(2016) 02 CAL CK 0137

In the Calcutta High Court

Case No : M.A.T. No. 1615 of 2014, C.A.N. Nos. 10315 of 2014 and 4373 of 2015 with F.M.A. No. 181 of 2016 and C.A.N. No. 12342 of 2014, F.M.A. No. 182 of 2016, C.A.N. No. 12340 of 2014, F.M.A. No. 183 of 2016, C.A.N. No. 12343 of 2014, F.M.A. No. 184 of 2016, C.A.N

Union of India APPELLANT

Vs

Navin Kr. Jha RESPONDENT

Date of Decision : 17-02-2016

Acts Referred:

Citation : (2016) 341 ELT 561

Hon'ble Judges : Girish Chandra Gupta and Indrajit Chatterjee, JJ.

Bench : Division Bench

Advocate : S/Shri Somenath Bose, Anirban Mitra, Ms. Sonia Sharma, Sandip Ghose, Lal Mohan Hazra, Somesh Panja and Mrs. Moutusi Hazra, Advocates, for the Appellant; S/Shri. Pranab Kumar Dutta, Senior Advocate, Shovendu Banerjee, N.K. Choudhury, Arijit Chakraborty, Ni

Final Decision : Dismissed

Judgement

1. All the appeals are directed against a common judgment and order. Therefore, all the appeals are taken up for hearing together.

2. The two grounds on the basis of which the writ petition was allowed by the learned Trial Court are as follows :

"(a) the impugned notification cannot be sustained as the prohibition can also be made by way of an Order published in the Official Gazette and not in the manner as has been done in the instant case.

(b) It is relevant to quote the source of power of restriction of the DGFT under paragraph 2.6 of the Foreign Trade Policy, which reads thus :

"2.6. DGFT may, through a notification, adopt and enforce any measure necessary for :-

(i) Protection of public moral.

(ii) Protection of human, animal or plant life or health.

(iii) Protection of patents, trademarks and copyrights and the prevention of deceptive practices.

(iv) Prevention of use of prison labour.

(v) Protection of national treasures of artistic, historic or archaeological value.

(vi) Conservation of exhaustible natural resources.

(vii) Protection of trade of fissionable material or material from which they are derived; and

(viii) Prevention of traffic in arms, ammunition and implements of war."

The aforesaid parameters set forth therein does not satisfy the imposition of conditions by way of revision of rate from Rs. 75/- to 110/- per kg. and above. Therefore, the DGFT even as a delegatee is not empowered to put a condition by revising the rate as a condition to import."

3. The subject-matter of challenge in the writ petition was the notification dated 13th May, 2013, a copy whereof is at Page 104 of the paper book appearing to have been issued by the Central Government in exercise of power under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992.

4. The learned Trial Court held that the impugned notification cannot be sustained as the prohibition can also be made by way of an Order published in the Official Gazette. In order to show that the impugned notification amounted to imposing prohibition the learned Trial Court took assistance of the definition of the expression "prohibited goods" appearing in Section 2(33) of the Customs Act.

5. We are unable to agree with the learned Trial Court that no such exercise was permissible. The Foreign Trade (Development and Regulation) Act, 1992 is an Act both for the purpose for development and regulation of foreign trade. There cannot be any development without regulation. For a planned development regulations are necessary. The Central Government is authorised to formulate the form of regulation under the provisions of the aforesaid Foreign Trade (Development and Regulation) Act, 1992. The question for consideration was whether the revision effected by the impugned notification dated 13th May, 2013 from Rs. 75/- to Rs. 110/- was valid in law. We are inclined to think that if the Central Government was authorised to fix the value at Rs. 75/- then they were also authorised to revise it. Power to fix a rate without any power to revise the same does not amount to any power, to fix the rates, any more than there can be a power to appoint without a corresponding power to dismiss. The learned Trial Court has held "the DGFT functions as a limb of the Central Government and not as a delegatee and mere non-mentioning of the specific source of power does not invalidate the entire executive action." Having done so it could not have been

held that the impugned notification was not an act of the Central Government under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992. Reliance placed by the learned Trial Court upon Paragraph 2.6 of the Foreign Trade Policy, quoted above, is altogether misplaced for the simple reason that the impugned policy, at Page 104 of the Paper Book, is deemed to have been issued by the Central Government which is the policy making body whereas DGFT, in Para 2.6 of the Foreign Trade Policy, is a mere implementing authority. Any restrain on the power of implementing authority cannot be treated also as a restrain or limitation on the power of Central Government. Therefore, both the grounds assigned by the learned Trial Court are without any merit and therefore cannot be sustained.

6. Our attention has, however, been drawn by Mr. Dutta, learned Senior Advocate, appearing for the respondents/writ petitioners that there were substantial grounds taken in the writ petition to which the learned Trial Court did not give any attention though submissions were made on that basis. He drew our attention to Ground Nos. 18 and 19 in the writ petition to show that the impugned policy is irrational and is detrimental to the interest of the country. He also drew our attention to Ground No. 12 in order to show that the contention of the learned Advocates was that the power vested under the Foreign Trade (Development and Regulation) Act, 1992 is intended to be used with respect to the quantity of the goods to be imported and not with respect to the value of goods. He submitted that submissions on each of these points was advanced but the learned Trial Court did not consider the same. The learned Advocate appearing for the appellant did not dispute these submissions.

7. In that view of the matter, we are of the opinion that the proper order shall be to set aside the order as regards the legality of the aforesaid notification dated 13th May, 2013 and to remand the matter for re-hearing on all the points pertaining thereto agitated by the writ petitioners.

8. In that view of the matter, the order under challenge is to that extent set aside. The writ petition is remanded for re-hearing except as regards the validity of the Customs notification which has attained finality.

Re : CAN 10315 of 2014

9. This is an application for leave to appeal. Admittedly, the applicant was not a party to the writ petition. Therefore, he has not been impleaded as a party respondent to this appeal. We do not think any order should be passed on this application. This application is as such dismissed.

Re : CAN 4373 of 2015

10. This is an application for addition of the applicant as a party respondent to the appeal. We do not see any reason why this application should be allowed. This application is therefore, dismissed.

