

(2010) 11 KL CK 0053

In the High Court Of Kerala

Case No : Writ Petition (C) No. 6747 of 2009 (K) and W.P. (C) No's. 5135, 5481, 5822, 5990, 8479, 29465, 31806, 243, 257, 1065 of 2009 and 20318, 23273, 26671, 34054, 36296, 36302 of 2008 and 32270, 34282, 9624, 35133, 37012 of 2007 and 7379-7380, 9176, 9626, 1032

Global Industries

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 02-11-2010

Acts Referred:

Foreign Trade (Development and Regulation) Act, 1992 — Section 15, 16, 19, 3, 5

Citation : (2011) 263 ELT 517

Hon'ble Judges : Antony Dominic, J

Bench : Single Bench

Advocate : C.K. Karunakaran, for the Appellant; John Varghese, SC, CBEC, for the Respondent

Final Decision : Allowed

Judgement

Antony Dominic, J.—W.P. (C) Nos. 6747, 5135, 5481, 5822, 5990, 8479, 29465, 31806, 243, 257, 1065/2009 & 20318, 23273, 26671, 34054, 36296, 36302/2008: These writ petitions have been filed by importers of betel nuts, challenging Notification No. 15 (RE-2008)/2004-2009 dated 4-6-2008 issued by the Director General of Foreign Trade in the purported exercise of powers conferred by Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 read with paragraph 2.1 of the Foreign Trade Policy-2004-2009, amending Schedule-1 (Imports) of the Import Trade Control (HS) Classifications of Export and Import Items, 2004-2009, incorporating the condition that import of betel nuts, whole, split, ground and others, will be permitted freely provided the CIF value is Rs. 35/- per Kilogram and above. Among others, it is contended by the learned Counsel for the Petitioners that the Director General of Foreign Trade had no jurisdiction, either under the FTDR Act, 1992 or the Foreign Trade Policy, to have issued the notification and, therefore, the notification is illegal and

unconstitutional.

2. A counter affidavit has been filed by Respondents 1 and 2. In paragraph 6 of the counter affidavit, it has been stated thus:

6. It is denied that Ext. P1 notification is arbitrary, discriminatory, issued with oblique motive and not in public interest. The Ext. P1 notification has been issued to protect the interests of the domestic cultivators. It has been issued by the DGFT in public interest in exercise of powers conferred u/s 5 of the Foreign Trade (Development and Regulation) Act, 1992 read with paragraph 2.1 of the Foreign Trade Policy 2004-2009 according to which the Central Government is empowered to make amendment in Schedule-I (Imports) of ITC (HS) Classification of Export and Import Items 2004-2009. The issuance of the above notification is a policy decision of the Central Government in exercise of the powers conferred under the above Act.

3. The averments in paragraph 6 have been reiterated in paragraph 10 of the counter affidavit also.

4. Thus, it is obvious that even according to Respondents 1 and 2, Ext. P1 notification has been issued by the Director General of Foreign Trade and the question is whether he had the jurisdiction to have issued the same. Answer to this question is available in the FTDR Act, 1992 itself. Section 3 of the Act provides that 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. Sub-section (2) authorises the Central Government to issue order published in the official gazette providing for prohibiting, restricting or otherwise regulating, in all cases or in specified classes of cases and subject to such exceptions, if any, the import or export of goods.

5. Sections 5 and 6 of the Act being relevant are extracted below:

5. Export and import policy - The Central Government may, from time to time formulate and announce, by notification in the Official Gazette, the export and import policy and may also, in the like manner, amend that policy.

6. Appointment of Director General and his functions -

(1) The Central Government may appoint any person to be the Director General of Foreign Trade for the purposes of this Act.

(2) The Director General shall advise the Central Government in the formulation of the export and import policy and shall be responsible for carrying out that policy.

(3) The Central Government may, by Order published in the Official Gazette, direct that any power exercisable by it under this Act (other than the powers under Sections 3, 5, 15, 16 and 19) may also be exercised, in such cases and subject to such conditions, by the Director General or such other officer subordinate to the Director General, as may be specified in the Order.

6. Reading of these Sections shows that it is only the Central Government which can formulate export and import policy and amend the said policy. It also is evident that the power conferred on the Central Government u/s 5 cannot be delegated to the Director General of Foreign Trade appointed u/s 6 of the Act. If this be the position, and as admittedly the notification has been issued by the Director General of Foreign Trade, it has to be concluded that the notification is issued without jurisdiction.

7. Learned Counsel for the Petitioners has also made available before me judgment of the Madras High Court in S. Mira Commodities Pvt. Ltd. and Others Vs. Union of India (UOI) and Others, wherein the Madras High Court has quashed Ext. P1 notification on the very ground itself.

8. Therefore, in view of the statutory provision referred above and in the light of the judgment of the Madras High Court, the Notification dated 4-6-2008 issued by the Director General of Foreign Trade is illegal and is to be set aside and I do so.

9. Counsel for the third Respondent submits that since goods imported by the Petitioners have been cleared under the interim orders passed in these writ petitions, Respondents should be permitted to proceed under the provisions of the Customs Act. Now that the notification has been set aside, as a necessary consequence, Respondents shall be free to proceed against the Petitioners in terms of the provisions of the Customs Act, 1962 and it is so clarified.

10. Subject to the above, writ petitions will stand allowed.

W.P. (C) Nos. 32270, 34282, 9624, 35133, 37012/2007, 7379, 7380, 9176, 9626, 10324, 29039, 33417/2008 & 2275, 26359/2010

11. In these writ petitions also, notifications issued by the Director General of Foreign Trade dated 20-2-2007, 10-7-2007, 29-8-2007 and 4-6-2008 are under challenge. These notifications also suffer the very same invalidity on the basis of which, W.P. (C) No. 6747/2009 and connected cases were allowed by this Court by judgment rendered today.

12. Therefore, for the very same reasons, these writ petitions will also stand allowed setting aside the notifications.

13. Now that the notifications have been set aside, it is clarified that the Respondents shall have the freedom to proceed against the Petitioners under the Customs Act, if they deem so necessary.