intention to import boric acid for non-insecticidal purposes with certainty proved by objective criteria supported by documentary evidence and facts and figures should be allowed to import the court should strike it down.

35. We are unimpressed by the argument that the provisions in the Act, which provides for violations being visited with legal consequences, should deprive the Government of the lawful exercise of its powers both executive and legislative. The manner of exercise of both legislative and executive power is only subject to the control envisaged under the Constitution through the doctrine of ultravires. The court will not sit in judgment over the wisdom of the measures. Wide latitude is usually shown in matters of economic policies by the Court. Therefore, in such circumstances we see no merit in the contention of the writ petitioners that the restriction deprives the traders of their right to import. They only had such right as is vouchsafed to them under the extant policy and law. In this case, only those who are able to produce import permit alone can have the limited right to import. If they intend either as traders or anyone else for that matter to import boric acid to be used as an insecticide, then in view of section 9 of the Act certainly the must obtain registration under the Act.

36. No doubt, under the notification issued under the Foreign Trade Act Foreign Trade Policy is announced, it will then become a statutory instrument. As already noticed, a legal right would accrue to the person concerned to import without any licence or permission. Then, to require him taking out of import permit as a condition for importing insecticides being used for non insecticidal purposes, may result in the executive instruction being vulnerable on the ground that an executive instruction cannot go against a legal right. In the case of Ext. P4, thus under 2004-2009 policy to insist on import permit would have been illegal. No doubt, it would not be ultravires as understood by the learned Single Judge as what would be impossible and therefore arbitrary and ultravires would have been

taking out of registration. Even it is to be noticed that in so far as traders are not able to establish the requirements by which they are able to prove that there would be no diversion. It can be said that the requirement is in tune with law. In so far as the executive instructions under which import permit including the form of application are provided for after the imposition of the condition in the statutory import policy is concerned quite clearly the imposition is by subordinate legislation. The executive instructions would then become the procedure to provide the machinery for working out the modality for the issuance of import permit and in that sense we would think that as long as requirement of import permit is part of the law under notification issued u/s 5 of the Foreign Trade Act. It cannot be said to be illegal.

37. One of the contentions of Sri. Gopinatha Menon the learned counsel for the writ petitioners is that import permit is not a concept which is provided for in the Act. He would also submit that the Act does not provide for power with the Registration Committee and the Central Insecticides Board to grant import permit. In this regard he sought to draw support from the judgment of the Apex Court in P.H. Paul Manoj Pandian Vs. Mr. P. Veldurai,

38. Sri. Sri. Devan Ramachandran would point out that the Registration Committee and the Board is not acting as a statutory body and Ext. P5 notification also does not show that it is a Body acting under the Act. In Paul Manoj Pandian v. P. Veldurai''s case (supra), the Apex Court was dealing with the case where the appellant had filed an election petition challenging the election of the respondent on the ground that the respondent was disqualified for submitting nomination papers as he had subsisting contracts with the Government and those contracts had not been terminated in terms of an executive order. The Election Petition was dismissed by the High Court. The appeal was allowed by the Supreme Court. The Court took the view as follows inter alia:

47. Once a law occupies the field, it will not be open to the State Government in exercise of its executive power under Article 162 of the Constitution to prescribe in the same field by an executive order. However, it is well recognized that in matters relating to a particular subject in absence of any parliamentary legislation on the said subject, the State Government has the jurisdiction to act and to make executive orders. The executive power of the State would, in the absence of legislation, extend to making rules or the state would, in the absence of legislation, extend to making rules or orders regulating the action of the executive. But, such orders cannot offend the provisions of the Constitution and should not be repugnant to any enactment of the appropriate legislature. Subject to these limitations, such rules or orders may relate to matters of policy, may make classification and may determine the conditions of eligibility for receiving any advantage, privilege or aid from the State.

48. The powers of the executive are not limited merely to the carrying out of the laws. In a welfare State the functions of the executive are ever widening, which cover within their ambit various aspects of social and economic activities.

Therefore, the executive exercises power to fill gaps by issuing various departmental orders. The executive power of the State is coterminous with the legislative power of the State Legislature. In other words, if the State Legislature has jurisdiction to make law with respect to a subject, the State executive can make regulations and issue government orders with respect to it, subject however, to the constitutional limitations. Such administrative rules and/or orders shall be inoperative if the legislature has enacted a law with respect to the subject. Thus, the High Court was not justified in brushing aside the Government Order dated 16/11/1951 on the ground that it contained Administrative instructions.

No doubt the writ petitioners seeks to draw support from the paragraph 46.

46. Under Article 162 of the Constitution, the executive power of the State extends to matters with respect to which the State Legislature has power to make laws. Yet the limitations on the exercise of such executive power by the Government are two fold; first, if any Act or law has been made by the State Legislature conferring any function on any other authority, in that case the Governor is not empowered to make any order in regard to that matter in exercise of his executive power nor can the Governor exercise such power in regard to that matter through officers subordinate to him. Secondly, the vesting in the Governor with the executive power of the State Government does not create any embargo for the legislature of the State from making and/or enacting any law conferring functions on any authority subordinate to the Governor.

39. We would think that the principle that when the law is made conferring any function of any other authority, the Governor is not empowered to make any order in regard to that matter in exercise of its executive power nor can the Governor exercise such power in regard to that matter through officers subordinate to that authority cannot apply to the situation at hand. What is involved is not grant of Registration u/s 9 or discharge of any other function assigned to the statutory authorities under the Act through any subordinate authorities. Equally, it is not a case where the Executive power in this case has been exercised in relation to the matter which is the subject matter of Section 9. In other words, the executive orders relate to providing for a procedure for the Government to control the import of multi-use insecticides so that those insecticides are imported only for non insecticidal purposes as intended. The writ petitioners have not been able to establish that members of the Board of the Registration Committee, who have been appointed by the Government, are being asked to discharge any duties which violate terms of their appointment or the duties which could be assigned to them in terms of the orders of appointment. There is nothing in the Act in relation to deprive them off their authority conferred under executive orders to process applications for import permit.

40. Equally without merit is the contention that the Government in exercise of the executive power cannot provide for the issuance of import permit. Import permit no doubt is not a concept which is to be found in the Act. As already

noticed, the matters which are provided in the Act are applicable only to insecticides which are used as insecticides. When they are not intended to be used as insecticides, then it would go outside the purview of the Act. But, then in respect of such insecticides, therefore, the legislative enactment would not apply. But as already noticed, that would not deprive Govt. of the authority to regulate dealings in insecticides purported to be not intended for insecticidal purposes. In fact, the case of the 2nd respondent authority is that when the Act exempts insecticides which are not intended to be used for insecticidal purposes, the statutory authority would have implied power to provide for a mechanism to check the misuse of insecticides purporting to be intended for non insecticides purposes being diverted. At any rate, we would think that the in the exercise of executive power there would be power to regulate the import of insecticides for non insecticidal purposes and towards this end, if the authority under the Foreign Trade Act felt that there must be import permit to be obtained from the Ministry of Agriculture to be issued by the Board and the Registration committee it cannot be said to be illegal. In this connection, it is relevant to note that the Central Insecticide Board is set up u/s 4 of the Act. The Board is set up to advise on matters relating to risk to human beings or animals involved in the use of insecticides and safety measures necessary to prevent such risk, for manufacture, sale, storage, transport and distribution of insecticides with a view to ensure safety to human beings or animals. Therefore, this itself is a clear indication that the real purport of the Act is the safety of the human beings and the animals from unregulated and indiscriminate use of insecticide as insecticide. The Board consists of 21 members. Most of the Board members are Government Officers. Many of them function ex-officio. Section 5 provides for the Registration Committee. It consists of a Chairman and not more than five persons who shall be the members of the Board. Therefore, virtually members of the Registration Committee are also drawn from the members of the Board. The statutory function of the Committee appears to be to register the insecticides after scrutinizing their formulae and verifying claims as regards safety to human being and animals. Further clause (2) of Section 5(1) indicates that they are bound to perform such other functions as are assigned to them by or under the Act. In this connection it is also necessary to note that executive orders were holding the field. providing for import permit and it is apparently taking note of such procedure that the authority under the Foreign Trade Act provides such condition in Ext. P5. It is to be noted in this context, the authorities under the Foreign Trade Act Customs Officers may not be equipped with necessary information and inputs which are needed for regulation of indiscriminate import of insecticides purporting to be made for non insecticidal purposes, but which were not meant to be so used. The competent authority which would have the technical authority would be the expert body viz. the Board and the Registration Committee. The requirement of end use being certified, may have to be cross checked in the context of other inputs and on being satisfied of the genuineness of the claim import permit is issued which would entitle the permit holder to freely import boric acid meant for non insecticidal purposes. We do not think that mere absence of concept of import permit in the Act which admittedly does not apply to insecticides intended for non insecticidal purposes would in any way deprive the authority of insisting for import permit of the Central Body providing for the procedure for grant of import permit.

41. Another contention raised by Sri. Gopinatha Menon is about the absence of guidelines in the executive orders in the matter of allowing application for permit and to decline the same. In the case of insecticides covered by the Act an order rejecting the application for registration can be appealed against. Further revision is provided. There is no such procedure if import permit is declined and when parliament did not provide for the procedure of registration of insecticides not intended for insecticides purposes, the insistence on import permit cannot be sustained having regard to the aforesaid aspects also. In this regard, he sought to draw support from the judgment of the Apex Court in State of Rajasthan and Others Vs. Basant Nahata, . That was a case where the State has inserted section 22A, where under the Government by notification could refuse the registration of any document or class of documents which are opposed to public policy. A notification was issued declaring any power of attorney to transfer any immovable property for terms of more than 3 years or for term not mentioned as document opposed to public policy. The Apex Court took the view inter alia that the delegation of legislative power cannot be wide, uncanalised or unguided and the legislature while delegating such power is required to lay down the criteria or standard so as to enable the delegatee to act within the words of the statute. Essentially, the legislative functions cannot be delegated. The principle on which the power of the legislature is to be exercised is required to be disclosed. On the strength of the same, it is pointed out that the executive instructions does not contain indication of the principles on which the import permit can be granted or refused.

42. We are afraid that there is no merit in the contention. Only two executive orders are called in question. In Ext. P1 dated 28/10/2004, it is provided inter alia that the registration of the importers of boric acid with the Central Committee (CIB & RC) under the Act should be a pre condition for import if its uses are insecticidal. No exception can be taken. It is further provided that in case boric acid is proposed to be imported for an identified non insecticidal use, then such import would be exempted from the requirements of registration under the Act on the basis of a certificate of end use issued by the concerned Administrative Ministry or the Department of the Government of India. In regard to traders, it is stated that as the end use of the boric acid in respect of import by traders cannot be verified, they would require registration with CIB & RC. In Ext. P3 dated 6/9/2005 issued by the Ministry of Finance, Department of Revenue, after referring to Ext. P1, it is stated that the Ministry of Agriculture has clarified that import of boric acid for non insecticidal use may be allowed as per the same procedure and guidelines with regard to import of other insecticides for non insecticidal use that is only on the basis of import permit issued by the Registration Committee. Also reference is made to the requirements being in

addition to the Ministry of Agriculture specified in paragraphs 2 and 3 of Ext. P1. This would mean that traders who import boric acid, must take out registration as the end use cannot be verified. We notice that the writ petitioners have not called in question what is produced as Annexure R3(i) which we have already extracted. Essentially the purport of import permit is to ensure that import is genuinely intended for catering to non-insecticidal purposes alone. This result would appear to be inescapable having regard to the form of application for grant of import permit. Therefore, we cannot even say that it is bad for reasons which would invalidate a piece of subordinate legislation viz. there is conferment of uncanalised power. We must proceed on the basis that the officers called upon to decide the issue on merit being experts in their field would not only act on the basis of the information which is available objectively in the application forms but also in a fair manner as every member associated with the activities of the State are enjoined to. If there is any exercise of power illegally or arbitrarily, certainly any such aggrieved person can always seek legal redress if a genuine claim is rejected without warrant in law and facts. The possibility of abuse by itself cannot persuade us to hold procedure for issuance of permit is bad. We would also expect the officers to bear in mind that it has a duty not to harass any applicants, but process their application with needed speed and to grant import permit where requirements are fulfilled and without any bureaucratic hassles.

Whether the condition is unworkable or unreasonable?

43. We must notice that in this case the learned Single Judge has actually proceeded on the basis that the authorities under the Foreign Trade Act do not have any direct control over the authorities under the Insecticides Act and they cannot direct that latter to do something which they are not obliged to do under the Act and they are not legally obliged to entertain an application for registration in respect of boric acid imported for non insecticidal use. Therefore it is impossible to comply with such condition and the same is found to be arbitrary and unreasonable. It is pointed out by the learned counsel for the appellant and the local manufacturers that the learned Single Judge has not taken into consideration the actual condition in Ext. P5 issued under the Foreign Trade Act. It does not speak about the registration. Rather it refers to requirement of import permit. In fact it is pointed out that the learned Judge finally held that the impugned condition in the policy to take out a registration under the Act is arbitrary and unsustainable. It is pointed out that there is no requirement of taking out registration under the Act in Ext. P5. We notice that as far as import notification is concerned as contained in Ext. P5, there is no requirement of taking out registration though the learned counsel Sri. Gopinatha Menon would point out that what is meant is only import permit. We would think that the learned Single Judge has not appreciated the relevant aspects properly. As noted, the learned Single Judge proceeded as if what is required is taking out registration.

44. It would appear, from the document produced, that import permits have

been granted not only for boric acid but for other chemicals/insecticides. What would have been unworkable would have been insistence of registration when it is sought in respect of insecticide not intended for insecticidal purposes. But, that is not the case here. When boric acid is sought to be imported for non insecticidal purposes under the Foreign Trade policy, no registration under the Act is required. The learned Single Judge was in error in thinking otherwise. That appears to be basis for finding that the condition imposed is on impossible condition and it involves directing the authority under the Act to do something which they are not obliged to do.

45. On the contrary going by the examples projected of permits granted, it is clear that far from it being unworkable, import permits have been granted no doubt subject to the conditions which are imposed therein. With regard to the plea of discrimination the attempt made by the learned counsel Sri. Gopinatha Menon, and Sri. Paul learned counsel who appears for impleaded importers that discrimination is practised between the importers and local manufacturers of boric acid cannot be considered by us. There is no such case set up in the writ petitions such. The contention of the local manufacturers is that importers and the local manufacturers may not fall in the same category as such but we leave the issue open. We only would observe that in the matter of enforcement of law relating to taking out registration by local manufacturers and other requirements, they are certainly meant to be enforced with utmost strictness. The Act is aimed at controlling insecticides with a view to ensure the safety of the human beings and animals. It is an Act which therefore relates to the security of human beings as also the animals as defined in the Act. We only would point out that it is bounden duty of the authorities if it is found that the Act is being the violated, they will take appropriate action. We make this observation, as it is pointed out by Shri. Gopinatha Menon, that none of the local manufacturers have got themselves registered u/s 9. In fact, the learned counsel for the appellant also does not appear to dispute that there is no registration by the local boric manufacturers u/s 9. Certainly this is a matter which must be looked into by the authorities and they are bound to take action if there is violation. Of course, it is a case of the local manufacturers that they applied for registration. But, the Act appears to prohibit carrying out the activities without getting registration if intended to be used as insecticides. According to us, no further investigation into this matter is necessary for by finding that there is illegality committed by the local manufactures which is being condoned by the authorities may not advance the case of the writ petitioners. The case of the writ petitioner is to quash the of condition in Ext. P5 relating to boric acid. We are of the view that there is no basis for the learned Single Judge to have quashed Ext. P5.

Whether there is hostile discrimination and whether Article 14 is violated?

46. The next question which arises for consideration is whether there is discrimination. A plea of discrimination is founded upon Article 14 of the constitution. Article 14 of the Constitution is available to citizens and persons

who are not citizens. In substance it provides for three principles. Equals must not be treated as unequals. Unequals must not be treated as equals. Last, but not the least, the action of the State must be free from arbitrariness as arbitrariness is a sworn enemy of equality. In this case, apparently the argument is that by the imposition of the impugned clause there is discrimination in so far as while restriction is imposed on imported boric acid on no other insecticide, it is imposed. Many insecticides are more dangerous than boric acid. The government does not display the same level of concern as is projected in the case of boric acid. In this regard, we may refer to the pleading in the writ petition from which arises. What is stated in ground E is as follows:

E. Ext. P5 is grossly discriminatory and not issued on the basis of any justifiable reasonable classification. The onerous policy condition of obtaining an import permit from the Central Insecticides Board & Registration Committee imposed vide Ext. P5 has not been extended to other technical grade inorganic chemicals falling under chapter 28 of the ITC (HS) which also finds a place in the Schedule to the insecticides Act, 1968. For example, technical grade inorganic chemicals like sodium cyanide (28 37 1100) Copper Suplhate (28 33 25 00) etc. That are registered insecticides continue to be freely importable without any such requirement of obtaining a prior import permit. Only the free importability of boric acid, which belongs to the aforesaid group has been arbitrarily modified much to the prejudice of bona fide traders in boric acid like the petitioner. Ext. P5 Notification in so far as it is discriminatory on this count is violative of the fundamental rights of the petitioner guaranteed under Article 14 of the Constitution of India and hence is liable to be quashed on this sole ground alone. The said condition is irrational and would result in procedural irregularity in view of the fact that the petitioner''s application for registration has been pending before the Board for over a year now.

47. It is pointed out that these averments are not effectively rebutted. In the counter affidavit filed by the 2nd respondent viz. the Director General of Foreign Trade, in answer to the allegation it is stated that the registration under the Act is required when the schedule product is used for insecticidal purposes in agriculture/household/public health whereas import permit is given to have control over the schedule products for non insecticidal use.

48. We notice that in Ext. R3(i) it is inter alia stated that in cases where multi use pesticides are already governed by a health and safety law, such as Sodium Cyanide which is governed under the Poisons Act, the licenses (and quantities mentioned therein) issued by such statutory authorities may be accepted as end use certificate for issue of import permits. Therefore, even in respect of Sodium cyanide there is a requirement of import permit and also the end use element govern the import of sodium cyanide which apparently is multiple use pesticide. No doubt the writ petitioner would point out that there are such requirements in an executive order in relation to other insecticides. It is pertinent to note that there is no such requirement in the statutory policy in regard to other

insecticides. Discrimination and arbitrary conditions are imposed only in regard to the boric acid in the statute.

49. Under 2004-2009 policy column 1 provides for EXIM Code, Column 2 provides for item description, column 3 contains policy. The restrictions contained are of two types viz. Prohibited and Restricted. Items which do not require any licence under the Exim policy have been denoted as "Free" subject to the Licensing Notes contained in the relevant chapter/heading/sub-heading or as may have been indicated under column 4 mentioning conditions relating to the policy and is also subject to any other law for the time being in force. Column 4 deals with Policy Conditions. The precise restriction are detailed in this column. It is further provided that the details of the conditions and restrictions are given at the end of the chapter would also be restrictions. It is also provided that it is not to be understood that there may not be other conditions applicable on imports.

50. Chapter 38 deals with Miscellaneous Chemical Products. It is provided in the Heading "Notes" that this Chapter does not cover insecticides among other products put up as described in Heading 3808. Under heading 3808, the column ''item description'' contains insecticides, rodenticides, fungicides, herbicides, anti-sprouting products and plant-growth regulators, disinfectants and similar products, put up in forms or packings for retail sale or as preparations or articles(for example, sulphur treated bands, wicks and candles and flypapers. 3808.10 provides for insecticides. Various categories of insecticides are mentioned. Though declared free, all of them also contain a condition that "if it is registered and not prohibited for import under the Insecticides Act and Formulations thereof''. In respect of D.D.T., it is stated to be restricted. Finally after providing for under category 3808.10.99 under ''Item Description ''Other" it is provided that while import is free, it must be registered under the Insecticides Act and not prohibited under it.

51. On the basis of this Sri. Devan Ramachandran would point out that actually in respect of insecticides while the policy is that if one wants to import freely, there is requirement that the concerned insecticides must be registered under the Act where as in the case of boric acid, having regard to the multiple uses, import though it is free, the only condition is that in the case of non insecticidal purposes, import permit as provided must be obtained. Obtaining of import permit for non insecticidal purposes is not something which is ultra vires the Insecticides Act. We also notice that at the end of Chapter 38 following Import Licensing Notes are to be found:

Import Licensing Notes:

(1). Hazardous chemicals; import permitted without a licence in accordance with the provisions of the Manufacture, Storage and Import Hazardous Chemicals Rules, 1986 (made under the Environment(Protection) Act, 1986). Besides other conditions mentioned in the Rules, the importer shall, before 30 days but not later than the date of import, furnish the details specified in Rule 18 to the authority specified in Schedule 5 of the said Rules.

(2). Import is restricted in terms of Interim PIC Procedure of Rotterdam Convention on Prior Informed Consent Procedure for hazardous chemicals and pesticides.

52. In fact the learned counsel for the appellant would emphasise that the right, which is given to import without licence, is subject to the above conditions. Of course, the learned counsel for the writ petitioners would point out that under the Prior Informed Consent Procedure, the condition which is imposed on the importers of boric acid is not imposed. Under the terms of the Prior Informed Consent Procedure what is required is after the import is carried out, the importer would have to comply with the procedure.

53. We would think that this is a case where the learned Single Judge has not pronounced on the case set up that there is violation of Article 14 based on the alleged discrimination. We find that there is no denial of the same by the appellants. But, at the same time, we noticed materials which are produced before us including the case based on the various entries in Chapter 38. There are also the conditions which are attached to the policy. Even though prima facie we would think that, in view of the requirement attached to the import of the various insecticides and categories of ''other'' as already noted that, the insecticides to be imported must be registered and therefore the plea of discrimination appears rather untenable, we would not like to pronounce on the same. We would rather leave it open so that, if advised, in a properly constituted proceedings this matter can be considered. Accordingly we leave it open.

54. As already noted, the learned Single Judge has quashed the impugned condition in the import policy requiring the writ petitioners to take out a registration under the Act is arbitrary and unsustainable. It is to be noted that in W.P. (C) No. 1577/2006 from which W.A. No. 648/2012 arises, the prayer of the writ petitioners was essentially to quash the circulars to the extent they mandate that imports of boric acid by traders can be effected only after they get a registration under the Act. In W.P. (C) No. 4168/2007 from which arises, the main challenge was to quash Exts. P1 and P3 circulars and also Ext. P5 notification to the extent they mandate that import of boric acid to be effected only after the import permit from the Central Insecticides Board and Registration Committee is obtained. There are other reliefs also. In W.P. (C) No. 26432/2006 from which W.A. No. 649/2012 arises, challenge is on the same line as W.P. (C) No. 1577/2006 except that it is circulars that was challenged to the extent that manufacturers can import boric acid only after they get a registration under the Act. In W.P. (C) No. 10934/2007 from which W.A. No. 630/2012 arises, filed by the writ petitioners wherein they also challenged the condition in the policy to the extent that manufactures can import only on getting import permit. W.P. (C) No. 26432/2006 & 10934/2007 are filed by the same parties. The aforesaid cases were disposed of by the learned Single Judge by a common judgment wherein, as already noted, the learned Single Judge quashed the condition in the

import policy. There is no reference to the Circulars apparently in view of the subsequent development in the form of mandate to the foreign trade policy by the impugned policy condition. W.P. (C) No. 11388/2005 also filed by the very same authority which filed W.P. (C) No. 1577/2006 & 4168/2007. In W.P. (C) No. 11388/2005, the prayer was to quash Ext. P1 circular to the extent it mandates that import of boric acid by traders can be effected only on their getting a registration under the Act. As far as the said writ petition is concerned, another learned Single Judge following the judgment in the other cases only found that Ext. P1 Circular is liable to be quashed and there was a direction to refund the duty paid by the petitioner within a period of three months.

55. No doubt, if the restriction had not been imposed by law (the amendment on 7/4/2006 to the statutory policy), the question would arise as to what is the effect of executive instructions on the right to import boric acid as per the statutory policy till the date of the amendment that is 7/4/2006. An executive order cannot impinge on a legal right. There was a right available under the extant statutory policy before the amendment. It could be said that an executive order could not have imposed a restriction on the right available under the policy. But, after the amendment with effect from 7/4/2006 the issue is purely academic as restriction is placed by statutory amendment.

56. As we have noticed, as far as W.A. No. 1653/2013 is concerned, it is to be noted that the writ petition is against the circular. Since the circular placed restriction on the legal right under the unamended statutory policy to import, the circular, in so far as it prohibited traders from import of boric acid for non insecticidal purposes, cannot be supported. But, at the same time, the direction to refund the duty cannot be sustained, as it has no connection at all to the question relating to the circular being illegal. Therefore, the direction to refund the duty can only be set aside. In W.A. No. 1653/2013 we uphold the quashing of the circular to the extent it effected the trader''s right to import boric acid without registration. We, however, delete the direction to refund the amount.

W.A. No. 1653/2013 is partly allowed as above. As far as the other appeals are concerned, as already noticed, the learned Single Judge has quashed the impugned condition in the statutory policy. We have already taken the view that the policy condition is valid. As regards the executive instructions, no doubt they appear to be in the teeth of the legal right available under the statutory policy till the amendment. However, in view of the subsequent development in the form of amendment to the statutory policy the question has become academic. In such circumstances, the common judgment in all the other appeals are liable to be set aside and we do so.

The appeals are allowed there is no order as to costs.

