



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO.5601 OF 2023

PETITIONER : M/s Shriram Food Industry Ltd.
A Company incorporated under the Companies Act, 1956, having its Corporate Office at Plot No.16-17-18, Mahadev Galaxy, First Floor, Near Harihar Mandir, Nagpur. Through its Authorized Director Shri Anup S/o Ramavtar Goyal
Factory At : M/s Shriram Food Industry Ltd.,
A Company incorporated under the Companies Act, 1956 and having its Factory at Survey No.81/2, 182/1A, 182/2, Mouza-Marodi, Tahsil-Mouda, Distt. Nagpur441104 (M.S.).

..VERSUS..

RESPONDENTS : 1. Union of India, Through the Secretary Ministry of Commerce and Industry New Delhi-110001.

2. The Director General of Foreign Trade, Udyog Bhavan, New Delhi-110001.

3. The Commissioner of Customs and Central Excise, Seminary Hills, Nagpur-440006.

4. The Chief Commissioner of Customs and Central Tax, Vishakhapatnam Zone, GST Bhawan, Post Area, Vishakhapatnam-530 035.
5. The Chief Commissioner of Customs, Having its Office at : Jawaharlal Nehru Customs House, Taluran, District-Raigarh-400707 (Maharashtra).
6. The Additional Commissioner of Customs Kakinada Customs House, Port Road, Kakinada-533007, East Godavari District (Andhra Pradesh)
7. The Commissioner of Customs, Custom House, Mundra, 5B, Port User Building, Mundra Port, Mundra, Gujrat-370421.
8. The Chief Commissioner of Customs, Office of the Chief Commissioner of Customs, Custom House, 15/1, Stand Road, Kolkata-700001.
9. The Commissioner of Customs Office of the Commissioner of Customs, Custom House, Near Balaji Temple, Kandla Gujrat-370210.
10. The Commissioner, Customs (Preventive) Commissionerate, 55-17-3, C-14, 2nd Floor,

Industrial Estate, Autonagar,
Vijayawada-500 007.

WITH

WRIT PETITION NO.6539 OF 2023

PETITIONER : M/s Bharti Foods, Having its office at M/s Bharti Foods Kh No.53, village Bhowari Tahsil-Kamptee, Distt. Nagpur-441104 (M.S.) Through its authorized representative Mr. Bharatlal Mate.

..VERSUS..

RESPONDENTS : 1. Union of India, Through the Secretary Ministry of Commerce and Industry New Delhi-110001.

2. The Director General of Foreign Trade, Udyog Bhavan, New Delhi-110001.

3. The Commissioner of Customs and Central Excise, Seminary Hills, Nagpur-440006.

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5. The Chief Commissioner of Customs, Having its Office at : Jawaharlal Nehru Customs

House, Taluran, District-Raigarh-400707 (Maharashtra).

6. The Additional Commissioner of Customs Kakinada Customs House, Port Road, Kakinada-533007, East Godavari District (A. P.).
7. The Commissioner of Customs, Custom House, Mundra, 5B, Port User Building, Mundra Port, Mundra, Gujrat-370421.
8. The Chief Commissioner of Customs, Office of the Chief Commissioner of Customs, Custom House, 15/1, Stand Road, Kolkata-700001.
9. The Commissioner of Customs Office of the Commissioner of Customs, Custom House, Near Balaji Temple, Kandla Gujrat-370210.
10. The Commissioner, Customs (Preventive) Commissionerate, 55-17-3, C-14, 2nd Floor, Industrial Estate, Autonagar, Vijayawada-500 007.

WITH

WRIT PETITION NO.6986 OF 2023

PETITIONER : M/s Pagariya Export Private Limited, Having its office at Plot

No.19, House No.1256/U1,
Great Nag Road, Rambagh,
Nagpur-440 018.

Through its authorized
representative Mr. Sudip
Madhusudan Kothari

..VERSUS..

- RESPONDENTS** :
1. Union of India
Through the Secretary Ministry
of Commerce and Industry New
Delhi-110001.
 2. The Director General of Foreign
Trade, Udyog Bhavan, New
Delhi-110001.
 3. The Commissioner of Customs
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 4. The Commissioner of Customs,
Custom House, Mundra, 5B, Port
User Building, Mundra Port,
Mundra, Gujrat-370421.
 5. The Commissioner of Customs,
The office of Commissioner of
Customs, Customs House, Near
Balaji Temple, Kandla Gujrat-
370210.
 6. The Commissioner, Customs
(Preventive) Commissionerate,
55-17-3, C-14, 2nd Floor,
Industrial Estate, Autonagar,
Vijayawada.

Shri M. G. Bhangde, Senior Advocate i/b Shri S. Dewani,
Adv., Ms S. Sarada, Adv. and Ms A. Bangde, Adv. for the
Petitioners in all .

Shri N. S. Deshpande, Deputy Solicitor General of India for
Respondent Nos.1 and 2 in all.

Mr S. N. Bhattad, Advocate for Respondent Nos.3 to 7, 9
and 10 in WP No.5601 and 6539 of 2023 and for
Respondent Nos.3 to 5 in WP No.6986 of 2023.

CORAM : **AVINASH G. GHAROTE AND**
SMT. M. S. JAWALKAR, JJ.

RESERVED ON : **21ST FEBRUARY, 2024.**

PRONOUNCED ON : **9TH MAY, 2024.**

JUDGMENT (PER : SMT. M. S. JAWALKAR)

1. Heard.

2. **Rule.** Heard finally with the consent of the learned counsel
appearing for the parties.

3. The petitioners are the companies incorporated under the
Companies Act, 1956, and are dealing in the business of rice and rice
related products. The petitioners company claim to be one of the
companies of the group by name “Greta Group”, which has various
kinds of business activities, namely rice milling, power generation
and trading of metal scraps in India and overseas market. The
petitioners companies have its corporate office in Nagpur and also in
other parts of the world.

4. The respondent No.1 is the Union of India. The respondent No.2, the Director General of Foreign Trade is a statutory Authority regulating and controlling foreign trade in India. Respondent No.3 is the Head of Central Excise and Customs Department. The respondent Nos.4 to 10 are the Heads of respective Divisions of the Custom Department working under the directives of the respondent No.3 and implement the policies framed by the respondent Nos.1 and 2. As the facts in all these petitions are identical, the facts in Writ Petition No.5601 of 2023 are considered here.

5. The petitioners, by these petitions, raise challenge to the action on the part of the respondent No.1 in issuing Notification dated 20.07.2023 in exercise of powers conferred under Section 3 read with Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (for short, “the Act of 1992”). By this Notification, the export policy was amended and export of Non-Basmati Rice against ITC (HS) code 1006 30 90 was declared as “prohibited”. Prior to such amendment, export of the said Commodity was “free”. The said Notification No.20/2023 is ordered to be brought into force with immediate effect. By this notification, the respondent No.1 has permitted four conditions under which the consignments of “Non-Basmati Rice” will be allowed to be exported.

The said Notification further came to be clarified by respondent No.1 on 18.08.2023 vide Trade Notice No.23/2023 dated 18.08.2023 clarifying that the conditions which were stipulated vide Notification No.20/2023 dated 20.07.2023, were independent of each other and export is allowed in case of completion of any of the conditions of Para 2 of Notification dated 20.07.2023 by the exporter. The said notification is challenged mainly on the ground that before taking such decision, the Government ought to have considered the concluded contracts which are partly performed. A challenge is also raised that the notification cannot be by retrospective effect so as to divest and adversely effect the concluded contracts which have already been entered into by the petitioners with their Foreign buyers.

6. The petitioners have placed a summary of details of various sales contracts entered into with various customers by the petitioners. It is contended that the petitioners are obligated to comply with each and every of such contract. These contracts were entered into before the issuance of impugned Notification when the policy of export was free, as such these contracts are saved from prohibition contained in the impugned Notification. The details of sales contract entered into by the petitioners are reproduced below :

Sales Contract Date	Sales Contract No.	Buyer	Quality	Quantity in M.T.
13.01.2023	SE22Y-00513	Glometz International	Indian White Rice	50,000
10.07.2023	SE23Y-0005814023637	Aditya Birla Global Trading	Indian Long Grain White Rice 25 PCT Broken	1,50,000
13.07.2023	SE23Y-00067	Glometz International DMCC	IR64White Rice 5% Broken	2,500
13.07.2023	SE23Y-00066	Roop International General Trading	Indian White Rice	11,750
			Total (in M.T.)	79,250

7. In order to fulfill its obligation for exporting the products in pursuance to the aforesaid sale contracts, the petitioners are claimed to have entered into various purchase contracts for the purchase of sale of Non-Basmati Rice and accordingly, advance has been paid and received under the said contracts. It is submitted that respondent Authorities are well aware of practice of advance sale and purchase contracts prevailing in the trade. It is also contended that the provision is arbitrary, hasty and illogical decision was taken without having regard to this fact. Huge stakes are involved which has not been looked into, while the said Notification was brought into force. In view of the Foreign Trade Policy issued by the Central Government under Section 5 of the Act of 1992, the amendments

carried out therein shall only have a prospective effect and not retrospective effect. The Foreign Trade Policy provides for protection to those who were holders of letter of credit and the retrospective effect could not have been given to the Notification in respect of any such transactions. It is submitted that similar issue was involved in Writ Petition No.22444 of 2007, before the High Court of Andhra Pradesh at Hyderabad and the petitioners therein were granted interim relief, wherein Notification dated 15.10.2007 was made effective retrospectively from 09.10.2007. It is submitted that the law, pertaining to the prospective or retrospective effect of the Notification pertaining to any prohibition relating to import or export any good, is well settled.

8. After hearing the learned Senior Counsel Shri M.G. Bhangde, for the petitioners, his arguments focus primarily on following contentions that :

8.1. Before issuing notification, no notice was given nor any suggestion, objections were called nor there was any consultation with exporters. Thus, the respondents Authorities violated the principles of natural justice.

8.2. The notification is unreasonable and violates fundamental right under Articles 14 and 19(1)(g).

8.3. The impugned notification contains no reasons to justify the prohibition. Thus, it amounts to non application of mind or arbitrary exercise of power by the respondents.

8.4. The notification has not taken into consideration the concluded contracts which were based on the existing FTP

8.5. It was legitimately expected from respondents to take into consideration the contracts executed up to the date of issuance of the notification, as it may lead to litigation, losses and adverse affect on the reputation of the exporters. It is expected of respondents statutory Authorities to be fair and reasonable in their approach so also they should be unbiased and follow the principles of fairness and justice. There is no data available to take such decisions which not only affect the petitioners but also to the Countries who depends on our Nation for rice.

8.6. The petitioners have legitimate expectation that they will be able to honour the concluded contracts and accordingly export the Non-basmati Rice. However, respondent Nos.1 and 2 have not taken this into consideration which renders the impugned notification arbitrary and violation of Article 14 of the Constitution of India.

8.7. The respondents/Statutory Authorities deliberately suppressed martial and relevant particulars. The respondent Nos.1 and 2 were required to state the details of : i) “Sudden spike in global price of rice”, such as what was the price of rice in global market for some period. Similarly, for the reason ii) “Food Security was at risk in India”, the respondent Nos.1 and 2 were required to state the quantity of rice available as well as quantity of rice required for the entire country and the quantity of rice to be exported. For the reason “Price stabilization of food items”, relevant data ought to have been placed on record. There is no data placed on record in respect of production and export of Non-basmati rice. All these details have not been supplied. Therefore, the impugned Notification suffers from malice in law. As such, there is no justification for impugned amendment to the export policy.

8.8. It is further argued that paragraph No.1.05 of the Foreign Trade Policy, 2023 provides for “Transitional arrangement” Clause (b). Therefore notwithstanding change in the policy, the exporter who has commitment through Irrevocable Commercial Letter of Credit (ICLC) before date of imposition of such restriction and was permitted to export the balance quantity of goods as per value and period available in the ICLC, for availing which the exporter had to register ICLC with jurisdictional RA against computerized receipt

within 15 days of imposition of any such restriction. However, the impugned Notification in paragraph No.2 states that ‘the provision under paragraph No.1.05 of FTP, 2023, regarding transitional arrangement shall not be applicable under the impugned notification for export of Non-basmati rice’. It is vehemently argued that the benefit conferred upon an exporter by paragraph No.1.05 of FTP cannot be taken away by the respondent Nos.1 or 2. Even if, it is presumed that such powers are there to take away the benefit, such power is required to be exercised in a fair and reasonable manner. There is no justifiable reason or material placed on record to take away such benefits. Thus, the exercise of power, if any, in the matter is manifestly arbitrary as it is not backed by any material or reasons recorded in the file. It is contended by petitioners that it could not register the ICLC with jurisdictional RA as provisions of paragraph No.1.05 (b) have been made inapplicable.

8.9. Lastly, it is submitted that power under Sections 3 and 5 of the Foreign Trade (Development and Regulation) Act, 1992, to amend and/or formulate the export and import policy is that of Central Government. The Director General of Foreign Trade has no such power. The power of Central Government under aforesaid provisions cannot be delegated to any Officer including the Director General, Foreign Trade. From the notification, the petitioners

reasonably believe that the decision to amend the export policy in respect of Non-basmati rice from “free” to “prohibited” has been taken by the Director General, Foreign Trade and not by the Central Government. No such information is supplied under the Right to Information Act, 2005. As such, the decision is taken by the Director General, Foreign Trade and not by Central Government.

8.10. Relying upon para-15 in *Union of India and Ors. vs. Agricas LLP and Ors., (2021) 14 SCC 341*, it is contended that Article 77 does not provide for delegation of any power, albeit under sub-section (3) of Article 77, the President is to make rules for more convenient transaction of business and allocation of same amongst Ministers. It is vehemently contended that the notification issued requires to be presumed, who has been issued by the DGFT as there is nothing on record to show that it is issued in the name of the President, authenticated in the manner specified in the Rules made by the President. If that notification was as per the provisions and under the Authority of the President that would not have been challenged but it is already brought on record by the petitioners that in spite of repeated request, no information is supplied by the respondent that by which order the powers are delegated to the DGFT.

8.11. In support of his contentions, Mr. Bhangde, learned Senior Counsel for the petitioners relied on the judgments of various High Courts and the Hon'ble Apex Court as under :

- i) *Parag Milk and Milk Products Ltd. vs. Union of India, 2007 SCC OnLine Bom 716,*
- ii) *Cellular Operators Association of India and Ors. vs. Telecom Regulatory Authority of India, 2016) 7 SCC 703,*
- iii) *K. S. Paripoornan vs. State of Kerala and Ors., (1994) 5 SCC 593,*
- iv) *Director General of Foreign Trade and Anr. vs. Kanak Exports and Anr., (2016) 2 SCC 226.*
- v) *Food Corporation of India Vs. M/s Kamdhenu Cattle Feed Industries (1993) 1 SCC 71.*
- vi) *Parisons Agrotech Pvt. Ltd. And Anr. vs. Union of India and Ors., (2015) 9 SCC 657.*
- vii) *State of Jharkhand vs Brahmaputra, (2023) 10 SCC 634.*

9. In reply, the learned Dy. Solicitor General of India, Shri Nandesh Deshpande, for the respondent Nos.1 and 2, supported the notification and submitted that there is no violation of any fundamental right. The Notification is issued as per provisions of law.

The Notification is under signature of Director General of Foreign Trade/ respondent No.2 and Union of India is represented through respondent No.1 in Ministry of Commerce and Industries who are entrusted with the formulation and enforcement of Foreign Trade Policy. It is submitted that as per Section 3 of Foreign Trade Act, the Central Government has the power to formulate and announce the export/import policy and to amend the policy. It is further submitted that there has been sudden spike in the global prices of rice and the food security of India was at risk. Therefore, keeping in view the domestic food security situation in India and the need for price stabilization of food item, the respondent No.1/Union of India within its regulatory role, amended the export policy of Non-basmati Rice. It was carried out after due consideration with the Nodal Departments. It is further submitted that in certain conditions, the Non-basmati rice was allowed to be exported. Those four conditions are mentioned in the notification, are as follow :

“i) Where loading of non-basmati rice on the ship has commenced before this Notification;

ii) Where the shipping bill is filed and vessels have already berthed or arrived and anchored in India ports and their rotation number has been allocated before this Notification; the approval of loading in such vessels will be issued only after confirmation by the concerned Port Authorities regarding anchoring/berthing of the ship for loading of non-basmati rice prior to the Notification;

iii) Where non-basmati rice consignment has been handed over to the Customs before this Notification and is registered in their system/where Non-basmati rice consignment has entered the Customs Station for exportation before this Notification and is registered in the electronic systems of the concerned Custodian of the Customs Station with verifiable evidence of date and time stamping of these commodities having entered the Customs Station prior to 20.07.2023. The period of export shall be upto 31.08.2023.

iv) Export will be allowed on the basis of permission granted by the Government of India to other countries to meet their food security needs and based on the request of their Government.”

9.1. It is submitted that prior intimation was not given as very purpose of the amendment will be defeated as it has to be implemented with immediate effect. As such, the notification is issued in a fair and reasonable manner. The notification was not issued with retrospective effect. It is issued in public interest which prevail over the private interest of exporters. It is submitted that the execution of contract is bound by law and regulation and sovereign power of Government cannot be circumscribed by entering into a contract. Thus, the contracts entered into by petitioners cannot be a bar in a sovereign decisions of Government of India.

9.2. The learned Dy. S. G. I., relied on the following citations:

1) *Union of India Vs. International Trading Co. and another, (2003) 5 SCC 437*

**2) *Union of India and Ors. vs. Agricas LLP and Ors.,
(2021) 14 SCC 341***

10. The question of authority needs to be addressed first, for if we find that there was no authority to issue the notification, then the petition must succeed on that count alone.

10.1. A perusal of the notification dated 20/7/2003 (pg.47), indicates that it has been issued by the Central Government in exercise of the powers conferred under sec.3 read with sec.5 of the FT (D & R) Act, 1992 and para 1.02 and 2.01 of the FTA Policy 2023. What is material is that the notification states that it has been issued by the Central Government, in exercise of the powers under Sec.3 r/w/ 5 of the F T Act, 1992. It has also been published in the Gazette of India Extraordinary Part-II, Section-3, Sub-Section (ii). This would prima facie indicate that the notification has been issued by the Central Government. The only contention raised for the plea that it is not so, is the fact that it bears the signature of Mr. Santosh Kumar Sarangi, Director General Foreign Trade. This however ignores the position that the above named person, has also acted in his capacity as Ex-Officio Additional Secretary, to the Government of India. This would clearly indicate that the notification has been issued by the Central Government and not by the Director General of Foreign Trade.

10.2. Mr. Nandesh Deshpande, learned Dy.SGI, has rightly placed reliance on *Union of India and Ors. vs. Agricas LLP and Ors.*, (supra). This was a case which involved challenge to the validity of the Notifications dated 29/03/2019 bearing S.O. Nos.1478-E, 1479-E, 1480-E and 1481-E pending in several writ petitions filed before different High Courts. The matter also involved connected challenge to the Trade Notice dated 16/04/2019 issued by the Directorate General of Foreign Trade on the ground of excessive delegation as not being in accordance with sub-section (2) to Section 3 read with the bar under sub-section (3) to Section 6 of the Foreign Trade (Development and Regulation) Act, 1992. The Hon'ble Apex Court held as under:

“11. Several traders had thereafter filed Writ Petitions before different High Courts challenging imposition of restrictions on import of Peas and pulses and interim orders were passed staying the notifications which had the effect of permitting imports without any restriction as to quota or licence. The primary grounds raised in the writ petitions before the High Courts were:

11.1. The impugned notifications issued by the DGFT had the effect of modifying or amending the EXIM policy as the specified items were withdrawn from the free category and moved to restricted category. But, DGFT, a statutory authority under the provisions of FTDR Act, was not authorised to authenticate/issue an order amending or modifying the EXIM policy as this power vests with the Central Government in terms of sub-section (2) to Section 3, read-with sub-section (3) to Section 6 of the FTDR Act, which states that powers exercisable under Sections 3, 5, 15, 16 and 19 of the FTDR Act cannot be delegated to the

DGFT or any other officer subordinate to the Director General.

11.2. Section 19(3) of the FTDR Act provides that every rule or every order passed by the Central Government shall be laid, as soon as may be after it is made, before each House of the Parliament while it is in session or thereafter. The impugned notifications had not been laid before the Houses of the Parliament

11.3. The Notifications and trade notices suffer from the vices and defects mentioned by this Court in DG of Foreign Trade v. Kanak Exports, (2016) 2 SCC 226.

11.4. The notifications and the trade notices offend the right to equality and violate Article 14 of the Constitution.

15. At the outset, we must record that the importers, and in our opinion rightly, have not raised the contention that DGFT could not have notified the impugned notifications. The notifications themselves record that they were published by the Ministry of Commerce and Industry, Department of Commerce, Directorate General of Foreign Trade. The first paragraph of the notification states that they had been issued by the Central Government in exercise of powers conferred under Article 77 of the Constitution. Clearly, the notifications were issued by the Central Government, and not the DGFT that had performed the ministerial act of publication. The decision to amend and issue the notification was of the Central Government. Neither Section 3(2) nor Section 6(3) of the FTDR Act was violated. This Court in Delhi International Airport Limited v. International Lease Finance Corporation and others, 9 (2015) 8 SCC 446, had referred to Articles 77 and 166 of the Constitution and held that the Constitution stipulates that whenever executive action is taken by way of an order or instrument it shall be expressed to be taken in the name of the President and Governor in whose name the executive power of the Union and the States, respectively, are vested. Article 77 does not provide for delegation of any power, albeit under sub-section (3) of Article 77, the President is to make Rules for more convenient transaction of business and allocation of same amongst Ministers. Under the Government of India (Transaction of Business) Rules, 1961,

the government business is divided [2 (2015) 8 SCC 446] amongst Ministers and specific functions are allocated to different Ministries. The Director General of Foreign Trade is an ex officio Additional Secretary in the Government of India and is appointed by the Central Government under sub-section (1) to Section 6 of the FTDR Act to advise the Central Government in formulation and carrying out the Foreign Trade Policy. Wherefore, even the website of the Ministry of Commerce and Industry, Department of Commerce, states that the DGFT is an agent of the Central Government and attached office to it. Further, clause (2) of Article 77 provides that validity of an order or instrument made or executed in the name of the President, authenticated in the manner specified in the Rules made by the President, shall not be called in question on the ground that it is not an order or an instrument made or executed by the President. Therefore, the contention of issuance of the impugned notification sans authority, cannot be sustained.

10.3. It would thus be apparent that a similar challenge as the present one, raised in ***Union of India and Ors. vs. Agricas LLP and Ors.***, (Supra) has been turned down by the Hon'ble Apex Court by observing that the Director General of Foreign Trade is an Ex-officio Additional Secretary in the Government of India and thus is an agent to the Central Government. The argument of Mr. Bhangde, learned Senior Counsel for the petitioners based upon Article 77 of the Constitution, has also been addressed and turned down.

10.4. The contention that the notification dated 20/7/2023 (pg.47) was without authority, therefore in view of ***Union of India and Ors. vs. Agricas LLP and Ors.***, (Supra), is not acceptable and is turned down.

11. It is not disputed, that prior to the notification No. 20/2023 dated 20.07.2023 (page 40) export of Non-Basmati Rice, was free thereby indicating that there were no restrictions for transport of the same. It is for the first time, by virtue of the aforesaid notification dated 20.7.23 the export of Basmati Rice under the revised export policy has been brought under the prohibited category. The notification dated 20.07.2023, does not spell out the reasons for this, which however, are indicated in the reply of the respondents, to which we will advert to later on. For the purpose of considering the challenge, the notification is reproduced as under:

*“Government of India
Department of Commerce
Directorate General of Foreign Trade
Vanijya Bhawan, New Delhi*

*Notification No.20/2023
New Delhi, Dated 26th July, 2023*

Subject:- Amendment in Export Policy of Non-basmati rice under HS Code 1006 30 90.

S.O.(E) The Central Government, in exercise of powers conferred by Section 3 read with section 5 of the Foreign Trade (Development & Regulation) Act, 1992 (No.22 of 1992), as amended read with Para 1.02 and 2.01 of the Foreign Trade Poolicy, 2023, hereby amends the Export Policy of Non-basmati rice against ITC (HS) code 1006 30 90 of Chapter 10 of Schedule 2 of the ITC (HS) Export Policy, as under:

<i>ITC HS Codes</i>	<i>Description</i>	<i>Export Policy</i>	<i>Revised Export Policy</i>

1006 30 90	Non-basmati white rice (Semi-milled or wholly milled rice, whether or not polished or glazed : Other)	Free	Prohibited
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2. *The Notification will come into immediate effect. The provisions as under Para 1.05 of the Foreign Trade Policy, 2023 regarding transitional arrangement shall not be applicable under this Notification for export of Non-basmati rice. Consignments of Non-basmati rice will be allowed to be exported under following conditions:*

- i. where loading of Non-basmati rice on the ship has commenced before this Notification;*
- ii. where the shopping bill is filed and vessels have already berthed or arrived and anchored in Indian ports and their rotation number has been allocated before this Notification; the approval of loading in such vessels will be issued only after confirmation by the concerned Port Authorities regarding anchoring/berthing of the ship for loading of Non-basmati rice prior to the Notification;*
- iii. where Non-basmati rice consignment has been handed over to the Customs before this Notification and is registered in their system / where Non-basmati rice consignment has entered the Customs Station for exportation before this Notification and is registered in the electronic systems of the concerned Custodian of the Customs Station with verifiable evidence of date and time stamping of these commodities having entered the Customs Station prior to 20.07.2023. the period of export shall be upto 31.08.2023.*
- iv. Export will be allowed on the basis of permission granted by the Government of India to other countries to meet their food security needs and based on the request of their Government.*

3. *Export of Organic Non-basmati rice will be governed in accordance with Notification No.03/2015-2020 dated 19th April, 2017 read with Notification No.45/2015-2020 dated 29th November, 2022.*

4. **Effect of this Notification:**

Export Policy of Non-basmati white rice (Semi-milled or wholly milled rice, whether or not polished or glazed: Other) under HS Code 1006 30 90 is amended from “Free” to “Prohibited”.

*Signed
(Santosh Kumar Sarangi)
Director General of Foreign Trade
Ex-Officio Additional Secretary, Government of India
E-mail: dgft@nic.in”*

A perusal of this notification would therefore indicate, that export of Non-Basmati Rice (Semi milled or Wholly milled Rice, or whether or not polished or glazed; other) was brought into the prohibited category. The notification was indicated to come into immediate effect and it was specially mandated that the provisions of para 1.05 of the Foreign Trade Policy 23 regarding transitional arrangements was made inapplicable under the aforesaid notification for export of Non-Basmati Rice. Consignment for Non-basmati Rice were allowed to be exported under the conditions No.(i) to (iv) as indicated above, condition No.(i) providing the loading of Non-basmati Rice having already commenced before the notification; condition No.(ii) where the shipping bill was filed and vessels had already birthed or arrived or anchored in Indian Ports and their rotation numbers were allocated before the notification; condition No.(iii), where the Non basmati rice consignments were handed over to the customs before this notification and was registered in their

system or where the consignments had entered the custom systems for exportation before the notification and was registered in the electronic system of the concerned custodial of the concerned systems with verifiable evidence of date and time stamping prior to 20.07.2023, the period of export was stated to be 31.08.2023; condition No.(iv) indicated export was to be allowed on the basis of permission granted by the Government of India to other Countries to meet their security needs and based upon the request of such Government.

12. Before considering the issue further, it would be necessary to note what is indicated by para 1.05 of the Foreign Trade Policy 2023 regarding transitional arrangements, which for the sake of ready reference is quoted as under:

“1.05 Transitional Arrangements

- (a) Any License/ Authorisation/ Certificate/ Scrip/ instrument bestowing financial or fiscal benefit issued before commencement of FTP 2023 shall continue to be valid for the purpose and duration for which it was issued, unless otherwise stipulated.
- (b) Item wise Import/Export Policy is delineated in the ITC (HS) Schedule I and Schedule II respectively. The importability/exportability of a particular item is governed by the policy as on the date of import/export. The date of import/export is defined in para 2.17 of HBP 2023. Bill of Lading and Shipping Bill are the key documents for deciding the date of

import and export respectively. In case of change of policy from 'free' to 'restricted/prohibited/state trading' or 'otherwise regulated', the import/export already made before the date of such regulation/restriction will not be affected. However, the import through High Sea sales will not be covered under this facility. Further, the import/export on or after the date of such regulation/restriction will be allowed for importer/exporter who has a commitment through Irrevocable Commercial Letter of Credit (ICLC) before the date of imposition of such restriction/ regulation and shall be limited to the balance quantity, value and period available in the ICLC. For operational listing of such ICLC, the applicant shall have to register the ICLC with jurisdictional RA against computerized receipt within 15 days of imposition of any such restriction/regulation. Whenever, Government brings out a policy change of a particular item, the change will be applicable prospectively (from the date of Notification) unless otherwise provided for."

13. The provisions regarding transitional arrangement in the Foreign Trade Policy 2023 (FTP 2023 for the sake of ready reference), which came into effect from 01.04.2023 provided amongst other things, export on or after the date of any regulation/restriction for an exporter who had a commitment through irrevocable commercial letter of credit (ICLC) before the date of imposition of such restriction/regulation and was to be limited to the balance quantity value and period available in such ICLC , which ICLC was required to be registered with the jurisdictional registering authority against

computerised receipt within 15 days of imposition of any such restriction/regulation. It further clarified, that whenever Government brings out a policy change of applicable item the change will be applicable prospectively from the date of notification, unless otherwise provided for.

14. The purpose of transitional arrangement, is therefore to assure , that an exporter who has committed contract with a foreign buyer, which is demonstrated through an irrevocable commercial letter of credit (ICLC) should be permitted to complete the contract, as failure to do so, would result in drastic consequences financially not only to such exporters, but to persons, from whom such exporters are had procured the goods to be exported. It in fact, created a limited window, for the exporter to complete the commitment which he had already with a foreign buyer which in law, he was obligated and bound to complete.

15. The position that the respondents realised a burden upon the exporter to complete the obligation of fulfilling a complete contract is further indicated from conditions i to iv, as appended to Clause 2 of the impugned notification dated 20.7.23 (page 40), though in a limited sense, as indicated thereto.

16. Thus, when FTP 2023, provided for a transitional arrangement , to enable an exporter to complete its obligation under the contract, the impugned notification, for not applying the transitional provisions as contained in para 1.05, of the FTP 2023 , does not assign any reasons at all, why the benefit of such a transitional arrangement, which normally ought to have ben granted has not been granted in the case of Non-basmati Rice, all other things remaining the same.

17. Mr. Bhangde, learned Senior Counsel for the petitioner, is correct, in relying upon the notification No.6/2015-20 dated 13.05.2022 (Page 108-H), which is an amendment in the export policy of wheat, by which while changing the free export policy in respect of wheat to be prohibited with effect from 13.05.2022, the same has vide clause 2 A permitted as a transitional arrangement of export of wheat in case of shipments where ICLC has been issued on or before the date of the notification, subject to submission of documentary evidence as prescribed. In this context, it is also necessary to note that averments made in petition regarding concluded contracts and ICLC as detailed in para 12 and 13 of the petition, which have been supported by the copies of the purchase contracts at Annexure-K of the petition have not been denied by the respondent Nos. 3 and 5 in their submissions dated 23.09.2023. It is

also material to note, that the reply by the respondent Nos. 3 and 5 does not whisper a single word as to why the transitional arrangement 1.05 in the FTP 2023, has not been made applicable to the impugned notification, as is the case of the reply of the respondent No. 3. The respondent No. 2 in his submission also does not speak anything about the applicability of the aforesaid transitional arrangements 1.05 in the FTP 2023, except for saying, that on account of request made by traders seeking clarification on the transitional arrangement as bulk shipments were stuck at Kandla Port, the Central Government by vide notification No. 29/2023 dated 29.8.23 clarified that where non basmati rice consignment had been handed over to the customs before 21:57:01 Hours on 20.07.2023 and is registered in customs systems or has entered the customs station and is registered in the electronic systems with verifiable evidence of date and time of stamping of these commodities, the period of export shall be up to 30.10.2023. It is on this count it is stated that the central government had also taken necessary steps to minimise the contingencies faced by the traders and the policy formulation cannot be stretched to cover situations like opening of letter of credit. The replies of the respondent Nos. 4, 6, 7 and 10, in this regard are also on the same lines as that of the respondent Nos. 3 and 5.

18. No doubt, that the framing of a policy, is the absolute domain of the law makers, however, what is necessary to note, is that the existence of the transitional policy 1.05 in the FTP 2023, is not denied by the respondents. That being so, it was equally applicable to all, including the petitioners. It was therefore, necessary for the respondents to point out, since the transitional policy exists, the reasons for denial of the benefits of such a policy to the persons, who are effected by the impugned notification dated 20.07.2023. Needless to say, that once the Union frames a policy, it has to be applied in an even handed manner to one and all and any denial of the policy will have to be construed as an action, which is arbitrary and unreasonable unless, acceptable reasons, for such denial are spelt out, which in the present matter, considering the reply affidavits of the respondents are absent.

19. Even otherwise when a right to export, which was earlier free, is sought to be restricted, that would be putting a fetter upon the right of a citizen guaranteed to him under Article 19(1)(g) of the Constitution which can only be curtailed, if it is demonstrable that the fetters being sought to be placed on the exercise of such right were reasonable, the reasonability, being based upon discernible and justifiable factors.

20. In this context, it is necessary to note that the Hon'ble Apex Court in *Cellular Operators Association of India and Ors. (Supra)* , while considering the test of arbitrariness has held that when viewed from the angle of manifest arbitrariness or reasonable restriction, sounding in Article 14 and Article 19(1)(g) respectively, the Regulation must, in order to pass constitutional muster, be as a result of intelligent care and deliberation, that is, the choice of a course which reason dictates and any arbitrary invasion of a fundamental right cannot be said to contain this quality. It also held that a proper balance between the freedoms guaranteed and the control permitted under Article 19(6) must be struck in all cases before the impugned law can be said to be a reasonable restriction in the public interest.

21. In *Food Corporation India vs. M/s Kamdhenu Cattle Feed Industries*, (*supra*) it has been held as under:

7. In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its

instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.

22. In ***Brahmaputra Metallics Ltd.*** (*supra*) the Hon'ble Apex Court while considering the plea of legitimate expectation, has held that the doctrine of 'substantial legitimate expectation', is one of the ways in which the guarantee of non-arbitrariness enshrined under Article 14 of the Constitution, finds concrete expression, thereby indicating that the doctrine of 'legitimate expectation' can be used when denial of legitimate expectation leads to violation of Article 14 of the Constitution.

23. Regarding the parameters of judicial review, regard also needs to be had to what has been held in ***Parisons Agrotech (P) Ltd.*** (*supra*), which hold as under:

14. No doubt, the writ court has adequate power of judicial review in respect of such decisions. However, once it is

found that there is sufficient material for taking a particular policy decision, bringing it within the four corners of Article 14 of the Constitution, power of judicial review would not extend to determine the correctness of such a policy decision or to indulge into the exercise of finding out whether there could be more appropriate or better alternatives. Once we find that parameters of Article 14 are satisfied; there was due application of mind in arriving at the decision which is backed by cogent material; the decision is not arbitrary or irrational and; it is taken in public interest, the Court has to respect such a decision of the executive as the policy making is the domain of the executive and the decision in question has passed the test of the judicial review.

24. It would therefore be apparent, that for the purpose of sustaining a policy, what is necessary to be demonstrated is that there was due application of mind in arriving at the decision which is backed by cogent material; the decision is not arbitrary or irrational and; it is taken in public interest. If these necessary ingredients are not demonstrable, then the policy makes it open, to be branded as arbitrary and unreasonable, on the touchstone of Article 14 of the Constitution and therefore, open to judicial review.

25. The reason for converting the policy for export of Basmati Rice from free to prohibited as per contention of Mr. Deshpande, learned DSGI is the domestic food security situation in India, which as claimed to be at risk and the need for price stabilization of food items, as is indicated, from para-3 of the reply of

the respondent No.2 (Pg.138). For this it is contended, that there was due consultation with the nodal Departments such as Departments of Agriculture and Farmers Welfare, Department of Food and Public Distribution and Department of Consumer Affairs and it is stated that the consultation process had taken into account all data relating to production and export of non-basmati rice. It is however material to note that except for a plain statement in this regard which is contained in Paras-3 and 4 (Pg.138 and 139) of the reply of the respondent No.2, there is nothing else therein in the nature of what was the form of consultation, what data was collected and considered, in spite of the fact, that by amendment to the petition by inserting ground L (Pg.36-A), a specific plea was raised regarding absence of any such material, to indicate any food security threat or any need for price stabilization of food items, so as to demonstrate the reasonability of the restriction placed by way of the impugned notification on export of non-basmati rice. When we had asked Mr.Deshpande, learned DSGI, whether he would be in a position, in view of the absence of the reasons in the replies, in this regard, to place on record, the file containing the minutes of the consultation, and the data which was collected and analysed, upon instructions, he expressed his inability to do so. This would clearly indicate, that the very basis, for such a restriction to be imposed, appears to be not available with the respondents. Having said so, this would actually

require us to strike down the notification in absence of any reasonable, verifiable material for its imposition however, that it is not the relief which is being sought. Even otherwise, if the policy can be saved by reading down, the same should be a preferred course of action by the Courts.

26. The relief which is being sought is for enabling the petitioners to complete the concluded contracts, which they have with foreign traders for supply of basmati rice. In this context, it would be material to note, that in case the petitioners establish concluded contracts, for supply of non-basmati rice, to foreign traders, for which they have established ICLC and the petitioners have already procured the goods, this would be an action, relatable to the Policy prior to the impugned notification, which indicated that the export was free. If this is the case, then the petitioners, would have legitimate expectation, of fulfilling of their contracts, which they had entered into on the basis of the free policy, with foreign traders. IT is also necessary to note that non-fulfilling the concluded contract would also make the petitioners open to litigation on account of breach of contract and consequently damages. Thus, the expectation of fulfilling an existing concluded contract, on the basis of the existing policy could be said to be legitimately available to the petitioners. In this context, it is necessary to note what has been held

by the Hon'ble Apex Court in *Food Corporation of India Vs. M/s Kamdhenu Cattle Feed Industries (Supra)*, while dealing with the relationship between Article 14 and the doctrine of legitimate expectation, which is as under :

“46. As regards the relationship between Article 14 and the doctrine of legitimate expectation, a three Judge Bench of Food Corporation of India vs Kamdhenu Cattle Feed Industries, (1993) 1 SCC 71, speaking through Justice J. S. Verma, held thus:

“7. In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is ‘fairplay in action’. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.

8. The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate

expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law.....”

27. The common principle which emerges is that the mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A *bona fide* decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent. That the petitioners, had legitimate expectation of exporting basmati rice without any restrictions, is

further indicated by the mandate of section 3(4) of the FT Act, 1992, which mandates that without prejudice to anything contained in any other law, rule, notification, regulation 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. Since at the time of making a concluded contract, the policy of free export, was in existence, the petitioners can be said to have had a reasonable and legitimate expectation to complete their obligations under the concluded contracts which were in existence, when the impugned notification was brought into force.

28. The right of a trader, to fulfill his obligation under the concluded contract, on the basis of the policy as was existing on the date when the contract was concluded, fell for consideration of this Court in *Parag Milk and Milk Products Ltd.* (*supra*). This is what has been held in that regard by the learned Division Bench of this Court.

“9. In the present case it cannot be disputed that when the Letters of Intent were issued in favour of the petitioner the declared policy of the Government did not impose any ban upon export of SMP and its alike products. The right by virtue of the contract between the exporter and importer should settle for them. The expression “export obligation” as defined in the Foreign Trade Policy has to be given a cogent meaning on its plain interpretation. It will not be permissible to attach an unnecessary restricted meaning to this expression. In the impugned order dated 30th April,

2007 it has been noticed by the Authority that export obligation means obligation to export product or products gathered by authorisation or permission in terms of the quantity, value or both as may be prescribed or specified by the regional or competent authority. This has been understood by the authority that the contractual obligation against some Letter of Credit would not fall in this category. We are unable to accept this reasoning of the authority in as much as once there was no ban or restriction on export of SMP no permission from any authority would have been required. It falls within the ambit of free sale and the necessary documents for shipping or export of SMP and other milk products would only be by virtue of contract/export document and nothing more. In the entire order it has not been stated as to which document the petitioner has failed to produce or which the Authority expected it to produce. There are concluded contracts between the parties and in fact part of them was implemented as well. Another reason stated by the petitioner was that Skimmed Milk Products is a product taken out of normal milk and/or the normal milk products and there was no ban on export of such items. As such a ban was not justified and in any case would not be made effective retrospectively. May be the Court would not go into such question primarily for the reason that the demand of skimmed milk and its products may be high in domestic market and authorities concerned may have taken decision to ban such export retrospectively but to unsettle the settled rights or concluded rights of the parties would hardly be permissible in the garb of such notification. The decision of the authority does not appear to be in conformity with the settled canons of law.”

29. ***Kanishka Trading*** (*supra*) relied upon by Mr. Deshande, learned DSGI, was a case in which it was found that the withdrawal of the exemption, was not on account of any fraud practiced by the Government nor any huge loss was caused to the importer as burden

of customs duty was passed on to the consumer. In *International Trading Company (supra)*, it was held, that renewal of the permit, could be refused for outweighing reasons of public interest, which were found to exist.

30. Testing the impugned notification on the anvil of the principle of legitimate expectation, vis-à-vis Article 14 of the Constitution, we find that no reasons are forthcoming from the respondents, for denial of the benefit of the transitional arrangements, in the FTP, 2023, to the petitioners, and, though the same has been granted, in the case of wheat, as indicated above, in a similar circumstance, denial of the same, in the impugned notification, is not justified.

31. There is yet another contention, of retrospectivity by Mr.Bhangde, learned Sr. Advocate for the petitioners contending, that the impugned notification would not have any retrospective effect. It is a settled position of law, that any policy, brought in by the Union, would not have any retrospective effect, unless the policy indicates so. The impugned notification, dated 20/07/2023 (Pg.40), indicates, that it has to come into immediate effect. This would indicate, its applicability, from the date it has been issued. Though it is contended, that it is retrospective in operation, the notification, does

not indicate, that is to take effect, from any earlier date. However, clauses 2(i) to (iv) in their effect, indicate, that past transactions, which have been entered and concluded, but which are yet to be performed, are also being taken in its sweep, which position is substantiated by the fact that clause 2 of the impugned notification indicates that the transitional arrangement in para-1.05 of the FTP 2023, which saved concluded contracts, indicated by an irrevocable ICLC, was not applicable. In this regard, what has been held in *Director General of Foreign Trade and Anr. vs. Kanak Exports and Anr.*, (*supra*) is material, which is as under:

“113. We may, in the first instance, make this legal position clear that a delegated or subordinate legislation can only be prospective and not retrospective, unless rule making authority has been vested with power under a statute to make rules with retrospective effect.....

27. The reliance placed on the power to regulate under Section 3 of the Act is equally misconceived. Section 5 gives express power to formulate the policy and to amend it. This is specific power. The power to regulate, therefore, cannot be read as a power to amend when a specific power to amend is given. If the power to regulate does not include the power to amend retrospectively such a power cannot be read into Section 3 of the Act.

135. We have already discussed these aspects in detail. To recapitulate, it is held by us that Section 5 of the Act does not empower the Government to make amendments with retrospective effect, thereby taking away the rights which have already accrued in favour of the exporters under the Scheme. No doubt, the Government has, otherwise, power to amend, modify or withdraw a particular

Scheme which gives benefits to a particular category of persons under the said Scheme. At the same time, if some vested right has accrued in favour of the beneficiaries who achieved the target stipulated in the Scheme and thereby became eligible for grant of duty credit entitlement, that cannot be snatched from such persons/exporters by making the amendment retrospectively.....”

32. If the policy is to be saved, we do not see any reason, why the same proposition should not be held to be applicable to the impugned notification, which is issued by the respondents in exercise of the powers under section 3 read with section 5 of the FT Act, 1992.

33. Considering the discussion made above, we find that the restriction imposed vide clause 2 of the impugned notification dated 20/07/2023, denying the benefit of para 1.05 of the Foreign Trade Policy 2023 regarding transitional arrangement to the petitioners, is clearly not justified, in absence of any reasons in that regard, forthcoming from the respondents, specifically in view of the fact, that it is not disputed that the FTP 2023, is applicable to the petitioners. We therefore, hold and declare, that the impugned notification, dated 20/07/2023, insofar as it denies the benefit of the transitional arrangement as contained in para-1.05 of the FTP 2023, is bad-in-law and the benefit of this transitional arrangement would be available to the petitioners, in case the requirements, as indicated

in clause (b) therein are complied by the petitioners. The petition is accordingly allowed in the above terms and to the above extent. Rule is made absolute in the above terms. In the circumstances, there shall be no order as to costs.

(SMT. M. S. JAWALKAR, J.)

(AVINASH G. GHAROTE, J.)

Bhimte/Khunte