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HIGH COURT OF MADHYA PRADESH, BENCH AT INDORE

**Division Bench : HON'BLE SHRI JUSTICE S. C. SHARMA AND
HON'BLE SHRI JUSTICE SHAILENDRA SHUKLA**

Writ Petition No.7902/2020

Mr. Akshay N. Patel

Versus

Reserve Bank of India and Another

Counsel for the Parties	:	Shri Abhinav Malhotra, learned counsel for the petitioner. Shri Bharat A. Chitale, learned counsel for the respondent No.1. Shri Milind Phadke, learned counsel for the respondent No.2.
Whether approved for reporting	:	Yes
Law laid down	:	(1) Ban of export in respect of KN95 Masks, Personal Protective Equipment Kits and other products does not amount to violation of fundamental right guaranteed under Article 19(1)(g) of the Constitution of India. Its a purely policy matter and the Government of India does have the power to frame Trade Policy in exercise of powers conferred under the Foreign Trade (Development & Regulation) Act, 1992. (2) The Circular issued by Reserve Bank of India dated 23/01/2020 in respect of Merchanting Trade Transactions is not at all violative of Article 19(1)(g) of the Constitution of India and the Government does have the power to regulate import / export and to regulate Merchanting Trade Transaction Contracts.
Significant paragraph numbers	:	34 to 61

O R D E R

(Delivered on this 08th October, 2020)

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The petitioner before this Court has filed this present petition challenging the circular issued by the Reserve Bank of India dated 23/01/2020 which is in respect of Merchanting Trade Transactions (MTT).

02- The petitioner's contention is that the petitioner is an Indian citizen and is engaged in the business of manufacturing and trading of Pharmaceutical, Herbal, Skin Care and Personal Protective Equipment (PPE) products in India and several other countries. The petitioner has further stated that Corona Virus has infected large number of people over the entire globe and Personal Protective Equipment (PPE) Kits, Masks and Ventilators are in acute shortage all over the globe.

03- The petitioner has further stated that as there was an acute shortage of PPE Kits, Masks, Sanitizer, etc. and as some of the countries were manufacturing more than the demand in their own country, the petitioner wanted to supply the goods to United States of America (USA).

04- The petitioner has further stated that he has negotiated the supply of PPE Kits and other goods with a buyer of United States of America and he has placed an order for purchase of KN95 Masks from a manufacturing Company based in China, meaning thereby, the petitioner wanted to purchase the goods from China and to supply in United States of America by exploiting the system of Merchanting Trade Transactions which involves an Indian Bank as well as Reserve

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Bank of India.

05- The petitioner has further stated that under the Merchanting Trade Transactions an Indian Citizen facilitates the export of any goods or material from a Company or individual of an export country (other than India) and then import / supply of the said goods to a Company in another country, which is also other than India. Thus, in short their contention is that goods are neither manufactured in India nor imported to India at any point of time, however, the profit comes to India in various currencies.

06- The petitioner has further stated that Merchanting Trade Transaction Contracts are regulated and governed by Reserve Bank of India by issuing circulars from time to time and the Reserve Bank of India in the year 2000 in exercise of its powers conferred under Section 10(4) and Section 11(1) of the Foreign Exchange Management Act, 1999 has issued a circular dated 24/08/2000 to regulate any Merchanting Trade Transaction contract entered into by any Indian national. The aforesaid circular was amended later on in the year 2014 i.e. on 27/01/2014.

07- The petitioner has further stated that on 23/01/2020 the Reserve Bank of India has issued another notification dated 23/01/2020 and revised guidelines for Merchanting Trade Transactions have been issued superseding its earlier guidelines. The petitioner's grievance is that Rule 2 Clause (iii) provides that MTT shall be undertaken for the goods that are permitted for export / import

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under the prevailing Foreign Trade Policy (FTP) as on the date of shipment.

08- The petitioner has further stated that after receiving the Merchanting Trade Transaction contracts for supply of KN95 Masks manufactured in China to the buyer based in United States of America, the petitioner on 01/05/2020 contacted its banker for execution of necessary international trade documents and requested its bankers to open a Letter of Credit in favour of manufacturer / supplier based in China.

09- The petitioner has further stated that on 05/05/2020 the officials of HDFC Bank wrote to the petitioner that at present on account of spread of Corona Virus Disease, the Union of India through Director General of Foreign Trade (DGFT) has prohibited export of PPE Kits, Masks, Ventilators and Sanitizer from India and because Merchanting Trade Transactions regulations dated 23/01/2020 as contained in Clause 2(iii) which is in respect of the MTT contracts read with the Foreign Trade Policy of India prohibited such contracts, the Reserve Bank of India has refused the permission for the subject MTT contract for supply of KN95 masks from China to United States of America. The officials of HDFC Bank have expressed their inability to the petitioner as the petitioner was carrying out the business which is not permissible.

10- The petitioner has further stated that the Director General of Foreign Trade, Ministry of Commerce through various notifications

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issued from January to May 2020 has prohibited export of PPE Kits, Masks, Ventilators, Sanitizer out of India to ensure that they are available to the Citizens, Doctors and Hospitals within our country. It has been stated by the petitioner that restrictions imposed by the Director General of Foreign Trade does not come in way of the petitioner as the petitioner on account of MTT Contract which has been executed with a buyer in America is exporting goods from China to America. There is no export out of India.

11- The petitioner has further stated that on 12/05/2020 the petitioner has wrote several letters to the Ministry of Commerce, Director General of Foreign Trade and requested for grant of exemption and for grant of permission to procure goods manufactured from China to supply to a Company in United States of America.

12- The petitioner has further stated that a request was also made to the banker to seek a clarification from Reserve Bank of India in respect of Clause 2(iii) of the guidelines dated 23/01/2020, however, as Reserve Bank of India has not issued any clarification and as the petitioner on account of Clause 2(iii) of the guidelines / circular dated 23/01/2020 has not been able to carry out its MTT contract for supply of goods from China to United States of America, he has approached this Court.

13- The petitioner's contention is that prohibition imposed by Reserve Bank of India is a total prohibition which violates petitioner's fundamental rights guaranteed under Section 19(1)(g) and 21 of the

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Constitution of India and therefore, Clause 2(iii) deserves to be struck down by this Court.

14- Another grounds has been raised stating that the absolute and total prohibition of Merchanting Trade Transactions in respect of PPE products runs afoul of reasonableness enshrined under Article 19 of the Constitution of India. It has also been argued that prohibition imposed by Reserve Bank of India has no rational nexus with the underlying purpose of maintaining sufficient supplies of PPE products in India.

15- The petitioner has stated that while regulation of a trade or business through reasonable restrictions imposed under a law made in the interest of the general public is saved by Article 19(6) of the Constitution, however, in the present case, a total prohibition on MTT of PPE products has been imposed through a subordinate legislation (impugned guidelines dated 23/01/2020) on a business and trade which is legal. Such a total prohibition is violative of protection offered under Article 19(1)(g) of the Constitution of India. The Hon'ble Supreme Court recently in the case of **Internet and Mobile Association of India Vs. Reserve Bank of India** reported in **2020 SCC OnLine SC 275** quashed the total prohibition of virtual currencies by the respondent No.1 – Reserve Bank of India through a circular.

16- Petitioner has further stated that when a statute invests a regulator with power to regulate, say, for example, a trade, it does not

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invest the authority with power wholly to prohibit or to put a stop to a trade. This view has been emphasized upon and affirmed several times. Therefore, where the objective of the impugned guideline was merely to facilitate and regulate the financial arm of Merchanting Trade Transaction, Reserve Bank of India cannot assume and exercise the power to completely prohibit MTT of PPE products. The subject MTT contract involves supply of KN95 masks (one of PPE products) manufactured by a company in China to a buyer at United States of America, therefore, the subject transaction has no bearing or reasonable connection on the availability of stock of PPE products within the territory of India. It has been further contended that the Hon'ble Supreme Court has laid down the test of reasonableness of restriction and held that laws imposing total prohibition would require close scrutiny in the cases of **State of Madras Vs. V.G. Row** reported in **AIR 1952 SC 196** and **Narender Kumar Vs. Union of India** reported in **AIR 1960 SC 430**.

17- Learned counsel for the petitioner has stated that MTT contracts in PPE products such as the present one do not affect the stock or availability of PPE products within India and it does not fall within the prohibition on export of PPE products imposed by respondent No.2. The mischief or intention of the respondent No.2 – Ministry of Commerce, DGFT to prohibit export of PPE products is ensuring adequate quantity and availability of PPE products for Indian citizens, doctors and hospitals. The aforesaid objective or mischief is

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totally unaffected by a MTT contract entered and executed by an Indian citizen where goods manufactured at China are supplied to a buyer at the United States of America. The Calcutta High Court in the case of **Nani Gopal Paul Vs. State of West Bengal** reported in **AIR 1966 Cal 167** quashed a total prohibition imposed on a trade and business.

18- He has further stated that the absolute prohibition on MTT of PPE products is arbitrary and completely disproportionate to the stated public interest of ensuring adequate supplies of PPE products within the territory of India. He has further contended that the latest briefings of the Central Government fairly informs that adequate quantity of PPE products is presently available across India and therefore, in light of the fact that the object has been substantially achieved, further restrictions on any trade activities relating to PPE would be disproportionate in nature for want of requirements. It has been further contended that the Andhra Pradesh High Court quashed a total prohibition imposed on operation of public taxis on ground disproportionate in the case of **State of A. P. Vs. Mini Taxi Owners Association, Hyderabad** reported in **2001 SCC OnLine AP 421**. His further contention is that the absolute prohibition of MTT of PPE products serves no larger public interest as MTT is concerned with those PPE products that are not manufactured in India or meant for use by people in India.

19- It has been stated that merchant trading of PPE kits is a legal

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and acceptable form of international business and trade and the respondent No.1 has no power or authority to completely prohibit such merchant trade or business as there is no illegality in the merchant trade and business of PPE products. It has been further contended that where the regulator or State imposes a restriction in the nature of complete prohibition, constitutional Courts are vested with the power and jurisdiction to see whether such special circumstances exist to justify total prohibition. In the present case, the objectives of Director General of Foreign Trade notifications to ban exports of PPE products is completely unrelated to and has no relation or nexus with prohibition on MTT of PPE products.

20- The petitioner has prayed for the following reliefs:-

a. Issue a writ of Certiorari or any other appropriate writ/order/direction in the nature of Certiorari quashing Clause 2(iii) of the Impugned Guidelines titled : RBI/2019-20/152 A.P. (DIR Series) Circular No.20 dated 23.1.2020 issued by Respondent No.1 – Reserve Bank of India as being violative of the Petitioner's fundamental rights under Article 19(1)(g) and 21 of the Constitution of India;

OR

b. Issue a writ of Certiorari or any other appropriate writ/order/direction to the Respondents directing them to issue a necessary clarification that Clause 2(iii) of the Impugned Guidelines titled : RBI/2019-20/152 A.P. (DIR Series) Circular No.20 dated 23.1.2020 would not be applicable with respect to any MTT contracts that the Petitioner may enter into for PPE products such as Personal Protection Equipment Kits, masks, ventilators and sanitisers;

c. Pass any other Order or Order(s) or grant any other relief as this Hon'ble Court deems fit and proper in the facts and circumstances of the present case.

21- The respondent No.1 - Reserve Bank of India has filed a detailed reply in the matter. It has been stated in the return that

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number of Corona Virus patients in India has crossed 42,04,614 cases and the death toll has crossed 71,642 (at the time the return was filed). India has taken over Brazil to have the second highest case load in the world. It has been further stated that India requires a steady and assured supply of ventilators, PPE Kits, Sanitizer and Gloves as well as other lifesaving equipment and drugs.

22- It has been further stated that in times of global shortage, developed countries have far greater financial clout than developing countries to draw scarce medical supplies to themselves, since they can afford to pay higher prices for them. It has been further stated that in larger public interest Government of India *vide* notification dated 31/01/2020 and 16/05/2020 issued in exercise of its power under Section 3 of the Foreign Trade (Development & Regulation) Act, 1992 has amended its Foreign Trade Policy 2015-2020 and has prohibited export of lifesaving equipment such as Ventilators, PPE kits and Gloves from India.

23- It has been further stated that it will also be wholly inappropriate and contrary to the national interest for Union of India to permit India's foreign exchange reserve to be engaged in enabling Indian entities, through Merchanting Trade Transactions, to preferentially divert lifesaving supplies to overseas countries rather than to India, merely for higher profits. The respondent No.1 has also stated that the petitioner is certainly free to carry on the business of import of such products into India, since only export, and not import is prohibited.

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24- The respondent No.1 has further stated that revised guidelines on Merchanting Trade Transactions permits transactions of goods only which are permitted for exports / imports under the prevailing Foreign Trade Policy (FTP) of India as on the date of shipment. It has been further stated that circular which is under challenge is of general nature. It does not mention particular goods such as Ventilators, Medical Personal Protection Equipment (PPE) kits or Gloves. The Reserve Bank of India does not classify and notify particular goods or services for the purpose of permitting Merchanting Trade Transactions, since that function is within the domain of the Government of India. However, the circular of Reserve Bank of India ensures that the country's foreign exchange reserves are managed by keeping in view with the country's Foreign Trade Policy issued by the Government of India.

25- It has been further stated that circular No.20 comprising the "Revised Guidelines on Merchanting Trade Transactions" has been issued by the Reserve Bank of India in exercise of powers under Section 10(4) and 11(1) of the Foreign Exchange Management Act, 1999. The revised guidelines are not new and they have been in force with some variation since 2000.

26- The respondent No.1 has further stated that circular challenged by the petitioner, viz. Clause 2(iii) of Circular No.20, is also not new and has been substantially in force since 2000. This will be clear from a perusal of 'Part B' of the above-mentioned earlier Circular No.9, and

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the same reads as under:

“Authorised dealers may take necessary precautions in handling merchant trade transactions or intermediary trade transactions to ensure that (a) goods involved in the transaction are permitted to be imported into India, (b) such transactions do not involve foreign exchange outlay for a period exceeding three months, and (c) all Rules, Regulations, and Directions applicable to export out of India are complied with by the export leg and all Rules, Regulations, and Directions applicable to import are complied with by the import leg of merchanting trade transactions. Authorised dealers are also required to ensure timely receipt of payment for the export leg of such transactions.”

(Emphasis supplied)

It has been stated that the impugned clause of Circular No.20 dated 23/01/2020, (a) restricting Merchanting Trade Transaction to “... goods that are permitted for exports / imports under the prevailing Foreign Trade Policy (FTP) of India as on the date of shipment”, and (b) requiring that “... all rules, regulations and directions applicable to exports (except Export Declaration Form) and imports (except Bill of Entry) shall be complied with for the export leg and import leg respectively”, are not novel. They may also be found, substantially in the present form, in the following prior Reserve Bank Circulars relating to Merchanting Trade Transaction:-

- “(i) A.P. (DIR. Series) Circular No.9 dated 24.8.2000 (see Annex.P/4 at page 50);
- (ii) A.P. (DIR. Series) Circular No.106 dated 19.6.2003;
- (iii) A.P. (DIR. Series) Circular No.95 dated 17.1.2014;
- (iv) A.P. (DIR. Series) Circular No.115 dated 28.3.2014 (see Annex.P/4 at page 51).”

27- It has been stated that the aforesaid two conditions have been a fundamental and essential part of the policy relating to Merchanting Trade Transaction for decades. The said conditions – restricting

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Merchanting Trade Transaction to goods that are permitted for exports / imports under the prevailing Foreign Trade Policy (FTP) of India, and requiring compliance of the rules, regulations and directions applicable to exports and imports - go to the root of the Reserve Bank's policy relating to Merchanting Trade Transaction. Respondent No.1 has submitted that the conditions are of general application to every Indian entity wishing to carry on Merchanting Trade Transactions. The conditions are neither specific either to the petitioner's business, nor to particular products such as ventilators or medical personal protection equipment.

28- It has been further stated that according to clause 2(i) of the Circular Annex. P/1, for a trade to be classified as a Merchanting Trade Transaction, the goods in question shall neither enter, nor exit, India (the "Domestic Tariff Area"). Merchanting trade transactions are very closely analogous to, and have all the trappings of, export as well as import except the fact that the goods are physically not located in India. The first leg of the transaction (termed as the "import leg") requires *outlay of foreign exchange* by the entity located in India carrying on the transaction ("the intermediary"), for the purpose of making payment for the goods being purchased overseas. The payment is made by the Indian intermediary by drawing foreign exchange or obtaining a letter of credit in India from its banker, which is a Reserve Bank - authorised dealer of foreign exchange ("authorized dealer bank") also located in India. Thus, there is a clear

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nexus of the first leg of the transaction to India and the involvement of its foreign exchange reserves.

29- Respondent No.1 has stated that similarly, in a successful trade, the Indian entity so purchasing the goods overseas recovers its money in the second leg of the transaction (termed as the “export leg”), by selling the goods to its buyer, also located overseas, but the money is under the law to be repatriated to India to the credit of the Indian intermediary which is located in India which had engaged in the Merchanting Trade business, within a strict time frame. The Reserve Bank has the statutory authority to regulate the foreign exchange held by or due to an entity located in India. Thus, even though both legs of the Merchanting Trade Transaction are carried on abroad, they are carried on by an entity located in India and subject to Indian laws, viz. the intermediary, and there is a clear and close nexus of the Merchanting Trade Transaction with India. Both legs of the Merchanting Trade transaction, the “import” leg and the “export” leg, require the Indian intermediary to deal in foreign exchange issued in India, through a Reserve Bank - authorised dealer.

30- Sub-sections (1) and (4) of section 10 of the Foreign Exchange Management Act, 1999 reads as under:

“10. Authorised person.— (1) The Reserve Bank may, on an application made to it in this behalf, authorise any person to be known as authorised person to deal in foreign exchange or in foreign securities, as an authorised dealer, money changer or off-shore banking unit or in any other manner as it deems fit.

[...]

(4) An authorised person shall, in all his dealings in foreign

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exchange or foreign security, comply with such general or special directions or orders as the Reserve Bank may, from time to time, think fit to give, and, except with the previous permission of the Reserve Bank, an authorised person shall not engage in any transaction involving any foreign exchange or foreign security which is not in conformity with the terms of his authorisation under this section.”

Sub-section (1) of section 11 of the said Act reads as under:-

“11. Reserve Bank’s powers to issue directions to authorised person.

(1) The Reserve Bank may, for the purpose of securing compliance with the provisions of this Act and of any rules, regulations, notifications or directions made thereunder, give to the authorised persons any direction in regard to making of payment or the doing or desist from doing any act relating to foreign exchange or foreign security”.

It has been stated that under the Foreign Exchange Management Act, 1999, the regulation and management of the country’s foreign exchange reserves has been entrusted to the Reserve Bank of India, which accordingly has the full statutory authority to enact the circular Annex.P/1 under section 10(4) and 11(1) of the Foreign Exchange Management Act, 1999. Such circulars and directions are issued by the Reserve Bank in exercise of its statutory duty to regulate and manage the country’s foreign exchange reserves, and embody the foreign exchange policy of the State. It is well settled that the Courts do not normally interfere with State policy, particularly in financial matters, unless fraud or lack of *bona-fides* is alleged and established. In the present case, the petitioner has neither pleaded, nor proved either of such grounds.

31- Learned counsel for the respondent No.1 has placed reliance upon judgment delivered in the case of **Kasinka Trading Vs. Union**

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of India, reported in (1995) 1 SCC 274, P.T.R. Exports (Madras) (P) Ltd. Vs. Union of India reported in (1996) 5 SCC 268 and State of Haryana Vs. Mahabir Vegetable Oils (P) Ltd. Reported in (2011) 3 SCC 778 and has prayed for dismissal of the writ petition.

32- The Union of India – respondent No.2 has also filed an application and has adopted the return filed by respondent No.1 Reserve Bank of India. The Union of India in addition to the return which they have adopted has stated that *vide* notification dated 25/08/2020 an amendment has been made in the Export Policy and the Personal Protective Equipment / Masks i.e. N-95 / FFP2 Mask and N-95 / FFP2 or equivalent had been categorized as “restricted”, which were earlier “prohibited” *vide* notification issued earlier on the subject. The notification dated 25/08/2020 is quoted as under:-

**“(To be published in the Gazette of India Extraordinary
Part-II, Section – 3, Sub-Section (ii))**

Government of India
Ministry of Commerce & Industry
Department of Commerce
Directorate General of Foreign Trade
Udyog Bhawan
New Delhi

Notification No. 29 / 2015-2020

Dated: 25th August, 2020

Subject:- Amendment in Export Policy of Personal Protection Equipment/Masks.

S.O. (E) in exercise of powers conferred by Section 3 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 Policy, 2015-20, the Central Government hereby makes following amendment in the **Notification No. 21 dated 28.07.2020** amending the Schedule 2 of the ITC (HS) Export Policy 2018 related to the export of Personal Protection Equipments/Masks, as under:

Serial Number	ITC HS Codes	Description	Export Policy	Policy Condition
207A	901850 901890 9020 392690 621790 630790	Following Personal Protection Equipments (PPEs) exported either as part of kits or as individual items -		
		1. Medical Coveralls of all Classes/ Categories	Free	PPE Medical coveralls are freely exportable.
		2. Medical Goggles	Restricted	Monthly export quota of 20 Lakh units of Medical Goggles
		3. N95/FFP2 masks or its equivalent	Restricted	Monthly export quota of 50 Lakh units
		4. All masks (Except N95/FFP2 masks or its equivalent)	Free	All masks (except N95/FFP2 masks or its equivalent) are freely exportable
		5. Nitrile/NBR Gloves	Prohibited	
		6. Face Shields	Free	Face Shields are freely exportable

2. Effect of the Notification:

Notification No. 21 dated 28.07.2020 is amended to the extent that the export policy of 2/3 Ply Surgical masks, medical coveralls of all classes and categories (including medical coveralls for COVID-19) is amended from "Restricted" to "Free" category and these coveralls (including gowns and aprons of all types) are now freely exportable. Medical goggles continue to remain in restricted category with monthly quota of 20 Lakh units and Nitrile/NBR gloves continue to remain prohibited.

The export police of N-95/FFP2 masks or its equivalent masks is revised from "Prohibited" to "Restricted" category. A monthly export quot of 50 lakh units has been fixed for N-95/FFP2 masks or its equivalent, for issuing export licenses to eligible applicants as per the criteria to be separately issued in a Trade Notice.

Sd/- 25/08/2020

(Amit Yadav)

Director General of Foreign Trade

Ex-Officio Additional Secretary, Government of India

E-mail: dgft@nic.in

(Issued from File No.01/91/180/21/AM20/EC/E-21933)"

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The aforesaid notification makes it very clear that all masks except N-95 / FFP2 Masks or its equivalent comes under “restricted” category. The other items mentioned in the notification are now freely exported. The Union of India has also prayed for dismissal of the writ petition.

33- Heard learned counsel for the parties at length and perused the record. The matter is being disposed of at motion hearing stage itself through Video Conferencing finally with the consent of the parties.

34- The petitioner before this Court as stated in the writ petition is a businessman engaged in the business of manufacturing and trading of Pharmaceutical, Herbal, Skin Care and Personal Protective Equipment (PPE) products. The petitioner under the Merchanting Trade Transactions (MTT) wishes to supply KN95 masks manufactured in China to a buyer in United States of America. The Reserve Bank of India in exercise of powers conferred under Section 10(4) and 11(1) of the Foreign Exchange Management Act, 1999 has framed guidelines on Merchanting Trade Transactions. Section 10(4) and Section 11(1) of the Foreign Exchange Management Act, 1999 reads as under:-

“10. Authorised person.—

(1)

(2)

(3)

(4) An authorised person shall, in all his dealings in foreign exchange or foreign security, comply with such general or special directions or orders as the Reserve Bank may, from time to time, think fit to give, and, except with the previous permission

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of the Reserve Bank, an authorised person shall not engage in any transaction involving any foreign exchange or foreign security which is not in conformity with the terms of his authorisation under this section.

11. Reserve Bank's power to issue directions to authorised person.-(1) The Reserve Bank may, for the purpose of securing compliance with the provisions of this Act and of any rules, regulations, notifications or directions made thereunder, give to the authorised persons any direction in regard to making of payment or the doing or desist from doing any act relating to foreign exchange or foreign security.”

35- The guidelines framed by the Reserve Bank of India are in force since 2000 with various variations from time to time. The relevant extracts of the circular issued by Reserve Bank of India in exercise of powers conferred under the Foreign Exchange Management Act, 1999 dated 24/08/2000 reads as under:-

“A. P. (DIR Series) Circular No.9 (August 24, 2000)

RESERVE BANK OF INDIA
CENTRAL OFFICE
EXCHANGE CONTROL DEPARTMENT
MUMBAI-400 001

A. P.(DIR Series) Circular No. 9 August 24, 2000

To

All Authorised Dealers in Foreign Exchange

Dear Sirs,

Foreign Exchange Management Act, 1999

Attention of authorised dealers is invited to the Government of India Notification No.GSR.381(E) dated May 3, 2000, notifying the Foreign Exchange Management (Current Account Transactions) Rules, 2000, in terms of which drawal of exchange for certain current account transactions has been prohibited and restrictions have been placed on certain other transactions. IN terms of Rule 4 ibid, the transactions specified in Schedule II to the said Notification required prior approval of the Government of India and in terms of the Rule 5, the transactions specified in Schedule III to the Notification require prior approval of the Reserve Bank. Authorised dealers may follow directions contained in Annexure while dealing with applications relating to import of goods and services into India.

Part A : Import of Goods :

Part B : Merchanting Trade

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Authorised dealers may take necessary precautions in handling merchant trade transactions or intermediary trade transactions to ensure that (a) goods involved in the transaction are permitted to be imported into India, (b) such transactions do not involve foreign exchange outlay for a period exceeding three months, and (c) all Rules, Regulations, and Directions applicable to export out of India are complied with by the export leg and all Rules, Regulations, and Directions applicable to import are complied with by the import leg of merchanting trade transactions. Authorised dealers are also required to ensure timely receipt of payment for the export leg of such transactions.

Part C : Import of Currency

C.1 Import of Currency

(i) Import of currency, including cheques, is governed by clause (g) of sub-section (3) of Section 6 of the Foreign Exchange Management Act, 1999, and the Foreign Exchange Management (Export and import of currency) Regulations 2000, made by the Reserve Bank vide Notification No. FEMA 6/RB-2000 dated May 3, 2000.

(ii) All imports of currency not covered by the general permission granted under the Regulations require prior permission of the Reserve Bank.”

The aforesaid circular of the year 2000 makes it very clear that the restriction imposed in respect of Merchanting Trade Transactions are in existence since 2000.

36- The petitioner is aggrieved by Clause 2(iii) of Circular No.20 of revised guidelines dated 23/01/2020 and the same reads as under:-

“2.(iii) The MTT shall be undertaken for the goods that are permitted for exports / imports under the prevailing Foreign Trade Policy (FTP) of India as the date of shipment. All rules, regulations and directions applicable to exports (except Export Declaration Form) and imports (except Bill of Entry) shall be complied with for the export leg and import leg respectively.”

The aforesaid clause restricts trading of goods which are not permitted to be imported / exported under the prevailing Foreign Trade Policy. A similar policy is in force on account of various circulars issued by Reserve Bank of India dated 24/08/2000, 19/06/2003,

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17/01/2014 and 28/03/2014. The import and export and framing of a policy on the subject of import and export is purely within the domain of Central Government and the Central Government in exercise of its power conferred under Section 3 of the Foreign Trade (Development & Regulation) Act, 1992 read with paragraph No.1.02 and 2.01 of the Foreign Trade Policy 2015-2020 has issued various amendments from time to time and its a purely policy decision to allow import / export or of particular goods keeping in view the policy framed by Central Government. Section 3 of the Foreign Trade (Development & Regulation) Act, 1992 reads as under:-

“3. Powers to make provisions relating to imports and exports.—(1) The Central Government may, by Order published in the Official Gazette, make provision for the development and regulation of foreign trade by facilitating imports and increasing exports.

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

(3) All goods to which any Order under sub-section (2) applies shall be deemed to be goods the import or export of which has been prohibited under section 11 of the Customs Act, 1962 (52 of 1962) and all the provisions of that Act shall have effect accordingly.”

37- The Government of India has issued a notification dated 28/07/2020 and later on 25/08/2020 which has already been reproduced earlier and N-95 / FFP2 Mask or its equivalent are under “restricted” category.

38- The Reserve Bank of India has to be adhere to the policy decision taken by the Government of India and in that backdrop the

Reserve Bank of India issued executive instructions / circular dated 23/01/2020. Once import of a particular product is barred or export of a particular product is barred, the question of permitting the Merchanting Trade Transactions in respect of that particular products does not arise.

39- The circular dated 23/01/2020 provides a restriction upon the Merchanting Trade Transactions and goods which are permitted for export / import under the prevailing Foreign Trade Policy can be subjected to Merchanting Trade Transactions. The Merchanting Trade Transactions also requires adherence to all rules, regulations and directions applicable to exports (except Export Declaration Form) and imports (except Bill of Entry).

40- The conditions imposed by Government of India as well as Reserve Bank of India are of general application to every Indian entity wishing to carry on Merchanting Trade Transactions. The conditions are neither specific either to petitioner's business, nor to a particular products such as Ventilators or Medical Personal Protective Equipment.

41- Clause 2(i) of the Circular dated 23/01/2020 provides that a Merchanting Trade Transactions means goods in question shall neither enter nor export India (Domestic Tariff Area). The Merchanting Trade Transactions have all the trappings of, export as well as import except the fact that the goods are physically not located in India.

42- The Merchanting Trade Transactions involves foreign exchange

and issuance of a Letter of Credit in India from a banker as well as Reserve Bank of India through its authorised dealer in foreign exchange. The banker as well as Reserve Bank of India are located in India and therefore, there is a clear nexus between the transactions and the involvement of foreign exchange reserves of Reserve Bank of India.

43- Shri Abhinav Malhotra, learned counsel for the petitioner has placed reliance upon a judgment delivered by the apex Court in the case of **Internet and Mobile Association of India Vs. Reserve Bank of India** reported in **2020 SCC OnLine SC 275** which was in respect of Digital Currency / Virtual Currency / Cryptocurrency and his contention is that a complete ban by Reserve Bank of India in respect of Digital Currency was struck down being violative of Article 19(1)(g) of the Constitution of India.

44- This Court has carefully gone through the aforesaid judgment, however, the judgment delivered by the Hon'ble Supreme Court is distinguishable on facts. There is no absolute ban imposed by Reserve Bank of India in respect of the Merchanting Trade Transaction contracts.

45- The Foreign Trade Policy is in existence framed by Government of India in exercise of powers conferred under the Foreign Trade (Development & Regulation) Act, 1992 and notifications have been issued by Government of India keeping in view the powers conferred by Section 3 of the Act of 1992. Its purely a policy decision taken by

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Government of India in larger public interest as there is an acute shortage of the goods which are the subject matter of the present writ petition.

46- The Courts normally do not interfere with the State policy particularly in financial matters unless fraud or lack of *bona-fides* is alleged and established. In the case of **Kasinka Trading v. Union of India**, reported in **(1995) 1 SCC 274**, the Hon'ble Supreme Court has held as under:-

“23. [...] The courts, do not interfere with the fiscal policy where the Government acts in “public interest” and neither any fraud or lack of bona fides is alleged much less established. The Government has to be left free to determine the priorities in the matter of utilisation of finances and to act in the public interest while issuing or modifying or withdrawing an exemption notification”

In a judgment delivered in the case of **P.T.R. Exports (Madras) (P) Ltd. v. Union of India** reported in **(1996) 5 SCC 268**, the Hon'ble Supreme Court has held as under:-

“5. [...] The court ... would prefer to allow free play to the Government to evolve fiscal policy in the public interest and to act upon the same. Equally, the Government is left free to determine priorities in the matters of allocations or allotments or utilisation of its finances in the public interest. It is equally entitled, therefore, to issue or withdraw or modify the export or import policy in accordance with the scheme evolved.”

47- The apex Court in the case of **State of Haryana v. Mahabir Vegetable Oils (P) Ltd.** reported in **(2011) 3 SCC 778**, has again held as under:-

“27. In cases where the Government on the basis of material available before it, bona fide, is satisfied that public interest would be served by granting, withdrawing, modifying or rescinding an exemption already granted, it should be allowed a free hand to do so. The withdrawal of exemption “in public

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interest” is a matter of policy and the courts should not bind the Government in its policy decision. The courts should not normally interfere with fiscal policy of the Government more so when such decisions are taken in public interest and where neither fraud nor lack of bona fides is alleged, much less established.”

In light of the aforesaid judgments, the question of interference in the policy decision taken by Government of India does not arise.

48- Thus, in short the statutory provisions, rules, circulars and notifications issued from time to time permits Merchanting Trade Transactions only in respect of goods that are permitted for export and import under the prevailing Foreign Trade Policy of India and the question of complete ban in respect of freedom of trade and commerce as argued by learned counsel does not arise.

49- In our country keeping in view the COVID-19 Pandemic large number of front line health workers and Doctors have succumbed to Corona Virus on account of inadequate Personal Protective Equipment Kits. The Ventilators are also in short supply and therefore, the Government of India is the best judge either to ban export of the aforesaid items or to place the aforesaid items under the restricted categories.

50- Shri Malhotra while the matter was being argued has stated before this Court that the petitioner is now importing goods from South Africa and is exporting it to United States of America and therefore, the petitioner now be permitted to avail the facility of Merchanting Trade Transactions. In the considered opinion of this Court, once import of a particular item is banned in India or its export is banned,

such permission can never be granted, even though the item is not touching the Indian soil.

51- If analogy canvassed by Shri Abhinav Malhotra is accepted, then the Reserve Bank of India will have to grant permission for Merchanting Trade Transactions in respect of “Sniper Rifles”. The petitioner on the basis of reasoning assigned by Shri Malhotra, even though he is procuring Sniper Rifles from United States of America and is supplying to Pakistan will have to be granted permission by Reserve Bank of India and Government of India and therefore, the analogy and the arguments canvassed by Shri Malhotra are illogical and does not have support of statutory provisions.

52- The another example to make things more clear is of “Blood Diamonds” The Blood Diamonds are diamonds mined in a war zone and sold to finance insurgency, invading army's war efforts, or warlord's activity. India is a very big base in respect of cutting and polishing of diamonds. India cuts 10 out of 11 diamonds sold in the world market. Import of Blood Diamond is not permissible and a diamond imported into India has to be duly certified under the “Kimberley Process”. The Kimberley Process is a joint initiative by Governments. The international diamond industry and civil society to stem the flow of Conflict Diamonds (“Blood Diamonds” are also known as “Conflict Diamonds”) and therefore, the Blood Diamonds from Zimbabwe cannot be imported to India. The diamonds only with Kimberley Process certification are permitted for import. The petitioner

if he wants to import Blood Diamonds / Conflict Diamonds from Zimbabwe to China as per reasoning canvassed by Shri Malhotra has to be given a permission for Merchanting Trade Transactions, as the diamonds are not coming to India.

53- By no stretch of imagination such a permission can be given as statute does not permit for the same. Even though the goods are not coming to India at any point of time under the Merchanting Trade Transactions, only those goods which are permitted for export or for import are eligible for Merchanting Trade Transactions. The circular issued by the Reserve Bank of India is in no way violating the petitioner's right guaranteed under Article 19(1)(g) of the Constitution of India.

54- In the case of **Krishna Kumar Vs. Municipal Corporation** reported in **(2005) 8 SCC 612**, the Hon'ble Supreme Court has held that prohibition with respect to the exercise of a right referable only in a particular area of activity, or relative to only particular matters, does not amount to a total prohibition but only a restriction. In the present case the petitioner is free to import (but not export) PPE kits into India. The petitioner is also free to carry on Merchanting Trade Transactions in respect of all other goods where the export and import of which is permitted under the country's Foreign Trade policy.

55- In the case of **Indian Handicrafts Emporium Vs. Union of India** reported in **(2003) 7 SCC 589**, the Hon'ble Supreme Court upheld a complete ban on ivory. In the aforesaid case the apex court

has Court held as under:-

“38. In order to determine whether total prohibition would be reasonable, the Court has to balance the direct impact on the fundamental right of the citizens thereby against the greater public or social interest sought to be ensured. Implementation of the directive principles contained in Part IV is within the expression of restrictions in the interest of the general public.”

56- In the case of **Balram Kumawat Vs. Union of India** reported in **(2003) 7 SCC 628**, the apex Court has held that the complete ban on ivory extended even to mammoth ivory.

57- In the case of **Kamlesh Vaswani Vs. Union of India** reported in **(2016) 7 SCC 592**, the Hon'ble Supreme Court has approved of a complete prohibition on child pornography.

58- Complete ban on slaughter of cow and its progeny in the State of Gujarat has been upheld by the apex Court in the case of **State of Gujarat Vs. Mirzapur Moti Kureshi Kassab Jamat** reported in **(2005) 8 SCC 534** and in Bihar in the case of **Mohd. Hanif Quareshi Vs. State of Bihar** reported in **AIR 1958 SC 731**. Complete prohibition on the sale of eggs within the municipal limits of *Haridwar*, *Rishikesh* and *Muni-ki-Reti* has been found reasonable by the Hon'ble Supreme Court in the case of **Om Prakash Vs. State of U.P.** reported in **(2004) 3 SCC 402**. Similarly, in the case of **Systopic Laboratories (P) Ltd. Vs. Prem Gupta (Dr)** reported in **1994 Supp (1) SCC 160**, the apex Court has upheld a complete ban on the sale of fixed-dose corticosteroids in other drugs.

59- The judgments of the Hon'ble Supreme Court in the case of **State of Madras Vs. VG Row** reported in **AIR 1952 SC 196** and

Narender Kumar Vs. Union of India reported in **AIR 1960 SC 530** are on different facts and are not of direct relevance to the present case. As observed in **VG Row** (Supra), “Indeed, a decision dealing with the validity of the restrictions imposed on one of the rights conferred by Article 19 (1) cannot have much value as a precedent for adjudging the validity of the restrictions imposed on another right, even when the constitutional criterion is the same, namely reasonableness, as the conclusion must depend on the cumulative effect of the varying facts and circumstances of each case” (see para 19).

60- Article 19(1)(g) and 19(6) of the Constitution of India reads as under:-

“19. Protection of certain rights regarding freedom of speech, etc.-(1) All citizens shall have the right—

(g) to practise any profession, or to carry on any occupation, trade or business.

.....

(6) Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and, in particular, nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,

- (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
- (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.”

It is true that the Constitution of India guarantees fundamental

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right in respect of freedom of trade and commerce, however, the same can be subjected to reasonable restrictions as the same has been done in the present case.

61- In light of the aforesaid by no stretch of imagination the circular can be said to be *ultra vires*. The restriction imposed by Government of India and Reserve Bank of India amounts to reasonable restriction and in noway violating the freedom of trade and commerce as pleaded by the petitioner. No case for interference is made out in the matter and the writ petition is dismissed.

Certified copy as per rules.

(S. C. SHARMA)
J U D G E

(SHAIENDRA SHUKLA)
J U D G E

Tej

Digitally signed by
Tej Prakash Vyas
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