
(2016) 04 CAL CK 0078
In the Calcutta High Court
Case No : WP No. 289 of 2016

M/s. Banarsi Das & Sons

APPELLANT

Vs

Union of India & Ors.

RESPONDENT

Date of Decision : 07-04-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2016) 4 CalHCN 738 : (2016) 4 WBLR 76

Hon'ble Judges : Sanjib Banerjee, J.

Bench : Single Bench

Advocate : Mr. Abhrajit Mitra, Sr. Advocate, Mr. Aryak Dutt and Mr. D. Das, Advocates, for the Appellant; Ms. Debjani Roy, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Sanjib Banerjee, J.—The petitioners question the propriety of a notification of September 25, 2013 and the denial by the office of the Director General of Foreign Trade of an incentive that the petitioners were entitled to under a notification of December 28, 2012. The petitioners claim that the issue involved herein is covered by an order of this Court of January 28, 2016. The petitioners say that a recent judgment of the Supreme Court reported at (2016) 2 SCC 226 (Director General of Foreign Trade v. Kanak Exports) leaves no doubt as to the petitioners' entitlement.

2. Though the Union does not dispute that the issue is the same as in WP No.1355 of 2015 (LGW Industries Limited v. Union of India) which was allowed by the order of January 28, 2016, the Union places a contrary judgment of January 7, 2016 passed by a Division Bench of the Delhi High Court which, according to the Union, could not be cited before this Court when the order of January 28, 2016 was passed.

3. Curiously, the Delhi High Court judgment now cited by the Union founds its opinion on the issue also on the Kanak Exports judgment relied upon by the

petitioners.

4. The notification of December 28, 2012 added a paragraph to the foreign trade policy of 2009-2014 by way of paragraph 3.14.4, entitled Incremental Exports Incentivisation Scheme. The operative part of such scheme provided as follows:

"An IEC holder would be entitled for a duty credit scrip @ 2% on the incremental growth (achieved by the IEC holder) during the period 01.01.2013 to 31.3.2013 compared to the period from 01.01.2012 to 31.3.2012 on the FOB value of exports. Incremental growth shall be in respect of each exporter (IEC holder) without any scope for combining the exports for Group Company."

5. As in the case of petitioner pertaining to the order of January 28, 2016, the petitioners herein claim to have exported substantially larger quantities of raw cotton during the fourth quarter of financial year 2012-13 as compared to the quantum of the same material exported by the petitioners during the relevant quarter of the previous financial year. The petitioners applied before the appropriate authority with a substantial claim for the duty credit scrip. Such claim has been, in the most part, declined without reasons by an order of October 5, 2015. In fact, the relevant order does not reveal the rejection of the petitioners' claim under the notification of December 28, 2012, but it is evident from the quantum of credit indicated in the relevant communication, that a reduced amount has been allowed.

6. The petitioners say that such partial rejection is by virtue of the subsequent notification of September 25, 2013 by which a cap was put on the quantum of benefit. Clause 2 of the notification of September 25, 2013 is relevant:

"The following sub-paragraphs (i) & (ii) are added below paragraph 3.14.4(c) as under:

(i) Benefit of Incremental Export Incentivisation Scheme for the last quarter of 2012-13 will be limited to 25% growth or incremental growth of Rs. 10 crores in value, whichever is less.

(ii) Claims in excess of this value will be subjected to greater scrutiny by Regional Authority."

7. The petitioners suggest that once the petitioners had completed the act that entitled the petitioners to the incentive announced, the incentive could, thereafter, not be discontinued or the scheme could not be modified to the prejudice of the petitioners, unless the scheme had a date of closure originally indicated therein. The petitioners say that the Central Government does not have any authority under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 to alter a disclosed policy with retrospective effect. The petitioners enunciate the general principle that delegated legislation cannot be amended or modified with retrospective effect unless the power therefor is conferred by the relevant statute.

8. A similar submission was accepted in the order of January 28, 2016. An unreported judgment of the Delhi High Court rendered on September 28, 2015 in WP(C) 1345 of 2015 (Sesa Sterlite Limited v. Union of India) was also noticed therein where it was held that the subsequent notification could not affect the rights that had vested in any exporter prior to the subsequent notification coming into effect.

9. The later judgment of the Delhi High Court of January 7, 2016 in WP (C) 6732 of 2015 (TT Limited v. Union of India) does not appear to have noticed the earlier view of the same Court in the Sesa Sterlite case.

10. In TT Limited, the Bench relied on paragraph 105 of the judgment in Kanak Exports to decline the reliefs sought by the petitioner before the Delhi High Court in identical circumstances as the present case. The extract from the Supreme Court judgment relied upon in that case is quoted:

"105. We may state, at the outset, that the incentive scheme in question, as promulgated by the Government, is in the nature of concession or incentive which is a privilege of the Central Government. It is for the Government to take the decision to grant such a privilege or not. It is also trite law that such exemptions, concessions or incentives can be withdrawn any time. All these are matters which are in the domain of policy decisions of the Government. When there is withdrawal of such incentive and it is also shown that the same was done in public interest, the Court would not tinker with these policy decisions. This is so laid down in a catena of judgments of this Court and is now treated as established and well-grounded principle of law?"

11. The petitioners, however, refer to the paragraphs following the one which is quoted in the later Delhi judgment. At paragraph 109 of the report, the Supreme Court observed that the Government had a right to amend, modify or even rescind a particular scheme based on economic considerations and, in matters of such kind, the executive should be allowed some play in the joints. However, at the end of such paragraph, the question posed by the Court was as follows:

"109. ? The question, however, is as to whether it can be done retrospectively, thereby taking away some right that had accrued in favour of another person?"

12. After posing such question, the Supreme Court referred to the submission made by the exporters in that case that by achieving the target contained in the relevant scheme in respect of incremental exports, a right had accrued in their favour to claim the benefits provided for achieving the target. In that case, the scheme set out certain targets and once the targets were achieved by the exporters, they were entitled to duty free import to the extent of 10% of the incremental growth in exports. The Supreme Court noticed that the only conditions for such entitlement were that it had to be used after a certain date and in respect of certain items of import. A subsequent notification that discontinued the scheme, according to the Supreme Court, amounted to retrospective operation being given to the subsequent notification which was held

to be impermissible.

13. The Supreme Court referred to several previous judgments and the general principle that delegated legislation could not be made operative retrospectively unless the authority conferred by the statute in such regard was specific. Paragraph 113 of the report in *Kanak Exports* explains the legal position, including that the modification or the closure of such a scheme after an exporter had done the act that entitled the incentive under the original notification would amount to retrospective action:

"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 the rule-making authority has been vested with power under a statute to make rules with retrospective effect. In the present case, Section 5 of the Act does not give any such power specifically to the Central Government to make rules retrospective. No doubt, this section confer powers upon the Central Government to "amend" the policy which has been framed under the aforesaid provisions. However, that by itself would not mean that such a provision empowers the Government to do so retrospectively?"

14. In view of the clear enunciation of the legal position in the judgment in *Kanak Exports* which has to be regarded as the law of the land, the view expressed in the later *Delhi* judgment is not acceptable.

15. As a consequence, it is declared that the petitioners will be entitled to the benefit under the notification of December 28, 2012 irrespective of the modification that was brought in by the notification of September 25, 2013. Accordingly, the petitioners' claim should be considered by the DGFT in such light and on the basis of the earlier notification and without reference to the later. The order impugned dated October 5, 2015 is set aside to the extent that it disallowed the petitioners' claim under the notification of December 28, 2012. The relevant authority is requested to reconsider the matter in the light of this order and pass an appropriate order as to the petitioners' entitlement within four weeks of the receipt of a copy of this order.

16. WP No.289 of 2016 is allowed as above, but without any order as to costs.

17. Urgent certified website copies of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.