

SPECIAL CIVIL APPLICATION

*Before the Hon'ble Mr. Justice Akil Kureshi
and the Hon'ble Mr. Justice Biren Vaishnav*

ALL INDIA CERAMIC GLAZE AND GLASS FRIT (MIXTURE)
MANUFACTURING ASSOCIATION & ORS. v.
UNION OF INDIA & ORS.*

Constitution of India, 1950 — Art. 226 — Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992) — Secs. 3 & 5 — Insecticides Act, 1968 (46 of 1968) — Sec. 38 — Notification making import of 'boric acid' even for non-insecticidal use subject to permit by Central Board of Insecticides — Validity — Considering that boric acid is a substance of toxic nature, hence, unregulated import can cause damage to life and environment — It may also lead to diversion of substance for insecticidal use, hence judgment of Insecticides Board as to requirement crucial — Held, regulation neither arbitrary nor unreasonable — Further, the Court rejecting allegation of 'mala fide' that regulation on import imposed to benefit local manufacturers — Petition dismissed.

ભારતનું બંધારણ, ૧૯૫૦ — આર્ટિ. ૨૨૬ — વિદેશી વ્યાપાર (વિકાસ અને નિયમન) અધિનિયમ, ૧૯૯૨ — કલમ ૩ અને ૫ — જંતુનાશક દવા અધિનિયમ, ૧૯૬૮ — કલમ ૩૮ — જાહેરનામાંથી બિનજંતુનાશક હેતુ માટે પણ 'બોરીક એસીડ'ની આયાત કેન્દ્રીય બોર્ડની જંતુનાશક પરમીટથી જ થઈ શકે — કાયદેસરતા — એ બાબત ધ્યાનમાં લેતાં કે 'બોરીક એસીડ' ઝેરી પદાર્થ છે, તેથી તેની બિનનિયમિત આયાત જીવન અને વાતાવરણને નુકશાન કરી શકે છે — તે કદાચ જંતુનાશક વપરાશને બદલે બીજા વપરાશ તરફ દોરી જશે, જોકે જંતુનાશક બોર્ડનો ચુકાદો તેની જરૂરિયાત ખાસ છે તેવો છે — ઠરાવવામાં આવ્યું કે, નિયમન મનસ્વી નથી કે ગેરવ્યાજબી નથી — વધુમાં, અદાલતે 'બદ દાનત'નો આક્ષેપ નકાર્યો કે આયાતનું નિયમન સ્થાનિક ઉત્પાદકોને લાભ આપવા માટે છે — અરજી રદ કરવામાં આવી.

For, judicial review of policy decision extremely limited. (See Para 24)

The Court must appreciate that regulation has not been imposed by exercising power under the Insecticides Act, 1968 but in exercise of powers under the Act of 1992. Under the said Act of 1992, as noted, the import and export is regulated by the policy that the Government of India frames. (Para 21)

The Central Insecticides Board and Registration Committee under the Ministry of Agriculture is only assigned the task of processing applications by the prospective importers for granting the import permit. There is nothing either unreasonable in this Act or impermissible in the statute for the Government of India so to do. Under the Act of 1992, the Government of India has ample powers to regulate the import policy. While doing so, it is either open for the Government of India to prohibit or restrict import of a certain item or subject it to regulatory measures. In the present case, Government of India was of the opinion that looking to the toxic nature of the substance, it was necessary to regulate its import. It may be that such regulation is provided for import of

*Decided on 27-7-2017. Special Civil Application No. 9230 of 2008.

the substance for non-insecticidal purposes. However, the philosophy behind such regulatory measure cannot be faulted. (Para 21)

Its misuse and/or mishandling can cause extensive damage to human beings, plants, animals and environment. Further, uncontrolled or unregulated import of boric acid ostensibly for the purpose of non-insecticidal use may also lead to possible pilferage and diversion for insecticidal use. In this context, judgment of Central Insecticides Board and Registration Committee, as to the requirement of import of boric acid for its non-insecticidal purposes would be crucial. (Para 21)

The impugned notification issued by the Government of India does not lack the authority nor specifications of Central Insecticides Board and Registration Committee under the Ministry of Agriculture as the permitting authority, is impermissible under the law. (Para 23)

The Court also does not find any grounds to accept factual *mala fide*. It may be that in this particular case, the Government of India was activated into action on the representations made by the local manufacturers of boric acid. That by itself, however, would not necessarily imply *mala fide*. (Para 28)

Cases Relied on :

- (1) *Union of India v. Feroke Boards Ltd.*, W.A. No. 630 of 2012 decided on 3-6-2014 by Kerala H.C.

Cases Referred to :

- (1) *A. Satyanarayana v. S. Purushotham*, 2008 (5) SCC 416
- (2) *Supreme Court Employees' Welfare Assn. v. Union of India*, 1989 (4) SCC 187
- (3) *Bombay Dyeing & Mfg. Co. Ltd.-(3) v. Bombay Environmental Action Group*, 2006 (3) SCC 434
- (4) *Glass Chatons Importers and Users Association v. Union of India*, AIR 1961 SC 1514
- (5) *Abdul Aziz v. State of Maharashtra*, AIR 1963 SC 1470

Devan Parikh, for Petitioner Nos. 1 to 9.

Nikunt K. Raval, for Respondent No. 1.

Devang Vyas, for Respondent Nos. 1 to 3.

Nanavati Associates, for Respondent No. 7.

M/s. Trivedi & Gupta, for Respondent No. 8.

Rule served for Respondent Nos. 4 o 9.

AKIL KURESHI, J. This petition is filed by All India Ceramic Glaze and Glass Frit (Mixture) Manufacturing Association and its members (hereinafter referred to as "the Association"). The petitioners have challenged a Notification dated 7-4-2006 under which by amending the Schedule-I (Imports) of the I.T.C. (H.S.) Classifications of Export and Import Items, 2004-2009, the import of boric acid for non-insecticidal purposes was made subject to import permit issued by the Central Insecticides Board and Registration Committee ("the Committee" for short) under the Ministry of Agriculture.

2. Brief facts are as under. Petitioner No. 1 is an Association of Ceramic Glaze and Glass Frit (Mixture) Manufacturers. Petitioner Nos. 2 to 9 are its members. The members of the Association are engaged in manufacturing Ceramics Glaze and Glass Frit (Mixture). For such manufacturing activity, they require boric acid in large quantities. The boric acid, we are informed, is used for giving glaze to the tiles. The boric acid is also used in preparation of variety of insecticidal uses in agriculture. The boric acid thus has insecticidal and non-insecticidal uses. The petitioners use boric acid for non-insecticidal purposes.

3. To meet with the requirement of boric acid, the petitioners would depend heavily on the imports. According to the petitioners, there are few manufacturers of boric acid in India. The price of boric acid in the local market is much higher than in the international market. For long, import of boric acid was freely allowed and was subject to no conditions. The local manufacturers, however, represented the Government of India to restrict the imports so that the users of boric acid like the petitioners would be compelled to purchase boric acid from them. It is pointed out that on 1-6-2004, Borax Manufacturers Association of India made a detailed representation to the Ministry of Agriculture as under :

“Loss of Value addition in India

Multinationals have set up Boric Acid manufacturing plants, at the mining areas of Natural Boron Ore itself. Their every effort is to sell value added finished product and discourage supplies of raw material to the Indian manufacturers, in order to discourage value addition in India and maximize revenues in their own country. As a result, the Labour intensive Indian Manufacturers of Boric Acid are slowly closing down with thousands of workers loosing their employment.

The Insecticides Act does not permit clearing of import consignments by customs, on the basis of an undertaking provided by the importer regarding the end use of Boric Acid. It is an admitted fact that the Customs department is not in a position to verify/regulate the end use of a product after the consignments are cleared.

Therefore, it is humbly submitted that the provisions of the Insecticides Act relating to registration by importers prior to import of Boric Acid be enforced and accordingly the customs authorities be asked to verify the registration of the importers prior to clearing of import consignments.”

4. Once again on 7-6-2004, Borax Manufacturers Association of India wrote to the Ministry of Agriculture in which it was stated as under :

“Therefore, it is humbly submitted that the provisions under Sec. 9(3) T.I. of the Insecticides Act relating to registration by importers prior to import of Boric Acid be enforced and the already framed guidelines by R.C. in 124th/211th meeting (guidelines for issue of registration permit/Licence/

Import Permit for Industrial Use/Non-Agricultural/Public Health Purposes) may kindly be amended and a mandatory requirement be made for obtaining the required Registration for Import-since all the end uses of Boric Acid in various industries are only due to its Insecticidal/Herbicidal/Fungicidal property.

Accordingly, fresh guidelines, applicable from 1st April, 2004, may kindly be issued for obtaining Registration for import of Boric Acid as has been done for many other similar cases like Pheromones P.B.-Ropel, B.T.I., Trichoderma, Neem *etc.* and the customs authorities kindly be asked to verify the registration of the importers prior to clearing of import consignments.”

5. Our attention was drawn to the draft Minutes of the joint meeting between the Hon’ble Agriculture Minister, the Government officials from various departments and delegates from Borax Manufacturers Association of India on 17-6-2004 in which it was concluded as under :

“After considering these details, the Hon’ble Agriculture Minister passed the following orders :

(i) All importers of the Boric Acid should compulsorily obtain certificate of registration from the Registration Committee for import.

(ii) Import of Boric Acid should not be allowed as end use of Boric Acid in various industries due to its pesticidal properties and necessary directives be sent to the Customs Department to stop illegal import of Boric Acid till the importers obtain registration under the Act.

(iii) Indigenous manufacturers of Boric Acid should also submit applications to obtain registration certificate and they may be given two years period for registration.”

6. According to the petitioners on account of such efforts by the local manufacturers of boric acid, the Ministry of Agriculture issued a Circular dated 26-8-2005 providing certain restrictions on the import of boric acid for non-insecticidal use. The Circular reads as under :

“The undersigned is directed to refer to this Department’s communication of even number dated 17-12-2004 on the subject cited above and to say that it has been decided with the approval of the competent authority that in supersession of all previous instructions issued in this regard the import of Boric acid shall henceforth only be allowed on the basis of :

(i) Registration certificate issued by Registration Committee in respect of insecticidal use, or

(ii) Import permit issued by Registration Committee on the recommendations of the administrative Ministry/Department concerned in respect of non-insecticidal use.”

7. According to the Counsel for the petitioner, it was not within the purview of the Agriculture Ministry to impose restrictions on import of boric acid. Realising such difficulty, the Government of India issued the impugned

Notification dated 7-4-2006 amending the import policy by amending the Schedule, relevant portion of which reads as under :

Exim Code	Item Description	Policy	Policy Conditions
28100020	Boric Acid	Free	Import of Boric Acid for non-insecticidal purposes will be subject to an import permit issued by the Central Insecticides Board and Registration Committee under the Ministry of Agriculture.

8. According to this amendment, boric acid which was till then under free import policy and subject to no condition, was made subject to the condition that its import for non-insecticidal purposes would be subject to an import permit issued by the Central Insecticides Board and Registration Committee under the Ministry of Agriculture. This notification, the petitioners have challenged in this petition. Their grievance is that the notification was issued by the Government of India to favour the manufacturers of boric acid in India on representations made by them. The users of boric acid for non-insecticidal uses such as the petitioners are not allowed to import the full requirement of boric acid forcing them to purchase from the local market. According to the petitioners, it is not within the power of the Government of India to impose such restriction. The decision suffers from factual and legal *mala fides*. Counsel would point out that in number of cases, though the requirement of boric acid was certified by the nodal agency, the Committee sanctioned only a small fraction of such requirement.

9. On the other hand, the stand of Union of India emerging from the affidavit dated 11-8-2008 is that boric acid primarily has insecticidal uses and is highly toxic in nature. Therefore, to ensure the safety and to prevent risk to human life or animals or environment and to prevent misuse and abuse of such insecticides, the import of boric acid has been regulated. Such regulatory measures have been provided in cases of similar other multi-use insecticides such as sodium cyanide, copper sulphate, *etc.* It is further stated that the boric acid has insecticidal as well as non-insecticidal uses for industrial application. Looking to the nature of the substance, its application cannot be allowed unregulated. Such use is, therefore, regulated. The Registration Committee was competent to assess the quantity requirement of the importer and to grant permission for it to meet genuine requirement. It is further stated that the policy is framed for regulating insecticides for the purpose of safeguarding human health, plant, animal life and environment and the regulation is necessary also to ensure that the product is used only

for the intended purpose. It is pointed out that misuse of insecticides can cause wide spread effect on the health of the population. Boric acid is known to have caused deaths in Malaysia. It is pointed out that non-insecticidal use of boric acid is not confined to ceramic tiles manufacturing but in range of other incidental products. None of these manufacturers have objected to the regulation mechanism. An importer of boric acid for non-insecticidal use has to establish his intention to the satisfaction of Ministry of Agriculture and the power flows from Sec. 38 of the Insecticides Act, 1968 (“the Act” for short). It is further pointed out that the Committee consists of senior experts in various fields of agriculture, chemistry *etc.* Meeting is held frequently during which members deliberate on the data supplied by the importers for judging their actual requirement, capacity to handle/store safely the toxic substance and on consideration of such factors, actual quantity of import is allowed. It is further pointed out that in the year 2006-2007, import of boric acid was approximately 53.4% of the domestic demand which would mean that major part of the demand is met through imports.

10. The private respondents who are the local manufacturers of boric acid have also highlighted the nature of toxicity of substance and need for regulations on imports. It is contended that it was found that some of the importers were importing pesticides illegally by using chemical names in order to evade restrictions or prohibition under various laws. Boric acid also has various names and there is possibility of misdeclaration. The Central Board of Excise and Customs therefore, issued Circular dated 9-8-2011 providing that all pesticides listed in the Schedule of the Insecticides Act require registration and permit from the Registration Committee. Respondent No. 7 along with affidavit dated 15-6-2017 has produced the details of import permits issued in the year 2015-2016. This data shows that for the year 2015, total quantity of boric acid for import recommended in case of various local users was 24,469 metric tonnes against which the Committee approved import of 21,698 metric tonnes. Likewise, in the year 2016 upto 7-9-2016 figures of such quantities were 12,607 and 9,268 metric tonnes respectively. Along with the said affidavit, the said respondent has also produced a copy of Notification dated 1-1-2015 amending the Import Policy as under :

“3. Under Sec. 9 of the Insecticides Act, 1968 all chemicals intended to be used as insecticides, rodenticides, fungicides, herbicides *etc.* (referred to as ‘insecticides’ under the Act) require mandatory registration for import. In cases, where the ‘insecticide’ is imported for non-insecticidal purpose, an import permit is necessary from the Registration Committee under the Department of Agriculture and Co-operation. The Registration Committee while granting registration and a permit for import of an insecticide spells out the conditions for import which *inter alia*, may include reference to the source of import. No ‘insecticide’ can be imported from a source other

than that specified on the certificate of registration or the permit, as the case may be. In addition, the Registration Committee may issue regulatory guidelines from time to time with respect to safety, efficacy, quality *etc.*, which warrant full compliance from importers.”

11. On the basis of such materials on record, learned Counsel Shri Devan Parikh for the petitioners raised the following contentions :

(i) The entire exercise of regulating the imports of boric acid for non-insecticidal use was on the basis of representations made by the local manufacturers. The Government of India imposed restriction so that the boric acid users may be compelled to purchase boric acid from the local market at a higher cost. The decision of the Government of India was, therefore, not *bona fide*.

(ii) It was contended that the entire exercise was aimed at benefiting the local manufacturers of boric acid. The Committee does not grant necessary import permits even when genuine need is established and is duly supported by nodal agency. It is only the nodal agency which can properly ascertain the requirement of a manufacturing unit. The Committee without any reasons grants only a small portion of actual requirement whereby compelling the petitioners to purchase the boric acid from the local market.

(iii) The impugned notification was arbitrary, unreasonable and *ultra vires*. The Government of India did not have powers to regulate the imports of boric acid for non-insecticidal uses on the premise that such imports may harm the health of humans, animals or the environment. Far more toxic or poisonous substances are allowed to be imported freely without any restrictions.

(iv) The non-insecticidal uses of insecticide cannot be regulated by the Insecticides Act, 1968, since by virtue of Sec. 38 of the Act, such substance would be outside the purview of the Act. The Ministry of Agriculture, therefore, had no authority to supervise the imports of such substance for non-insecticidal use.

(v) Counsel would submit that local manufacturers are subjected to no control. Though the Government of India agrees that such units should be registered under the Insecticides Act, 1968, for long this policy has not been enforced.

12. In support of his contention that the subordinate legislation does not enjoy the same level of immunity as the legislation of the Parliament or the State Legislature, the Counsel relied on the following decisions :

(a) In case of *A. Satyanarayana v. S. Purushotham*, reported in 2008 (5) SCC 416, to contend that even the policy decision of the Government

of India is subject to judicial review. The Superior Courts while exercising their powers of judicial review, must determine the issue having regard to the effect of the subordinate legislation in question. It was further observed that a statutory rule must be made in consonance with constitutional scheme. A rule must not be arbitrary. It must be reasonable.

(b) In case of *Supreme Court Employees' Welfare Assn. v. Union of India*, reported in 1989 (4) SCC 187, in which it was observed that Rules are liable to be declared invalid if they are manifestly unjust or oppressive or outrageous or directed to an unauthorised end or violative of the general principles of the law of the land or so vague that it cannot be predicted with certainty as to what is prohibited by them or so unreasonable that they cannot be attributed to the power delegated or otherwise disclose bad faith.

(c) In case of *Bombay Dyeing & Mfg. Co. Ltd.-(3) v. Bombay Environmental Action Group*, reported in 2006 (3) SCC 434, in which it was held that though a presumption of constitutionality of a statute would arise also in case of subordinate legislation, such legislation would be susceptible or vulnerable to challenge not only on the ground that the same offends Arts. 14 and 21 of the Constitution but also that the provisions of M.R.T.P. Act are unreasonable.

13. On the other hand, learned Advocate Shri Nikunt Raval for the Union of India submitted that the Government of India policy is sound and merely regulates the import of boric acid. Such regulations are needed since the substance is highly toxic. To ensure that the same is not misused or mishandled, certain restrictions were found necessary which have been imposed by amending Import-Export Policy in exercise of powers of subordinate legislation. He further pointed out that since year 1991, all imports of insecticides for non-insecticidal uses are regulated. It is, therefore, not a new phenomenon. He submitted that Ministry of Agriculture is appointed as a nodal agency to regulate such imports. The Committee comprised of experts in various fields. The meetings of the Committee are convened regularly for ascertaining the genuine needs of importers. He drew our attention to the judgment of Kerala High Court in case of the *Union of India v. Feroke Boards Ltd.*, (W.A. No. 630 of 2012, judgment dated 3-6-2014), in which Division Bench has upheld the Government of India policy. It was pointed out that the review petition filed by the original petitioners came to be dismissed by judgment dated 28-2-2017.

14. Learned Counsel Shri K. S. Nanavati for the private respondents also opposed the petition contending that it was well within the purview of the Government of India to amend the Import-Export Policy and regulate

the imports of boric acid. All insecticides other than boric acid are also subjected to similar control regulations. Our attention was drawn to Schedule-I to the Import Policy in this respect. He also relied on the policy conditions under Chapter 38 of Schedule-I to the Import Policy (I.T.C. (H.S.), 2017), portion of which we have reproduced earlier which clarifies that in cases where the insecticide is imported for non-insecticidal purpose, an import permit is necessary from the Registration Committee under the Department of Agriculture and Co-operation and no insecticide can be imported from a source other than that specified on the Certificate of Registration or the permit, as the case may be. It is also provided that in addition, the Registration Committee may issue regulatory guidelines from time to time with respect to safety, efficacy, quality *etc.*, which warrant full compliance from importers. Counsel relied on the decision of Supreme Court in case of *Glass Chatons Importers and Users Association v. Union of India*, reported in AIR 1961 SC 1514, in which it was observed as under :

“6. A policy as regards imports forms an integral part of the general economic policy of a country which is to have due regard not only to its impact on the internal or international trade of the country but also on monetary policy, the development of agriculture and industries and even on the political policies of the country involving questions of friendship, neutrality or hostility with other countries. It may be difficult for any Court to have adequate materials to come to a proper decision whether a particular policy as regards imports is, on a consideration of all the various factors involved, in the general interests of the public. Even if the necessary materials were available it is possible that in many cases more than one view can be taken whether a particular policy as regards imports whether one of heavy customs barrier or of total prohibition or of entrustment of imports to selected agencies or channels is in the general interests of the public. In this state of things the burden on the person challenging that the Government of the country is not right in its estimate of the effects of a policy as regards imports in the general interests of the public will be very heavy indeed and when the Government decides in respect of any particular commodity that its import should be by a selected channel or through selected agencies the Court would proceed on the assumption that decision is in the interests of the general public unless the contrary, is clearly shown. Consequently, we are unable to accept the argument that a decision that imports shall be canalised, is *per se* not a reasonable restriction in the interests of the general public. We wish to make it clear that while the decision that import of a particular commodity will be canalised may be difficult to challenge, the selection of the particular channel or agency decided upon in implementing the decision of canalisation may well be challenged on the ground that it infringes Art. 14 of the Constitution or some other fundamental rights. No such question has how, ever been raised in the present case. The attack on the validity of Para 6(h) of the Imports Control Order, 1955, therefore,

fails. The contention that Sec. 3 of the Imports and Exports Control Act, 1947, is bad to the extent that it permits the Government to make an order as in Para 6(h) of the Imports Control Order, 1955, consequently also fails.”

Reliance was placed on decision in case of *Abdul Aziz v. State of Maharashtra*, reported in AIR 1963 SC 1470 in which it was observed that powers conferred under Sec. 3(1) of the Imports and Exports (Control) Act is not restricted merely to prohibiting or restricting imports at the point of entry of goods into the territory of India but extends also to controlling the subsequent disposal of the goods imported. It was further observed that it is for the appropriate authority and not for the Courts to consider the policy, which must depend on diverse consideration to be adopted in regard to the control of import of goods.

15. In order to judge the rival contentions, we may notice the relevant statutory provisions :

The Insecticides Act, 1968 :

16. The statement of objects and reasons for enactment of the Insecticides Act, 1968, would show that in the months of April and May, 1958, many persons died in the States of Kerala and Madras as a result of food poisoning arising from contamination of food with poisonous insecticides. Many more people fell severely ill. The Government of India, therefore, appointed a One man Commission to inquire into and report on the circumstances of such cases of food poisoning and the measures needed to avoid similar occurrences in future. Later on also instances of food poisoning came to light. The Insecticides Act, 1968 was, enacted therefore, in order to combat menace of food poisoning arising from contamination of food and insecticides *etc.* The Act was therefore, enacted to regulate the import, manufacture, sale, transport, distribution and use of insecticides with a view to prevent risk to human beings or animals, and for matters connected therewith.

- Clause (e) of Sec. 3 of the Act defines the term ‘*insecticides*’ as under :

“*Insecticide*” means —

 - (i) any substance specified in the Schedule; or
 - (ii) such other substances (including fungicides and (weedicides) as the Central Government may, after consultation with the Board, by notification in the Official Gazette, include in the Schedule from time to time; or
 - (iii) Any preparation containing any one or more of such substances.”
- Section 5 of the Act pertains to constitution of Registration Committee. Under sub-sec. (1) thereof, the Central Government is required to constitute a Registration Committee consisting of a Chairman, and

not more than five persons, who shall be the members of the Board including the Drugs Controller of India and Plant Protection Adviser to the Government of India to register insecticides after scrutinising their formulae and verifying claims made by the importer or the manufacturer as regards their efficacy and safety to human beings and animals, and to perform such other functions as may be assigned under the Act.

- Section 9 pertains to registration of insecticides. Under sub-sec. (1) of Sec. 9 any person desiring to import or manufacture any insecticide may apply to the Registration Committee for registration of such insecticide and there shall be separate application for each such insecticide.
- Section 13 of the Act pertains to grant of licence. Sub-section (1) thereof requires that any person desiring to manufacture or to sell, stock or exhibit for sale or distribute an insecticide or to undertake commercial pest control operations with the use of any insecticide, he may make an application to the Licensing Officer for the grant of a licence. Under sub-sec. (3) of Sec. 13, the licensing officer may grant licence in such form or on such condition as may be prescribed.
- Under Sec. 20 of the Act, the Central Government or a State Government may appoint requisite numbers of Inspectors. Section 21 of the Act lays down powers of Insecticide Inspectors which include the power to enter and search any premises which he has reason to believe that an offence under the Act or the Rules, has been or is being or is about to be committed or for the purpose of satisfying himself that the provisions of the Act or the rules or the conditions of any Certificate of Registration or Licence are being complied with.
- Section 27 of Act pertains to prohibition of sale *etc.* of insecticides for reasons of public safety. Under sub-sec. (1) of Sec. 27, if the Central Government or the State Government is of opinion that use of any insecticides is likely to involve risk to human beings or animals, as to render it expedient or necessary to take immediate action then the Government may by issuing notification in the Official Gazette, prohibit the sale, distribution or use of the insecticide pending investigation into the matter.
- Section 29 of the Act lays down the offences and punishment for such offences. Under sub-sec. (1) whoever imports or manufactures any insecticide without a Certificate of registration or sells or distributes an insecticide in contravention of Sec. 27, is liable to

punishment. Section 31A of the Act authorises the State Government to set up Special Courts for speedy disposal of cases under the Insecticides Act. Section 38 of the Act is an exemption provision and reads as under :

“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 or 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.”

17. A quick look at these statutory provisions would demonstrate that under the Act of 1968, detailed provisions have been made for registration of insecticides, for grant of licence to person desiring to manufacture, sell, stock or exhibit for sale insecticides. Insecticide Inspectors are to be appointed for carrying out such purposes. Such Inspectors are clothed with wide powers to enter and search any premises where he has reason to believe that any offence is or likely to be committed or conditions imposed under the Act are being flouted. Section 27 gives powers to the Central Government or the State Government to impose immediate ban on sale, distribution or use of the insecticide or batch of it, where in the opinion of the Government use thereof is likely to involve such human risk or risk to animals as to render it expedient or necessary to impose such immediate ban pending such investigation. Offences have been prescribed under Sec. 29 of the Act. Special Courts could be set up for speedy disposal of such cases.

18. Having made these provisions, the legislation framed Sec. 38 providing for exemptions. Under sub-sec. (1) nothing in the Act would apply to 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. Under clause (b) nothing in the Act would apply to any substance specified or included in the Schedule or any preparation containing any one or more of them, 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 or animal life not useful to human beings. Under sub-sec. (2) of Sec. 38, the Central Government is authorised to issue

notification exempting all or any of the provisions of this Act in case of educational, scientific or research organization engaged in carrying out experiments with insecticides. Sub-section (1) of Sec. 38 which is a general exemption is divided in two parts. Under clause (a), insecticides for household and kitchen purposes *etc.*, are kept out of the purview of the Act. Under clause (b), insecticides intended for the purposes other than agricultural and incidental purposes are exempted such as preventing, destroying, repelling or mitigating any insects, rodents, fungi, weeds and other forms of plant or animal life not useful to human beings. Clause (b) of sub-sec. (1) exempts the use of insecticides for non-insecticidal purposes from the purview of the Act. Sub-section (2) of Sec. 38 gives powers to the Central Government to grant exemption for use of insecticides for educational, scientific or research purposes.

Foreign Trade (Development and Regulation) Act, 1992 :

19. We may now peruse the relevant provisions of the Foreign Trade (Development and Regulation) Act, 1992 (“the Act of 1992” for short). Section 3 of the Act of 1992 pertains to power to make provisions relating to imports and exports. Under sub-sec. (1) of Sec. 3, the Central Government has the power by issuing order published in the Official Gazette, to make provision for development and regulation of foreign trade by facilitating imports and increasing exports. Under sub-sec. (2) of Sec. 3, it is open to the Central Government by issuing order published in Official Gazette, to make provisions for prohibiting, restricting or otherwise regulating involving specified classes of cases and subject to such exceptions, if any, the import or export of goods or services or technology. Under Sec. 5 of the Act of 1992, the Central Government may from time to time formulate and announce by notification in the Official Gazette, the Foreign Trade Policy and may also in like manner, amend the policy. Section 6 of the Act pertains to appointment of Director General and his functions. Under sub-sec. (1), Central Government may appoint any person to be the Director General of Foreign Trade for the purposes of the Act. As per sub-sec. (2), the Director General would advise the Central Government in formulation of the Foreign Trade Policy and he would be responsible for carrying out such policy.

20. Having noticed such statutory provisions, let us examine how they apply to the facts of the case. We may recall the petitioners have challenged the Notification dated 7-4-2006 issued by the Government of India, Ministry of Commerce and Industry, under which, the import of boric acid is made subject to the condition that the same would be on an import permit issued by the Central Insecticides, Board and Registration Committee under the Ministry of Agriculture. This notification is sought to be challenged

principally on three grounds namely, that it is not within the purview of the Ministry of Agriculture under the Insecticides Act to regulate the import of pesticides for non-insecticidal purposes; that the condition is imposed at the behest of local manufacturers to benefit them and the same is, therefore, wholly *mala fide*, and lastly, that such condition was even otherwise arbitrary, unreasonable and not within the powers of the Government of India to impose.

21. We have noticed that the Insecticides Act, 1968, makes detailed provisions for controlling and regulating the use of insecticides. Application of these provisions, however, has been by virtue of Exemption clause contained in Sec. 38, limited to the insecticides meant for insecticidal purposes and not for purposes other than insecticidal. Learned Counsel for the petitioners, therefore, may be correct in contending that it is not within the purview of the Ministry of Agriculture to control or regulate the import of insecticides for non-insecticidal uses. However, we must appreciate that regulation has not been imposed by exercising power under the Insecticides Act, 1968 but in exercise of powers under the Act of 1992. Under the said Act of 1992, as noted, the import and export is regulated by the policy that the Government of India frames. It is only subject to such policy that a person can import any goods into India. As is well-known, the Government of India frames such Import-Export Policy typically operating for a period of five years. It is in exercise of such powers that while amending the Import-Export Policy by the said Notification dated 7-4-2006, it was provided that the import of boric acid may be subject to the condition that same would be imported on a permit issued by the Central Insecticides Board and Registration Committee under the Ministry of Agriculture. It is therefore, a misconception to argue that the Ministry of Agriculture is seeking to regulate the import of boric acid in exercise of powers under the Insecticides Act, 1968. The Central Insecticides Board and Registration Committee under the Ministry of Agriculture is only assigned the task of processing applications by the prospective importers for granting the Import Permit. There is nothing either unreasonable in this Act or impermissible in the statute for the Government of India so to do. Under the Act of 1992, the Government of India has ample powers to regulate the import policy. While doing so, it is either open for the Government of India to prohibit or restrict import of a certain item or subject it to regulatory measures. In the present case, Government of India was of the opinion that looking to the toxic nature of the substance, it was necessary to regulate its import. It may be that such regulation is provided for import of the substance for non-insecticidal purposes. However, the philosophy behind such regulatory measure cannot be faulted. We have taken detailed note of Government affidavit filed before us to point out that boric acid has toxic property. Its misuse and/or

mishandling can cause extensive damage to human beings, plants, animals and environment. Even when, therefore, such boric acid is imported for non-insecticidal purposes, it is important that its handling, storage and usage is properly carried out. Further, uncontrolled or unregulated import of boric acid ostensibly for the purpose of non-insecticidal use may also lead to possible pilferage and diversion for insecticidal use. In this context, judgment of Central Insecticides Board and Registration Committee, as to the requirement of import of boric acid for its non-insecticidal purposes, would be crucial.

22. To reiterate, the Insecticides Act, 1968 makes detailed provisions for regulation and control of any insecticides including boric acid for the purposes of insecticidal uses. Its manufacture, trade, storage *etc.*, can be subject to control and supervision. Section 38 of the Act when exempts all uses of insecticides for non-insecticidal purposes from the provisions of the Act, would still leave the residual power in the Ministry of Agriculture to ensure that use of the substance is actually being made for non-insecticidal purposes and not for insecticidal purposes.

23. Looked from any angle, the impugned notification issued by the Government of India does not lack the authority nor specifications of Central Insecticides Board and Registration Committee under the Ministry of Agriculture as the permitting authority, is impermissible under the law.

24. Is the regulation unreasonable, arbitrary or otherwise not for the purposes of the Act? The answer has to be in the negative. We have noticed the purpose and philosophy providing for such regulations. If the Government of India in its wisdom found that certain substance which is otherwise toxic in nature, the import thereof is required to be subjected to certain regulations and regulatory measures even for the non-insecticidal purposes where it is likely to cause damage to plants, animals or human beings, such policy decision cannot be faulted. The judicial review of a policy decision of Government of India is extremely limited. Ordinarily, this Court would not enter into the correctness or advisability of a certain policy and substitute its own opinion, understanding or wisdom over that of the policy-making body. It is the Government of India which has necessary wherewithal, scientific and technical expert advise and more essentially, responsibility of taking policy decisions. Additionally, such policy decision has been given shape of statutory provisions albeit in exercise of powers of subordinate legislation. As is well-known, even subordinate legislation carries a presumption of constitutionality. It is for one who propounds the same as being arbitrary, unreasonable or in any other manner unconstitutional to establish the same through necessary facts. We have noted the provisions contained in the Act of 1992. We also noticed the provisions contained in the Insecticides Act,

1968. We do not find that the policy of the Government of India to ensure that imports of boric acid for non-insecticidal purposes also needs to be regulated, is in any manner unreasonable, arbitrary or discriminatory.

25. We may recall that similar issue had come up before Kerala High Court in case of *Feroke Boards Ltd.* (supra), in which following observations were made :

“34. Under Sec. 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 infect 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.”

26. We are conscious that in the Review petition filed by the importers, Kerala High Court had left the question of validity of the notification on the ground of discrimination open.

27. We have noticed that under Chapter Note 2810 in Schedule-I to the Import Policy also a policy condition is mentioned which requires that where insecticides is imported for non-insecticidal purposes and the import permit is necessary from Central Insecticides Board and Registration Committee under the department of Agriculture.

28. We also do not find any grounds to accept factual *mala fide*. It may be that in this particular case, the Government of India was activated into action on the representations made by the local manufacturers of boric acid. That by itself however, would not necessary imply *mala fide*. In a democratic form of governance, the administration is always open to representations from the various quarters. If a certain relevant fact is brought to the notice of the administration through representation from a particular quarter, and if such representation is taken into account even for framing the policy, such policy cannot be tainted as *mala fide* without there being anything more on record. The Government of India has pointed out that such import conditions are applied since year 1991. It is also pointed out that not only the boric acid but all other insecticides are subject to similar regulatory measures. There is nothing peculiar about import of boric acid.

29. The petitioners as well as the private respondents *i.e.* the local manufacturers of boric acid have presented different data of import permission sought and granted. These figures show a huge cleavage. The data produced by the petitioners would suggest permission was granted for a small proportion of the quantity demanded by the importer. Whereas the data produced by the respondents would suggest, much of the demand was met. Such data picked for a small period without anything further cannot establish *mala fides* nor lack of it. In any case, policy formation through subordinate legislation is entirely different from its implementation. The former may be perfectly valid whereas the later may be defective.

30. In the result, the petition is dismissed.

(NRP)

Petition dismissed.

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