

Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL WRIT PETITION NO. 7469 OF 2019

1. CHAILBIHARI TRADING PRIVATE LIMITED

Company incorporated under the provisions of the Companies Act, through its director Chhailbihari Premprakash Bansal, Age: 25, Occ: Business, having its registered office at 2, Dattu Ganpat Panchmore Chawl, Tanaji Nagar, Kurar, Malad East — 400 097

2. CHHAILBIHARI PREMPRAKASH BANSAL,

Age: 25, Occ: Business, R/at C-23, Divine Sheraton Plaza, Jesal Park, Jain Mandir, Bhayandar East, Thane — 411105

...Petitioners

~ VERSUS ~

1. UNION OF INDIA

Through Ministry of Finance,
(Department of Revenue), Room No. 267-B, North Block, New Delhi.

2. CENTRAL BUREAU OF NARCOTICS

Through its Commissioner, 19, The Mall, Morar, Gwalior (MP) — 476006
(Respondent No. 1 and 2 to be served through Standing Counsel for Union of India)

... Respondents

ALONG WITH

CIVIL APPLICATION NO. 1690 OF 2019
IN
CIVIL WRIT PETITION NO. 7469 OF 2019

AMRUT IMPEX

Having its office at Gat No. 272/5
Jawajibuwachi Wadi, Kasurdi, Taluka Daund,
District — Pune, through its proprietor Amrut
Rajendrakumar Bora,

... Applicant

APPEARANCES

**FOR THE
PETITIONERS**

Mr. S.P. Bharati, *i/b* Yadav P.R.

**FOR RESPONDENT
NO.1**

Mr. Dhanesh Ramanlal Shah

**FOR RESPONDENT
NO.2**

Mr. H.S. Venegaonkar

FOR THE APPLICANT

**Mr. Kevic Setalvad, *Senior Counsel*,
a/w Rajesh Datar, Prahlad Paranjape,
Sneha Prabhu, Manish Kelkar and Akshay
Kandarkar**

**CORAM : S.C.DHARMADHIKARI &
G.S. PATEL, JJ.**

JUDGMENT RESERVED ON : 21st August 2019

JUDGMENT PRONOUNCED ON : 28th August 2019

JUDGMENT (*per G.S. Patel, J*)

1. *Papaver somniferum*, commonly known as the opium poppy or breadseed poppy, is a species of flowering plant in the family *Papaveraceae*. From it are derived opium and poppy seeds. The plant can be grown domestically in a garden, but is said to be historically native to the eastern Mediterranean. It is cultivated on a large-scale for three primary purposes. The first is to produce poppy seed for human consumption, chiefly in bread and pastry. In kitchens in India, we know it as khas-khas. The second is to produce opium for pharmaceutical use. The third is to produce other alkaloids, mainly thebaine and oripavine. These are processed by the pharmaceutical industry into drugs such as hydrocodone and oxycodone. Opium (“poppy tears”; *Lachryma papaveris*) is the dried latex obtained from *Papaver somniferum*. Approximately 12% of the opium latex is made up of the analgesic alkaloid morphine. This is processed chemically to produce heroin and other synthetic opioids. Opium was prohibited in many countries during the early 20th century, leading to the modern pattern of opium production as a precursor for illegal recreational drugs or tightly regulated legal prescription drugs. The sale of poppy seeds from *Papaver somniferum* is banned in several jurisdictions for this morphine content and heroin potential: Singapore, Taiwan, China, and Saudi Arabia among other countries have complete or partial restrictions.

2. The Petitioners decry guidelines dated 25th June 2019 issued by the 2nd Respondent, the Central Bureau of Narcotics (“CBN”) to regulate the import into India of poppy seeds. The proposed import in question is from Turkey. According to the Petitioners, these guidelines are an unconstitutional restriction on their right to trade and carry on business.

3. We disagree.

4. That poppy seed import into India is regulated by the CBN is undisputed. The Petitioners are registered importers. They have the necessary licenses. They agree, further, that there is annual cap or quota on poppy seed import from various points of origin. There is a cap on the quantity that may be imported for each foreign exporter country. Until recently, import permissions were by sale of lots.

5. On 25th June 2019, the 2nd Respondent issued the impugned public notice No. 9/2019, notifying guidelines for registration of sales contract in regard to poppy seed imports from Turkey. A copy of these guidelines is at Exhibit “E” to the Petition, from page 32 onwards. We go to those directly.

6. The guidelines are specific to poppy seed imports from Turkey. They speak, in clause I, of a determination of a country cap. This cap is to be approved by the Department of Revenue, based on a recommendation by the Narcotics Commissioner, a representative of the Directorate General of Foreign Trade, and a representative of the Department of Revenue. The clause clearly says that the country cap will be based on stock and production of poppy seeds *as communicated by the Turkish Grain Board (TMO) or the Turkish Embassy in India*. Clearly, therefore, this cap is not ad hoc or without basis. Then Clause II says the Turkish exporter is to be registered with the TMO. Once that is done, an Indian importer may approach the Narcotics Commissioner for registration of the sales contract. Certain conditions are prescribed for such registration. One of these

is that each importer can register the quantity applied for or 25 containers (450 MT), whichever is less, during a particular crop year, which runs from 1st July to 30th June. A maximum of six applications are allowed from July to March of the next year. For 2018-2019, no registration application will be entertained after 15th July 2019 and any such contract is valid for shipment from Turkey only until 31st July 2019. Then there are detailed provisions for procedure, validity, surrender and penalty.

7. What the Petitioners say is that this process of registration will create a monopoly in the hands of big players, and that the old system of drawing of lots is preferable. Then it is argued that once a Turkish exporter is registered with the Turkish Board, or TMO, then requirement of the Indian importer having to register is arbitrary and unreasonable. It is a duplication of work. It introduces unnecessary red tape. Earlier, the restriction was a maximum of five containers. By raising this to 25, the 'rich and powerful importers take all the cake', is the allegation. Finally, it is argued that the time-frames are unrealistic and are a form of invidious discrimination. These are the principal submissions and grounds to assail the notification.

8. In our view, they are without merit. There is no fundamental right to be an importer. There is no fundamental right to import poppy seeds. There is no fundamental right to import anything without restrictions, or only on terms beneficial to a particular person. In mounting such a challenge, the burden on the Petitioner is to show that the notification is manifestly arbitrary, i.e. that a patent arbitrariness exists on the face of it, without requiring any

convoluted argumentation. It must, alternatively, be shown to be ex facie discriminatory, and not just discriminatory, but invidiously so. If a classification is challenged, it must be shown that it bears no nexus to the object of the impugned law. The petitioners are able to do none of this.

9. What is, however, clear is that this notification has been framed pursuant to a Memorandum of Understanding dated 23rd May 2018 between India and Turkey. By a Notification dated 29th July 2016, the government of India conferred powers on the Department of Revenue to frame guidelines (fixing country caps, imposing limits on import quantities per importer or in the aggregate and so on). These were intended to give effect to the National Policy on Narcotic Drugs and Psychotropic Substances, controlled by the Narcotic Drugs & Psychotropic Substances Act, 1985 (“**NDPS Act**”). Obviously, this MoU, a sovereign act, is not open to challenge. What the impugned Notification does is to provide guidelines and to restrain exercise of unfettered discretion. The Notification guidelines serve to filter out all but genuine and bona fide importers and prevent cartelization, artificial blocking of country caps, and artificial raising of re-sale prices. Notably, no other importer has complained. On the contrary, one importer, represented by Mr Setalvad, has sought to intervene to contest the petition. That application says that around 18000 MT of poppy seed imports are already under contract with various other importers, who have duly sought registration and complied with the guidelines’ requirements.

10. We may only note that this Petition does not question the power to frame such guidelines. In the NDPS Act, we find specific powers conferred under Chapter III. Section 9 gives the Central Government power to permit, control and regulate cultivation, manufacture, trade, possession, transport, export, import (both inter-State and into India) of various types of substances. Opium and opium derivatives are specifically mentioned. Section 11 confers a broadly similar power on the State Government. The NDPS Rules, 1985 contain more specific provisions. Chapter III deals with opium poppy cultivation and production, all of which is regulated. Similarly, Chapter IV of the Rules deals with manufacture, sale and export of opium. Chapter VI addresses import, export and transshipment of narcotic drugs and psychotropic substances. Now narcotic drug is defined in Section 2(xiv) to mean coca leaf, cannabis (hemp), opium poppy straw and includes all manufactured drugs. Opium poppy, under Section 2(xvii) means the plant of the species *Papaver Somniferum L* and the plant of any other species of *Papaver* from which opium or any phenanthrene alkaloid can be extracted or which the Central Government declares by notification to be an opium poppy. Opium straw is defined in Section 2(xviii) to mean all parts except the seeds of the opium poppy after harvesting, whether in their original form or cut, crushed or powered and whether or not any juices has been extracted therefrom. These definitions are immediately relevant to Rules 53 to 56 under Chapter VI of the NDPS Rules. These tell us that while the import of opium and concentrate of poppy straw is forbidden save by the Government Opium Factory (along with morphine, codeine, thebaine and their salts), every import of a narcotic drug or a psychotropic substance requires an import certificate. Thus, the poppy seed is not itself a

narcotic; but they come from the poppy plant, which has narcotic properties and from which other derivatives (poppy straw in particular) are produced.

11. The power to impose quantitative restrictions can be traced to Chapter III-A of the Foreign Trade (Development & Regulation) Act 1992. This was inserted by a 2010 amendment, and confers power on the Central Government to impose quantitative restrictions on imports. Section 9-A says that the Central Government may, after conducting a suitable enquiry, if satisfied that any goods are imported into India in large quantities and under such conditions as injure or threaten to injure domestic industry, it may impose quantitative restriction. These restrictions can continue for a maximum of four years, extendable by a like period.

12. We have noted this precisely because the source of power under both Act is not questioned by the Petitioners before us at all. Once, therefore, we find that there is a power to regulate and a power to impose quantitative restrictions, and there is no challenge to the exercise of that power, it is difficult to see what remains in the Petition. Merely saying that a certain clause is, in the Petitioner's view, sub-optimal, or leaves something to be desired, is not enough to warrant a striking down of the notification. We cannot, equally, substitute our view for government policy framed in legitimate exercise of statutory power. Yet that is precisely what the Petitioners would have us do. Worse yet, there is no data at all in the petition to support what the petitioners allege. In short, therefore, the entire case of the petitioners is this: "we do not like this new policy, though we do not question the power, and we would much prefer to

be governed by the earlier policy, even if we have not been able to substantiate our reasons with any hard facts or data”. It is impossible to accept any submission framed like this.

13. Mr Shah for the 1st Respondent draws our attention to a decision of a Division Bench of the Allahabad High Court in *Ayurveda Sewashram Kalyan Samiti v Union of India and Ors.*¹ There, too, the question was about poppy seeds imports from Turkey. The court noticed that India is a signatory to the Single Convention on Narcotic Drugs, 1961. The National Policy on Narcotic Drugs and Psychotropic Substances notes that while Narcotic Drugs and Psychotropic Substances do have many medical and scientific uses, yet they can be, and are, also abused and trafficked. India’s policy to preventing drug abuse is part of the Constitutional mandate to the State to promote health and nutrition. This country is a signatory to at least three international conventions on drug-related matters, viz., Single Convention on Narcotic Drugs, 1961, Convention on Psychotropic Substances, 1971 and the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. The Division Bench noted from an affidavit filed on behalf of the CBN, Gwalior that the Policy governing poppy seeds imports prescribes three conditions for such imports. The first of these is as to point of origin: the import must originate only from the countries stipulated in the Import Policy as amended. The second condition is that the importer must produce a certificate from the competent authority of the exporting country that the opium poppy has been grown legally in that country. The third condition is that all import contracts have to be compulsorily registered with the Narcotics

1 2014 (305) ELT 246 (All.)

Commissioner, Central Bureau of Narcotics, Gwalior. We pause to note that, therefore, the multiple grounds and objections before us today regarding this registration are not new. In fact, the Petitioners themselves had to have followed them in the past.

14. The Allahabad Division Bench noted that the Import Policy casts on the CBN, a specialized body, the duty of registering contracts. This is with the stated public purpose of protecting the due implementation of the policy of the Government of India of not permitting import of poppy seeds from non-designated countries. It is in pursuance of that policy that the conditions of the notification require a certificate that the poppy seeds originate in a country where opium poppy is grown legally. The Import Policy is a statutory document enacted in pursuance of the Import and Export Control Act, 1947. Then there is a reference to the National Policy on Narcotic Drugs and Psychotropic Substances.

15. Once, therefore, we see that the presently impugned Guidelines are but a step towards implementing a policy that has not only been in place in some form for many years previously, but is in furtherance of a policy to promote the larger public interest, then the narrow commercial interests of the Petitioners must yield. Viewed from this perspective, we do not think the decision of learned single Judge of the Madras High Court in *Sri Adinath Traders v Union of India*² is of much assistance. That related to a challenge to a categorization of importers, and that is nowhere near the challenge before us.

2 2016 (338) ELT 571 (Mad.)

16. Mr Bharati also cites the decision of a learned single Judge of the Karnataka High Court in *Om Traders v Union of India*,³ but to what purpose we are unable to discern. The decision seems very much against him. There, the learned single Judge had before him a group of petitions challenging the policy. Both *Ayurveda Sewashram Kalyan Samiti* and *Sri Adinath Traders* were cited. The petitioners in the Karnataka High Court alleged that the authorities had no jurisdiction to issue a notification limiting quantities or prescribing conditions, including registration. The learned single Judge *dismissed* the writ petitions.

17. We do so as well. The writ petition is entirely without merit. It is dismissed. The Civil Application is disposed of accordingly. No costs.

(S.C. DHARMADHIKARI, J.)

(G.S. PATEL, J.)

3 Decided on 9th February 2018.