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(2012) 07 DEL CK 0028

In the Delhi High Court

Case No : Writ Petition (C) No. 3576 of 2012

M/S Midwest Gold Ltd. and Another APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 30-07-2012

Acts Referred:

Citation : (2013) 290 ELT 198

Hon'ble Judges : Rajiv Sahai Endlaw, J;A.K. Sikri, J

Bench : Division Bench

Advocate : Prashant Kumar, Mr. Amit Singh and Mr. Rajan Singh, for the Appellant; Sumeet Pushkarna, for 1-3, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.—The petition impugns the Condition No.2 in Schedule-1 Section XIII of Import Policy ITC (HS) 2012 allowing import of items inter alia under EXIM Code - 68022190 (which includes polished marble slabs) from Sri Lanka under the Indo-Sri Lanka Free Trade Agreement (ISFTA), only through the Port of Calcutta. Notice of the petition was issued and though the interim relief claimed of allowing the petitioners to import the said goods from the Ports of their choice was denied but it was directed that the duty if any paid by the petitioners shall be subject to the outcome of the writ petition. A counter affidavit has been filed by the respondent no.2 Directorate General of Foreign Trade. Counsels have been heard. The petitioners, in the petition have stated that a similar condition earlier imposed vide Notification dated 19th March, 2008 was struck down by a Division Bench of the Bombay High Court vide judgment dated 20th October, 2008 in W.P.(C) No. 6613/2008 titled Gopal Lal Sarda v. Union of India as well as by a Single Judge of this Court vide judgment dated 1st April, 2009 in W.P.(C) No. 3641/2008 titled Midwest Granite Pvt. Ltd. v. Union of India filed by the petitioners themselves.

2. The petitioners claim to be an importer inter alia of polished marble slabs covered by tariff item aforesaid. It is further the case of the petitioners that under ISFTA, India and Sri Lanka have inter alia agreed to establish a Free Trade

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Area for the purpose of free movements of goods between both countries through elimination of tariffs; thus, polished marble slabs imported by the petitioners from Sri Lanka are exempt from payment of duty; however the respondents have in contravention of ISFTA permitted such free import from Sri Lanka only through the port at Calcutta; that import through Calcutta puts uncalled for transportation burden on the petitioners; that such restriction is violative of the rights of the petitioners to carry on business.

3. The respondents in their counter affidavit have stated that the government has imposed a restrictive import policy for marble on account of concerns for the domestic producers/processors of marble; marble is an important industry for the economy of the border State of Rajasthan; more than two lac families belonging to backward classes, minorities and tribals are dependent on marble mining industry for their livelihood; 95% of the units in marble sector in Rajasthan are small and tiny; to protect the cheaper priced domestic marble, import of even processed marble is subject to certain conditions; however import from Sri Lanka is allowed freely without payment of any duty under ISFTA; Sri Lanka does not have its own marble mines and rough marble is imported into Sri Lanka from third countries located in Europe, Africa etc. and which marble is then processed and exported to India at zero rate of custom duty; this has resulted in increased imports of marble through Sri Lanka and the Government has received representations that the same is affecting the domestic marble producers/processors; that the government has been modulating the application of ISFTA in case any specific provision hurts the interest of India; that the condition aforesaid restricting the import only through Calcutta was imposed for the said reason.

4. We may at this stage notice the reasoning which in the earlier round of litigation aforesaid had prevailed with the Division Bench of the Bombay High Court and followed by this Court in striking down a similar restriction. It was held:-

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,

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because it has no nexus with restricting the import to only Kolkata Port.

So far as second reason given is concerned.....

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.

5. We have enquired from the counsel for the respondents as to how the position is any different today. He has not been able to give any reply. We are of the opinion that the remedy of the respondents, if at all aggrieved from inclusion of marble/marble products in ISFTA is to have the same excluded therefrom, rather than to make it unworkable in the manner done. We are thus in agreement with the earlier judgments aforesaid and allow this petition and set aside/quash the condition aforesaid restricting the import through the Port at Calcutta only. Axiomatically the duty if any collected from the petitioners for import through the Ports other than the Calcutta Port be refunded to the petitioners within eight weeks hereof.

No costs.

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