

SUPREME COURT OF INDIA

Manohar Lal Sharma

Vs.

Union of India

(R.M.Lodha, Madan B.Lokur and Kurian Joseph JJ.)

01.05.2013

ORDER

1. We have heard Mr. Manohar Lal Sharma – petitioner in person and Mr. Goolam E. Vahanvati, learned Attorney General. We have also heard Mr. Vikramjit Banerjee, learned counsel for the intervenor – Swadeshi Jagaran Foundation in I.A. No. 2 of 2012.

2. Mr. Manohar Lal Sharma – petitioner in person prays for withdrawal of the rejoinder-affidavit in its entirety in view of the objectionable statements contained therein. We allow him to do so. It is directed that no part of the rejoinder-affidavit shall be treated as part of the record.

3. In the Writ Petition, the petitioner has prayed for quashing Press Note Nos. 4,5,6,7 and 8 of (2012 Series) dated 20th September, 2012 being unconstitutional and without any authority of law.

4. By these Press Notes, the policy of Foreign Direct Investment (FDI) in Single-Brand Product Retail Trading, Multi-Brand Retail Trading, Air Transport Services, Broadcasting Carriage Services and Power Exchanges has been reviewed. In the forwarding circular, it is mentioned in para 5 that necessary amendments to Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 (for short “Regulations, 2000) are being notified separately.

5. When the matter came up for consideration on 15.10.2012, learned Attorney General submitted that the process for necessary amendments to Regulations 2000 by the Reserve Bank of India was on and that necessary amendments in Regulations 2000 would be made soon.

6. On 5.11.2012, learned Attorney General placed for consideration of the Court, a copy of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) (Third Amendment) Regulations, 2012 (for short “2012 Regulations”) published in the Gazette of India – Extraordinary on October 30, 2012.

7. By the 2012 Regulations, Reserve Bank of India in exercise of the powers conferred by clause (b) of sub-section (3) of Section 6 and Section 47 of the Foreign Exchange Management Act, 1999 (for short “FEMA”), has made amendments to the 2000 Regulations.

8. There is no challenge to the 2012 Regulations. In the absence of any challenge to the 2012 Regulations, the contention of the petitioner that Press Note Nos. 4,5,6,7 & 8 (2012 Series) dated 20th September, 2012 have no force of law, does not survive for any scrutiny.

9. Be that as it may. We have carefully considered the submissions of the petitioner and intervenor that the impugned FDI Policy is not founded on any material obtained from the government agency and no extensive consultation was made before formulation of the impugned Policy.

10. In the Counter-affidavit filed by the Union of India, the benefits of FDI in Multi-Brand Retail have been enumerated. The impugned FDI policy have twin objectives, (one) benefit the consumer by enlarging the choice of purchase at more affordable prices; and (two) eradicating the traditional trade intermediaries/middlemen to facilitate better access to the market (ultimate retailer) for the producer of goods.

11. It is stated that the amended FDI policy will generate employment, improve infrastructure and provide better quality products. The farmers will benefit significantly from the option of direct sales to organized retailers. In this regard, the Central Government has relied upon the study commissioned by the World Bank indicating that profit realization for farmers selling directly to organized retailers is about 60% higher than that received from selling in the Mandi. The views in the study commissioned by the World Bank are said to be supported by the findings of a study instituted by the Government of India on the subject of “Impact of Organized Retailing on the Unorganized Sector” through the Indian Council for research on International Economic Relations (ICRIER) submitted in

May, 2008. According to ICRIER report, unorganized and organized retail not only co-exist, but also grow substantially in size.

12. The salient features of the FDI Policy on Multi-Brand Retail Trading are also indicated in the counter-affidavit. The policy mandates at least 30% of the value of procurement of manufactured/processed products purchased shall be sourced from Indian 'small industries' which have a total investment in plant & machinery not exceeding US \$ 1.00 million. It also provides that retail sales outlets may be set up only in cities with a population of more than 10 lakhs as per 2011 Census and may also cover an area of 10 Kms around the municipal/urban agglomeration limits of such cities. In States/Union Territories not having cities with population of more than 10 lakhs as per 2011 Census, retail sales outlets may be set up in the cities of their choice, preferably the largest city and may also cover an area of 10 Kms around the municipal/urban agglomeration limits of such cities.

13. We find that impugned policy is only an enabling policy and the State Governments/Union Territories are free to take their own decisions in regard to implementation of the policy in keeping with local conditions. It is , thus, left to the choice of the State Governments/Union Territories whether or not to implement the policy to allow FDI up to 51% in Multi-Brand Retail Trading.

14. The views on the efficacy of a government policy and the objectives such policy seeks to achieve may differ. The counter- view(s) may have some merit but under our Constitution, the executive has been accorded primary responsibility for the formulation of governmental policy. The executive function comprises both the determination of policy as well as carrying it into execution. If the Government of the day after due reflection, consideration and deliberation feels that by allowing FDI up to 51% in Multi-Brand Retail Trading, the country's economy will grow and it will facilitate better access to the market for the producer of goods and enhance the employment potential, then in our view, it is not open for the Court to go into merits and demerits of such policy.

15. On matters affecting policy, this Court does not interfere unless the policy is unconstitutional or contrary to the statutory provisions or arbitrary or irrational or in abuse of power. The impugned policy that allows FDI up to 51% in Multi-Brand Retail Trading does not appear to suffer from any of these vices.

16. Notably, the Department of Industrial Policy and Promotion (DIPP) as per the Allocation of Business Rules, 1961 is allocated the subject of 'Direct foreign and non-resident investment in industrial and service projects, excluding functions

entrusted to the Ministry of Overseas Indian Affairs'. Seen thus, the DIPP is empowered to make policy pronouncements on FDI. There is no merit in the submission of the petitioner that Central Government has no authority or competence to formulate FDI Policy. The competence of the Central Government to formulate a policy relating to investment by a non-resident entity/person resident outside India, in the capital of an Indian company is beyond doubt. The Reserve Bank of India (RBI) is empowered to prohibit, restrict or regulate various types of foreign exchange transactions, including FDI, in India by means of necessary regulations. RBI Regulates foreign investment in India in accordance with Government of India's policy.

17. Writ Petition is dismissed with no order as to costs. Interlocutory Applications stand disposed of.