

Sanjay Khanna Vs. Director General Foreign Trade and anr.

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Court : Delhi

Decided On : Feb-22-2006

Reported in : 129(2006)DLT100; 2006(87)DRJ700

Judge : Manmohan Sarin, J.

Acts : Foreign Trade (Development and Regulation) Act, 1992 - Sections 5; Livestock Importation Act, 1898 - Sections 3, 3(1) and 3A

Appeal No. : WP(C). 18267/04 and CM. 13807/04

Appellant : Sanjay Khanna

Respondent : Director General Foreign Trade and anr.

Advocate for Def. : R.M. Tewari, Adv.

Advocate for Pet/Ap. : Daljit Singh, Sr. Adv. and; A.S. Mathur, Adv

Judgement :

Manmohan Sarin, J.

1. By this writ petition, petitioner Mr.Sanjay Khanna, seeks a direction to the respondents to release the consignment of white Goose and duck feathers, imported by his customers for manufacture of shuttle cocks for the game of badminton. Petitioner is an indenting agent for his Chinese Principals and places

orders on behalf of Indian Customers and importers. Petitioner had placed orders for M/s.Rajindra Sports International, M/s.South Indian Industries and M/s.Jagdish Sports Industries all from Jalandhar, Punjab.

2. The goods had been shipped on 15th January, 2004 and had arrived in India on 4th February, 2004. Vide notification No.33(RE-2003)/2002-2007 dated 6th February, 2004 issued in exercise of powers under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992, the import of feathers from all countries in view of reported outbreak of Highly Pathogenic Avian Influenza (Fowl Plague) was prohibited for a period of six months. Vide another notification No.S.O.155 (E) dated 3rd February, 2004 issued under Sub-section (1) of Section 3 and Section 3A of the Livestock Importation Act, 1898 and in supersession of earlier notification dated 20th January, 2004, the Central Government prohibited the import into India from all countries feathers and other livestock product in view of the outbreak of Highly Pathogenic Avian Influenza (Fowl Plague). Initially prohibition under this notification was also for six months.

3. The ban under the notification dated 6th February, 2004 was extended vide another notification bearing No.43/(RE-2003)/2002-2007 dated 6th August, 2004 for a period of further six months. Again vide another notification dated 7th February, 2005, issued under Sub-section (1) of Section 3 and Section 3A of Livestock Importation Act, 1898, the import of feathers on account of Highly Pathogenic Avian Influenza (Fowl Plague) was extended for a further period of six months.

4. Petitioner's contention initially before the Court was that the consignments of its customers are not covered within the ambit of the notifications, prohibiting the import. The plea being that the order for the goods had been placed when there was no prohibition. The goods had been shipped prior to the prohibition and had arrived in India prior to prohibition. The above plea though attractive on the first flush, is not a plausible one. Firstly the ban under notification No.S.O.155 (E) came into effect on 3rd February, 2004 i.e., prior to even the arrival of goods in India. Secondly the relevant date or determining event for importation is the clearance of the goods by the customs authority. The importation is on the date on

which the goods are presented and cleared by the customs authority for home consumption. This event did not take place rather the prohibition came into being even before the arrival of the goods. The submission, therefore, that the notification did not apply to the goods, orders for which had been placed or shipped, is not a tenable one and merits rejection and is rejected.

5. The second limb of the submission of the petitioner was that the ban has ceased to be operative after the initial notification. This is also not borne out by the notifications produced on record, where the notifications prohibiting the import have been extended from time to time and still continue to be in force.

6. During the proceedings in the writ petition, petitioner submitted that assuming the feathers belong to the birds which had been culled when the Highly Pathogenic Avian Influenza (Fowl Plague) was prevalent in China and the possibility of the birds being affected could not be ruled out, the virus or micro organism would not subsist or survive in the feathers after such a long time, especially when the exporters claim that feathers were disinfected by washing with Chemicals and sterilised at high degree of temperature before shipment. The petitioner in support of his contention enclosed Fumigation/Disinfections Certificate to the effect that product was washed with detergent, cleaned and sterilized at high temperature of 110°C. Petitioner also relied on an opinion of Dr.D.Panigrahi which was filed as an enclosure to an affidavit dated 6th September, 2005. Dr.Panigrahy's opinion was sought with regard to the life span of H5N1 virus and whether the virus could be removed permanently? Dr.Panigrahi opined that it was highly unlikely that the virus would survive for one and half years in feathers stored at the customs facilities in Indian weather conditions. He stated that If the feathers were clean and dry, the virus would not survive for more than a few days at room temperature. Cool and moist conditions favor long survival of A1 viruses in the environment. He submitted that virus could be viable in liquid manure for 105 days in winter and in faeces for 30-35 days. He recommended that feathers could be placed in a closed room or a building and heating the building at 90-100° Fahrenheit for one week for its elimination. Relying on the above opinion, petitioner contended that in Indian summer conditions, it was highly unlikely that any virus would have survived assuming but not admitting that birds were infected

with the virus. Petitioner also offered that random samples from the consignment could be taken and tested at the High Security Animal Disease Laboratory, Bhopal of the Government of India.

7. Respondents in opposition to the writ petition, apart from the pleas taken in the counter affidavit, placed on record extracts of Guidelines from the Office of International Epizootics (OIE) Respondents pointed that China continued to be a country not free from Highly Pathogenic Avian Influenza(Fowl Plague) and it was rated as a positive country for the virus. It was contended that Highly Pathogenic Avian Influenzaremaind viable for a long period not only in infected faeces but also in tissues and water. H5N1 virus was stated to be highly contagious and mutative one. It was highly transmissible and mutative.

8. Respondents averred that the present wave of HPAI commenced in 1997 in Hongkong and has spread to 22 countries over several continents. Over 150 million domestic poultry have either died or has been destroyed in the affected countries. It has also affected human beings. Over 160 persons have contracted the infection and there have been 85 casualties. In case the virus gains, it has the capability to affect human beings easily and causing an influenza pandemic. This was a matter of concern to the global community. With each human case, the transmissibility and mutative part of the virus improves. The WHO has estimated that there may be 2.7 million to 7.4 million deaths, if HPAI assumes a human pandemic. As far as China was concerned from where feathers have been imported, it continued to have the HPAI positive status since January, 2004. 1,58,000 birds were reported sick with death toll of 1,51,000. 21.97 million birds were culled out in China. 10 human cases occurred out of which 7 casualties were there. As per global alert, India has been categorised as high risk country due to its proximity to the endemic areas in Asia. Respondents contended that HPAI free status of India deserves to be guarded zealously in the interest of its poultry as also the human population.

9. In these circumstances, respondents averred that they would not even take the remotest chance and were not amenable to test of the imported feathers at the laboratory at Bhopal. Prohibition is justified in the interest of safeguarding public

health.

10. The apprehension expressed by the respondents has turned out to be true. Judicial notice of the HPAI virus having surfaced in India affecting poultry live stock may be taken. 10 birds are reported to have died and tested positive for the virus. Read alert has been announced with orders for culling of a million birds in nearly 3 to 10 km radius where the infected birds were found.

11. Reference may also be usefully invited to the Judgment of the Supreme Court in Vincent Panikulangara Vs . Union of India and Ors : [1987]2SCR468 as to the approach to be adopted by the court while dealing with technical issues where the question of public health was involved. The court in Vincent Panikulangara v. Union of India and Ors (supra) was considering question of withdrawal of fixed dose combinations of drugs and withdrawal of licenses there for. The issues falling for consideration were technical and specialised matters relating to therapeutic value, justification and harmful side effects of drugs as also correctness of the action taken by the Drugs Control Authorities on the basis of advice. The court observed' In view of the magnitude, complexity and technical nature of the enquiry involved in the matter as also the far reaching implications of the total ban of certain medicines for which the petitioner has prayed, a judicial proceeding of the nature initiated is not an appropriate one for determination of such matters.

12. In view of the foregoing discussion, the rationale and the justification for the prohibition and the recent events in which virus has surfaced in India, the need to prevent ingress and further spread of HPAI virus into the country cannot be undermined. The approach of utmost caution as adopted by the respondents on an issue which could endanger public health gravely cannot be faulted with. Petitioner is thus not entitled to the reliefs sought. Respondents may permit the petitioner to reship the goods and upon the petitioner not exercising the option, respondents are free to carry out destruction of the same.

Writ petition is dismissed with the above directions.