(2008) 10 BOM CK 0033

In the Bombay High Court

Case No : Writ Petition No. 6613 of 2008

Gopal Lal Sarda APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 20-10-2008

Acts Referred:
Foreign Trade (Development and Regulation) Act, 1992 — Section 5

Citation : (2011) 263 ELT 24

Hon'ble Judges : J.P. Devadhar, J;D.K. Deshmukh, J

Bench : Division Bench

Advocate : Kamal Bulchandani with Ms. L.K. Bulchandani and Ms. Tulsi Zaveri, instructed by and M/s. Kamal and Co, for the Appellant; R. Ashokan, for the Respondent

Final Decision : Allowed

Judgement

1. Rule returnable forthwith. Heard finally by consent of the parries.

2. The petitioner by this petition challenges notification dated 19-3-2008 issued by respondent No. 2-Director General of Foreign Trade in exercise of powers conferred by Section 5 of Foreign Trade (Development & Regulation) Act, 1992 read with para 2.1 of the Foreign Trade Policy. By that notification, the respondent No. 2 has amended Schedule-I (Imports) of the ITC (HS) Classifications of Export and Import Items. It is common ground that as a result of this notification, now raw and polished marble can be imported from Sri Lanka under the India-Srilanka Free Trade Treaty Agreement, only through the Fort of Kolkata. It is common ground that previously raw and polished marble could be imported from Sri Lanka at any Port in India under the treaty. It is also common ground that because of the notification issued by the authorities under Customs Tariff Act, items which are part of India-Srilankan Treaty the importers are not liable to pay any customs duty.

3. The petitioner challenges validity of the Notification dated 19-3-2008 basically

on two grounds. According to him, notification could not have been issued u/s 5 of the Foreign Trade (Development & Regulation) Act, 1992 (hereinafter referred to as the said Act for the sake of brevity) as it is beyond the powers of the Respondent No. 2. It is further contended that even assuming that such a notification could have been issued, according to the petitioner exercise of powers is not proper in as much as it has been issued with the sole intention of denying the benefit of duty free import to the petitioner on importing marble from Sri Lanka.

4. The Respondents have not filed any affidavit in this writ petition, but it appears that Writ Petition No. 1026 of 2008 was filed by the petitioner earlier, which was subsequently withdrawn by the petitioner and in that petition, affidavit in reply was filed on behalf of the respondents. The learned counsel for the respondents stated before us that the said affidavit in reply filed in Writ Petition No. 1026 of 2008 be treated as reply of the Respondents in this writ petition.

5. We have heard learned counsel appearing for both the sides. The learned counsel appearing for the petitioner relied on various clauses of the India-Srilankan Treaty to point out that the respondent No. 2 had no authority to withdraw the concession which is given by the Treaty, without amending the Treaty. The learned counsel further submitted that because of the Treaty and the notification issued under the Customs Tariff Act, there is no customs duty payable on marble imported from Sri Lanka. In the affidavit filed on behalf of the Respondents, the Respondents however have stated that they have issued notification for two purposes; (i) to make it uneconomical for the importers to import marble from Sri Lanka by neutralizing the duty-free benefit that they were getting, and (ii) the object is to prevent misuse of concession by importing marble which is not of Srilankan origin-

The learned counsel submits that the first object stated in the notification is opposed to the law in as much as the object to defeat the concession granted by issuing notification under the Customs Tariff Act. The learned counsel further submits that if the marble imported by the petitioner and others from Sri Lanka is found not to be permitted to be imported duty free under the Treaty, then it can be detained and action in accordance with law, at any Port, could have been taken and for that purpose it was not necessary to restrict the import only to one Port in India i.e. Kolkata. We have heard the learned counsel appearing for the Respondents, who basically reiterated what is stated in the affidavit in reply.

6. So far as first contention is concerned in our opinion the same does not appear to have any substance because what has been done by the notification is that the Schedule has been amended and u/s 5 of the Act, the Central Government can even amend the trade Policy in public interest, but the amendment has to be in accordance with law. Perusal of the Policy decision of the Central Government further shows that any amendment in the Policy has to be in public interest. Therefore, basically we have to see whether the amendment that has been brought out is in public interest and is for legal object.

Perusal of the affidavit in reply filed on behalf of the Respondents shows that they have given two reasons for issuing notification and restricting the import of marble from Sri Lanka only at the Kolkata Port, (i) the traders are misusing the facility and were importing marble from Sri Lanka, which is not of Srilankan origin and (ii) to neutralize the benefit of concession granted under the Customs Tariff Act to protect the domestic marble industry.

So far as the first reason is concerned in our opinion for this reason restricting import to only Kolkata Port will serve no purpose. If marble which is not of Srilankan origin cannot be imported under the Treaty free of payment of duty, then that can be prevented by the Respondents, at whatever Port the marble is imported. For that reason, it is not necessary to restrict the import to Kolkata Port only. It is to be noted here that it is not the case of the Respondents that the facility of checking the marble which arrives from Sri Lanka is available only at Kolkata Port and not at other Ports. In our opinion, therefore, this reason given is incapable of being accepted, because it has no nexus with restricting the import to only Kolkata Port.

7. So far as second reason given is concerned, it is to be found in para 8 of the Reply, which reads as under :

8. I say and submit that the present standard rate of customs duty on processed marble products under chapter 68 is 10% of the CIF value. Since no import of marble below the floor price of US$. 27 00 per cubic meter is allowed the effective duty on processed marble comes to US$. 270 per cubic meter. By virtue of the trade agreement in the case of imports from Sri Lanka this duty becomes 0%. Therefore, an importer taking advantage of tariff concession under ISFTA can save to the extent of US$. 270 per cubic meter. It is respectfully submitted that the import of marble from Sri Lanka is restricted through the Kolkata Port is intended to neutralize the duty gain through transportation cost thereby discouraging the import of marbles into India to protect the domestic marble industry. However the importers are liable to pay the normal customs duty for the imports through any port other than Kolkata.

8. It is common ground that by issuing the notification under the Customs Tariff Act, the Government of India has granted total exemption from payment of customs duty so far as import of marble amongst other commodities from Sri Lanka under the treaty. It is clear from the above quoted portion from the reply of the Respondents that the object of issuing notification is to deny the benefit of statutory notification or concession issued under the Customs Tariff Act to the petitioner and others, who import marble from Sri Lanka. In our opinion, the object of defeating the statutory notification or concession cannot be said to be a legitimate object. The Government could have, if it was so advised, withdrawn the concession given in the Customs Tariff Act or it could have gone in for amendment of the Treaty between India and Sri Lanka. In our opinion, the object which is specified in the affidavit defeats both the notification issued under the Customs Tariff Act, as also the provisions of the India-Sri Lanka Treaty and,

therefore, it cannot be said that the purpose of issuing the notification is legitimate and, therefore in our opinion, it cannot be said that the notification impugned in the present petition has been issued in public interest, because what is opposed to law cannot be said to be in public interest.

9. For all the aforesaid reasons in our opinion, therefore, the petition has to succeed. The Rule in the petition is made absolute in terms of prayer clause (a). No order as to costs.