

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) 13091 of 2009 & CM APPL No. 14083/09

Reserved on: February 4, 2010

Decision on: March 4, 2010

**SOPHISTICATED MARBLES &
GRANITE INDUSTRIES**

..... PETITIONER

Through: Mr. Jayant Bhushan, Senior
Advocate with Mr. Mohit Chaudhary and
Mr. Gautam Talukdar, Advocates

versus

UNION OF INDIA AND ANR

..... Respondents

Through: Mr. A.S. Chandhiok, ASG with
Mr. Sachin Dutta and
Mr. Manikya Khanna, Advocates

CONT CAS (C) 43 of 2010

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Mr. Sachin Dutta and
Mr. Manikya Khanna, Advocates

CORAM: JUSTICE S. MURALIDHAR

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|---|-----|
| 1. Whether reporters of local paper may be allowed to see the judgment? | No |
| 2. To be referred to the report or not? | Yes |
| 3. Whether the judgment should be referred in the digest? | Yes |

JUDGMENT

1. The petitioner, an importer of rough marble blocks/slabs, challenges in this writ petition a circular dated 23rd October 2009 as well as notification dated 15th October 2009 issued by the Director General of Foreign Trade

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(‘DGFT’) imposing a condition that for the purposes of securing an import licence the Petitioner would have to install a gang saw machine in its unit.

2. The Petitioner is a sister concern of the Litoller Group which was a pioneer in importing Italian marble into India. The petitioner was issued an import license for the import of marble slabs/blocks on 12th October 1999. On 22nd January 2003 the DGFT renewed the Petitioner’s license for import of rough marble blocks/slabs.

A conspectus of the DGFT Circulars on import of marble

3. In order to appreciate the challenge to the impugned circular, it is necessary to refer to the background in which it came to be issued. On 14th March 2002 the DGFT issued guidelines for import of rough marble slabs. It was clarified that the EXIM Facilitation Committee (‘EFC’) which was an Inter-Ministerial Committee comprising of representatives from various Ministries/Departments, would be considering the applications for import license in the DGFT, New Delhi. The eligible categories included those who had set up manufacturing and processing units in the country and those who were already importing marble in the preceding years when marble was being imported under Special Import Licence (‘SIL’). The said circular dated 14th March 2002 also fixed the floor price for rough marble blocks at US\$ 300 per metric tonne (PMT) and for slabs at US\$ 450 PMT. The floor price for crude and roughly trimmed marble was fixed at US\$ 300 PMT. In case of the importers of marble who were operating when marble was included in the SIL list, the value of the licence to be issued in one year was limited to 50% of the average value of the sales made during the years when

marble was under the SIL list. The licences were subject to actual user condition.

4. After the import restrictions on marble were removed in 2001, when India became part of GATT, rough marble slabs/blocks continued to be in the restricted list. It is stated that based on representations received after 1st April 2001, and in consultation with Department of Industrial Policy & Promotion ('DIPP') and the Ministry of Mines, a policy circular was issued on 14th March 2002 permitting import of marble against licence, to those firms who had set up manufacturing/processing unit in the country and had also imported marble in the preceding year when it was under the SIL List.

5. By a circular dated 24th August 2004, the clause concerning value of yearly licence was amended and the limit was revised to the total CIF value of import made during 1999-2000 and 2000-2001. On 30th August 2005, further amendments were made to the following effect:

- I. eligibility to be considered by the EFC— only manufacturing/processing units and importers of these items in preceding years.
- II. Total import of rough marble blocks subject to a ceiling of 1.3 lakh MT per licensing year. The entitlement of individual firms to be worked out on the basis of the turnover of the preceding year.
- III. The last date for receiving applications 1st October of each licensing year.
- IV. Monthly returns regarding the imports to be filed with the Regional Licensing Authority.
- V. All applications forwarded through Chemicals and Allied Products Export Promotion Council who will certify the turnover of the applicant before sending it to DGFT(HQrs)

6. In September 2005 the Government introduced floor prices for import of processed marble products i.e. tiles, slabs etc. at US\$ 2700 per cubic meter. This was similar to the price fixed on processed marble during SIL period. The Domestic Tariff Area ('DTA') sale of marble by 100% Export Oriented Units ('EOUs') was banned during this period. This ban was imposed to address complaints that the 100% EOUs were diverting imported marble into the domestic market thereby adversely affecting the domestic mining industry and the livelihood of a large number of workers. The 100% EOUs protested this ban and challenged it in the various High Courts and the Supreme Court. These were consolidated and finally heard and disposed of by a judgment of the Supreme Court in *Hindustan Granites v. Union of India (2007) 12 SCC 178*. The Supreme Court rejected the challenge by the 100% EOUs to the aforementioned circular and notification.

7. On 30th November 2005, by a circular No. 34/2005-09, it was stipulated that the entitlement was to be calculated on only the basis of the turnover of marble imported under Chapter 25 of the ITC (HS) Classification of Export Import Items 2004-09. The companies which had been importing under Chapter 25 were also allowed to add their complete turnover for imported marble for the preceding year i.e. 2004-05. The same circular also introduced the eligibility criteria that the manufacturing/processing unit must have been established when marble was under SIL List or before.

8. On 26th July, 2007 the following amendments were made by Circular No. 01(RE-07)/2004-2009: floor prices were revised: for crude or roughly trimmed marble – US \$350 PMT, for rough marble blocks – US \$350 PMT

and for slabs – US \$500 PMT. The total import of rough marble blocks was subject to a ceiling of 1.85 lakh MT per licensing year. Entitlement of individual firms was to be worked out taking into account the growth in demand for these items, the unallocated quota of the preceding year i.e. 2006-07, on the basis of the eligible turnover of the eligible firm for 2006-07 i.e. the turnover of the eligible firm for 2005-06, or the turnover of the firm for 2004-05 with a cap of 10%, whichever is less. An additional quota of 10,000 MT could be allocated by the Government to actual users, such as hotels, places of worship etc.

9. Pursuant to the representations made by the domestic industry, a meeting of the Committee of the Secretaries ('COS') was convened on 11th September 2007 to discuss grant of import licences for rough marble blocks. The DGFT has, in its reply to the present petition referred to the decision taken by the said COS and also placed on record minutes of the above meeting held on 11th September 2007. The COS arrived at the following decisions:

“(i) The present system of quantitative restrictions combined with grant of licences only to a few importers who had imported under Special Import Licences during 1990-2001, is inequitable and hence needs to be changed.

(ii) with a view to liberalizing imports of rough marble blocks/slabs while protecting the domestic industry, Secretary, DOC will in consultation with Secretary, M/o Mines and Secretary, M/o MSME, review the current restrictions on marble imports and formulate an alternative arrangement. The following two options may be considered in this regard.

(1) Remove quantitative restrictions on imports and allow imports freely under OGL but at higher floor prices.

(2) Continue the present quantitative restriction system, but grant licences without restriction on the number of importers so as to do away with monopoly of a few and prescribe suitable objective criteria for granting the same.”

10. Thereafter, the Secretary, Commerce held a meeting on 22nd October 2007 with the Secretary, Ministry of Mines and Ministry of MSME. Regarding option at (1) above, the unanimous view was that “if the import of rough marble blocks is brought under OGL, then the domestic mining would be definitely adversely impacted. It was the consensus view that the import of rough marble blocks needs to be kept on the restricted list and not under OGL.” It was recommended by the above Committee to continue with the present quantitative restriction of 140,000 tonnes per annum, but grant import licence to all persons who meet the following criteria:

“(i) Marble processing units having their own gang saw, would be eligible.

(ii) The processing units should have been in operation for a minimum of three years as on 1.10.2007.

(iii) The processing units should have a minimum sales turnover of Rupees one crore per annum.”

11. Pursuant to the above recommendation, a dual policy was notified on 27th June 2008 and 30th June 2008. The circular dated 27th June 2008 introduced guidelines for import of rough marble blocks/slabs for the year 2008-09 permitting both groups i.e. SIL category as well as domestic

processors to obtain import licence. The SIL category was entitled to a maximum import of 1.40 lakh MT per annum and the domestic category was also entitled to an equivalent amount. For the domestic units the eligibility was to be decided on the basis of the following two criteria:

- a) Units which have installed marble gang saw machine [except 100% EOUs, units in SEZ and units which have been granted marble block import licences under previous licencing years or are eligible to avail licence in the current licensing year (2008-09) under SIL category]. The units should have been in operation since prior to 31/03/2001.
- b) All eligible units as per (a) above should have indigenous sales turnover of marble slabs/tiles only, of Rs. One Crore and above in each of the three financial years 2004-05, 2005-06 and 2006-07.

12. Eligible units were entitled to an import licence pro rata on the basis of average indigenous sales turnover of marble slabs/tiles only, in the financial years 2004-05, 2005-06 and 2006-07. The quantity so calculated was to be subject to the following overall ceiling:

- a) Unit having one marble gang saw machine entitled to a maximum licence of 3,000 MT of marble blocks/slabs; and
- b) Unit having more than one marble gang saw machine will be entitled for a maximum licence of 3,000 MT of marble blocks/slabs for the first gang saw machine and 1500 MT of marble blocks/slabs per additional marble gang saw machine.

13. On 16th July 2008 the DGFT issued a policy circular whereby certain additional conditions were imposed for importing of rough marble blocks/slabs for the year 2008-09. These were in addition to the conditions imposed in the Circular dated 30th June 2008. For the eligibility and

entitlement of the unit, the applicants would have to enclose certificates issued by the State Industry Department (District Industry Center) ('DIC') as to the number of gang saws established by the unit. The DIC certificate had to state that the unit has been in operation since prior to 31st March 2001. The list of equipments/capital goods set up by the applicant showing processing equipment for marble slabs/tiles as per the balance sheet, duly certified by a Chartered Accountant ('CA') or the year 2000-01 was also required to be enclosed. The certificate of the CA would also show the figures of indigenous sales turnover of marble slabs/tiles for the years 2004-05, 2005-06, 2006-07.

14. Another policy circular was issued on 8th August 2008 stipulating therein the sales turnover as criteria for granting import license. It is stated the Petitioner fulfilled all the above conditions as well and therefore, its import licence was continued. On 20th August, 2008 the ceiling for total import of rough marble blocks was increased from 1.10 lakh MT to 1.4 lakh MT for the year 2008-09.

15.1 On 10th October, 2008 further amendments were made in the policy. The eligibility of the units was to be decided based on the following two criteria:

- a) Units which have installed marble gang saw machine (except 100% EOUs, units in SEZ and units which have been granted marble block import licences under previous licensing years or are eligible to avail licence in the current licensing year (2008-09) under SIL category). The units should have been in operation since prior to 31/03/2001.

b) All eligible units as per (a) above should have indigenous sales turnover of marble slabs/tiles only, of Rs. Two Crore and above in each of the three financial years 2004-05, 2005-06 and 2006-07.

15.2 The floor prices were revised as under:

- i. For rough/unprocessed blocks of agglomerated/artificial stones – US \$300 per MT for goods of Chinese origin and \$400 per MT for others; and
- ii. For rough/unprocessed slabs of agglomerated/artificial stones US \$22 per square meter for goods of Chinese origin and \$28 per square meter for others.

15.3 The total ceiling was reduced to 40,000 MT while the individual units were to be entitled for an import licence pro rata on the basis of average indigenous sales turnover of marble slabs/tiles only, in the financial years 2004-05, 2005-06 and 2006-07. The quantity so calculated was to be subject to the following overall ceiling:

- a. Unit having one marble gang saw machine entitled to a maximum licence of 3,000 MT of rough/unprocessed blocks and slabs of agglomerated/artificial stones.
- b. Unit having more than one marble gang saw machine will be entitled for a maximum licence of 3,000 MT of rough/unprocessed blocks and slabs of agglomerated/artificial stones and 1500 MT of rough/unprocessed blocks and slabs of agglomerated/artificial stones per additional marble gang saw machine.

16. Subsequently, an amendment was made to the Circular dated 10th October 2008 and the total ceiling was increased to 60,000 MT. A further

condition was added to be eligible; minimum turnover for the year 2006-07 to be Rs. 5 Crore. Units having a turnover of more than 50 Crore were to be considered after capping their turnover at Rs. 50 Crores. On 2nd March, 2009 in light of the demand for artificial stones going down, an option was given to the importers to import rough/unprocessed blocks and slabs of agglomerated/artificial stones or the items listed in their licence i.e. artificial/agglomerated stones. On 29th September, 2009 with reference to the policy circular 12(RE-08)/2004-09 dated 27/06/08, another 25% quota of the quantity granted for the year 2008-09 was permitted.

17. On 15th October 2009 a notification was issued by the DGFT introducing two new eligibility criteria to replace the earlier criteria. It appears that with this notification the Government did away with the dual policy of permitting not only the existing importers to import marble but also encourage the domestic manufacturers to import marble.

18. On 23rd October 2009 within eight days of the earlier issued notification dated 15th October 2009, the DGFT issued another notification amending the earlier notification by stipulating the following conditions:

“(i) Serial No. 2 (C) 1 (a) of the DGFT notification No. 15 dated 15th October 2009, shall be substituted as under:

(a) units who have installed marble gang saw machine (except 100% EOUs and units in SEZ). However, the marble gang saw machine shall be in the name of the applicant only. No gang saw on lease basis shall be considered for the purpose of allocation of import entitlement.

The unit should have been in operation for five years prior to 1st April of the current licencing year.”

19. Pursuant to the above notification dated 23rd October 2009 the DGFT issued a policy circular on the same date. Para 3 (a) of the said circular read as under:

“Para 3 (a) The established gang saw in the unit should be in the name of the unit as on date of this circular, as certified by the State Industry Department (District Industry Centre). The gang saw should also not be ‘on lease’ from any other party.”

20. The Petitioner states that it was severely prejudiced by the introduction of the above conditions since the last date for receipt of the application for renewal of licence after fulfilling the conditions of the above policy circular dated 23rd October 2009 was to 2nd November 2009 i.e. barely seven days before the closing date. It is stated that there was no way the Petitioner could, within 17 days’ time, establish a gang saw machine in its own name. Such condition could have helped only those importers who had already installed gang saw machines and were using them for processing and sale of marble. In para 8 of the grounds in the writ petition it is submitted as under:

“8. Because the policy has been framed in order to benefit only a handful of players and is totally unjust and biased. The unit should be 5 years old we agree with that, the unit should have a minimum turnover of 1 crore a year petitioner also agree with that but regarding the gang saw the following needs to be done a) minimum 2 years should be given to the importer unit to set up at the required gang saws, b) The sole purpose of these gang

saws should be for the processing of imported marble only and not for the processing of domestic marble and locally produced artificial marble, c) gang saws set up during the period from November 2009 – November 2011 should only be taken into consideration.”

Proceedings in this Court

21. It may be recalled that the Petitioner had applied for import licence but had not received any response thereto. Along with the present petition filed on 20th November 2009, the Petitioner filed an application praying for stay of the notification dated 15th October 2009 and the subsequent policy circular dated 23rd October 2009. A direction was sought to the Respondent to consider the Petitioner’s application for issuance of import licence. On 11th November 2009 this Court passed the following order:

“Learned counsel for the respondents will take instructions on the averments made in paragraph XVI of the writ petition for extension of time.

Till the next date of hearing, the respondents will not reject the application filed by the Petitioner.

List on 17th November 2009. Dasti.”

22. It must be recalled that the statement made by the Petitioner in para XVI of the writ petition was that the conditions stipulating the ownership by the unit of the gang saw machine was introduced on 23rd October 2009 giving barely seven days’ time prior to the closing date of 2nd November 2009 for submitting the application. Therefore, it was not possible on the part of the Petitioner to comply with the said condition.

23. Thereafter, the case came up for hearing on 17th November 2009 this Court was informed by learned counsel for the Respondents that 164 persons had been granted licenses and the Petitioner's request had been rejected. The following order was then passed by this Court:

“Counsel for the respondents states that 164 persons have been granted licenses and the petitioner's request has been rejected.

Issue notice to show cause returnable on 22nd January 2010.

Notice is accepted by Mr. Sachin Datta, Advocate on behalf of the respondents.

Counter affidavit will be filed within four weeks. Rejoinder affidavit, if any, will be filed within four weeks after counter is served.”

24. According to the Petitioner, as on 30th October 2009 its application had not been rejected as was evident from the DGFT's letter dated 5th November 2009 informing the Petitioner that its application for import license was under scrutiny. The defect pointed out in the Petitioner's application was that it had not submitted “DIC certificate indicating number of gang saws installed and operational as on 30.09.2009.”

25. The Petitioner contends that its application could not be rejected in view of the order dated 11th November 2009 passed by this Court. However, the Petitioner was sent a rejection letter dated 16th November 2009 which reads as under:

“File No. 03/27-008/00246/AM19/234 30.10.2009

To,

Sophisticated Marble & Granite Industries,
Plot No. 17, Panchal Indl. Est. Bhimpur,
Daman, UT 396210

Sub: Rejection letter

Sir/Madam,

Your application has been rejected due to following reasons:

This has reference to your application for import licence for import of marble. In this regard this is to inform you that your application stands rejected because “you have not submitted the DIC certificate”. Also, you are requested to pay the balance application fee of Rs.19,000/- in your application is processed.

Your case stands closed.

Yours faithfully,

Place: Mumbai

Date: 16.11.2009

Sd/-

Foreign Trade

Development Officer”

26. It is the case of the Petitioner that the above rejection on 16th November 2009 was in the teeth of the order passed on 11th November 2009 passed by this Court. It is stated that the rejection letter was deliberately back dated to a day prior to 17th November 2009 on which date this Court was to be informed whether the Petitioner’s application had been rejected. It is in the above context that Cont Case No.43 of 2010 has been filed in this Court asking this Court to hold the Respondent to be in contempt of the order dated 11th November 2009.

Submissions of counsel

27. Mr. Jayant Bhushan, learned Senior counsel appearing for the Petitioner urges that if the Petitioner does not desire to process the imported rough marble for sale in the domestic market, then it makes little sense to require

an importer like the Petitioner to install a gang saw machine. It is further submitted that the pattern of the earlier circulars issued by the DGFT show that even while they were encouraging domestic manufacturers to also import marble directly, those who were purely importers were not totally excluded. It is also pointed out that a gang saw machine requires a minimum of four months for installation. Therefore, some lead time had to be given for setting up such a machine. The conditions imposed by the impugned circulation dated 23rd October 2009 of the DGFT was therefore impractical and unrealistic. Mr.Bhushan pointed out that for an importer like the petitioner, who did not further process the rough marble or the slabs but sold them validly in the market in the same form in which they were imported, a gang saw machine was of no use. He was further critical of the ceiling imposed on the maximum quantity of marble that could be processed on the first and subsequent gang saw machines. According to him, with such a restriction, the gang saw machine would remain idle for most of the time thus not serving the purpose and resulting in avoidable wastage of money.

28. Relying on the decision in ***Bacchhitar Singh v. State of Punjab AIR 1963 SC 395*** Mr.Bhushan points out that till a decision is communicated, it does not become effective. Since the rejection of the Petitioner's application for import license had not been communicated to the petitioner till 21st November 2009 as far the Petitioner is concerned that was the date of rejection which was subsequent to the interim order dated 1th November 2009 passed by this Court. Therefore the Respondents had wrongly informed this court on 17th November 2009 that the Petitioner's application had been rejected since as on that date the decision was yet to be communicated to the

Petitioner. It is urged that the Respondents should be held to have wilfully disobeyed the order dated 11th November 2009 which enjoined them from rejecting the petitioner's application.

29. Mr. A.S.Chandhiok, learned Additional Solicitor General appearing for the Respondent first submits that the impugned policy circular dated 15th October 2009 and the subsequent notification dated 23rd October 2009 have been issued to operationalise the earlier decision taken by the COS on 11th September 2007 itself. It is submitted that the change in the policy was brought about with a view to encouraging domestic industries. The earlier dual policy was replaced with a new policy requiring all applicants to satisfy the same criteria. It is stated that the unified policy has the following advantages over the previous dual policy:

- (i) Since the allocation is based on the indigenous sales turnover and the number of marble gang saw machines installed, it would promote additional investment;
- (ii) some new entrants would be eligible to be added every year;
- (iii) a large number of domestic processors would be entitled for the import entitlement.

30. It is pointed out that the above policy is for the third and fourth quarter of the financial year 2009-10 which comes to an end on 31st March 2010. While it is not denied that it takes four to five months to instal a gang saw machine it is stated that by the time the Petitioner installs and make the said machine operational, it would be the end of March 2010. Nevertheless, since the quota is fixed on annual basis, the Petitioners can apply under the quota

allocation for the next financial year subject to compliance with the conditions to be fulfilled for the 2010-11 quota.

31. As regards fixing the maximum output of 3000 PMT for the first gang saw and 1500 MTs for every subsequent gang saw, it is submitted that such a cap would result in an equitable distribution to all the eligible processors based on their turnover and the number of gang saw machines made operational by them. These gang saw machines are used for processing both imported as well as locally available marble blocks and slabs. If so used the machines would not be kept idle. It is pointed out that number of eligible applicants has increased from about 30 prior to the 2008 policy to around 140 (117 domestic processors plus 23 erstwhile SIL imports) under the 2008 policy. This has further increased to 158 (domestic processors) under the unified policy of 2009-10. It is further pointed out in the written synopsis of arguments that of the 29 erstwhile SIL category applicants, including the Petitioner who had applied in October 2009, 23 were found eligible having fulfilled the gang saw requirement.

32. Mr.Chandiok places reliance on the decisions of the Supreme Court in *Deputy Assistant Iron & Steel Controller v. L. Manickchand* (1972) 3 SCC 324, *Liberty Oil Mills v. Union of India* (1984) 3 SCC 465, *M.P. Oil Extraction v. State of M.P.* (1997) 7 SCC 592, *Secretary to Government of Madras v. P.R. Sriramulu* (1996) 1 SCC 345, *P.T.R. Exports (Madras) (P) Limited v. Union of India* (1996) 5 SCC 268 and *Ugar Sugar Works Limited v. Delhi Admn.* (2001) 3 SCC 635 to urge that the High Court will not, in exercise of its power of judicial review under Article 226, ordinarily

interfere with a policy decision of the executive unless the policy is shown to be vitiated on the grounds of mala fide, unreasonableness, arbitrariness or unfairness. However, the mere fact that it would hurt the business interests of a party would not justify invalidating a policy.

Is the unified policy and the gang saw requirement unreasonable?

33. The principal question that arises for consideration is whether the Petitioner has been able to persuade this Court to hold that the impugned policy circular and notification are arbitrary or irrational. In particular, the question is whether the condition requiring the ownership and installation of a gang saw machine by an importer of rough marble blocks/slabs, who does not further process such marble prior to sale in the domestic market, is unreasonable? This has to be examined in light of the fact that such importer sells the imported marble in the market without further processing. Does such condition therefore have a nexus with the object of discouraging monopoly in the imported marble trade? The question of the need for such an additional condition arises in the context that under the dual policy introduced in 2008, the domestic industry has been issued an increased number of licences for import of marble. Also, if indeed it takes four to five months to instal and make operational a gang saw machine, does giving an applicant just seven days' time to make arrangements to purchase and instal a gang saw machine render such requirement unreasonable as it would mean that an applicant not having such equipment would face the inevitable rejection of its application for licence?

34. The conspectus of the DGFT circulars shows that as a first step, acting

on the recommendations of the COS, the Respondent introduced a dual policy which permitted domestic manufacturers to import marble alongside the erstwhile SIL marble importers. Over the next year, there has been a further transition to a unified policy where all applicants are required to satisfy uniform criteria. The important aspect here is that this change did not happen overnight. Everyone in the marble trade, whether as importer or as a domestic manufacturer, was in the full know of the various policy changes. The frequency of policy changes, the number of circulars and notifications over a short span bear testimony to hectic behind-the scene lobbying by the two broad categories of marble traders, i.e. importers and domestic manufacturers, and even their sub-groups. Therefore, it is not possible to accept the contention that the change brought about by the impugned circular and notification took the petitioner and other similarly placed importers of marble by surprise.

35. The minutes of the meeting of the COS held on 11th September 2007 is instructive as to the background and the reasons for the change in the policy. There were divergent views expressed by the Secretaries of different Departments/Ministries. Some of them were in favour of liberalization of import of marble whereas others favoured retaining the restrictions on its import. This led to the decision to have a further sub-committee comprising the Cabinet Secretary, Secretary, Commerce in consultation with the Secretary, Ministry of Micro, Small and Medium Enterprises (MSME) to consider one of the two options i.e. removal of the quantitative restrictions on imports of marbles and allow imports freely under OGL but at higher floor prices or the second option of continuing the present quantitative

restriction system but grant licenses without restriction on the number of imports “so as to do away with monopoly of a few, and prescribe suitable objective criteria for granting the same.”

36. Pursuant to the above decision the COS, the sub-committee met on 22nd October 2007 and took a decision to continue with the quantitative restriction of 140,000 tonnes per annum but grant import license to all persons who meet the other criteria i.e. marble processing units should have their own gang saw machines; the processing units should have been operational for a minimum of three years as on 1st October 2007 and should have had a minimum sales turnover of Rs. 1 crore per annum. This was when the requirement first emerged. It is another matter that it was not actually introduced till June 2008. What is pertinent is that the requirement had a basis in the deliberations of the COS and the sub-committee which urged the formulation of “objective criteria” to curtail monopoly in marble trade.

37. Two essential legal principles govern the exercise of the power of judicial review by a High Court in matters such as these. First, the court will not sit in appeal over the ultimate decision of the administrative body. It is really concerned about the procedure adopted in arriving at such decision. Was it a fair, reasonable and just procedure? Were relevant materials considered and irrelevant materials kept out? As far as the final decision is concerned, is it vitiated by malafides or is it so arbitrary that no reasonable person would, in the circumstances, have arrived at it. Second, in policy matters, the Court will be slow to interfere. As the case law reveals, where

the question is of reasonableness of restrictions imposed through an import policy, the degree of deference shown by the judicial wing to the executive is greater. In *Dy. Assistant Iron & Steel Controller v. L.Manichand* the Supreme Court explained: (SCC p. 337)

“11..... In granting licences for imports, the authority concerned has to keep in view various factors which may have impact on imports of other items of relatively greater priority in the larger interest of the over-all economy of the country which has to be the supreme consideration; and an applicant has no absolute vested right to an import licence in terms of the policy in force at the time of his application because from the very nature of things at the time of granting the licence the authority concerned may often be in a better position to have a clearer over-all picture of the various factors having an important impact on the final decision on the allotment of import quota to the various applicants.”

38. It was observed in *Liberty Oil Mills v. Union of India* (SCC p. 477):

“6..... The import policy of any country, particularly a developing country, has necessarily to be tuned to its general economic policy founded upon its constitutional goals, the requirements of its internal and international trade, its agricultural and industrial development plans, its monetary and financial strategies and last but not the least the international political and diplomatic overtones depending on 'friendship, neutrality or hostility with other countries' (*Glass Chotans Importers and Users' Association v. Union of India [1962]1SCR862* . There must also be a considerable number of other factors which go into the making of an import policy. Expertise in public and political, national and international economy is necessary before one may engage in the

making or in the criticism of an import policy. Obviously courts do not possess the expertise and are consequently incompetent to pass judgment on the appropriateness or the adequacy of a particular, import policy. But we may venture to assert with some degree of accuracy that our present import policy is export oriented. Incentives by way of import licences are given to promote exports.....”

39. In *M.P. Oil Extraction v. State of M.P.* it was held (SCC, p.611):

“41.....The executive authority of the State must be held to be within its competence to frame policy for the administration of the State. **Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere ipsi dixit of the executive functionaries thereby offending Article 14 of the Constitution or such policy offends other constitutional provisions or comes in conflict with any statutory provision, the Court cannot and should not out step its limit and tinker with the policy decision of the executive functionary of the State.** This Court, in no uncertain term, has sounded a note of caution by indicating that **policy decision is in the domain of the executive authority of the State and the Court should not embark on the uncharted ocean of public policy and should not question the efficacy or otherwise of such policy so long the same does not offend any provision of the statute or the Constitution of India.** The supremacy of each of three organs of the State i.e. legislature, executive and judiciary in their respective field of operation needs to be emphasised. The power of judicial review of the executive and legislative action must be kept within the bounds of constitutional scheme so that there may not be any occasion to entertain

misgivings about the role of judiciary in out stepping its limit by unwarranted judicial activism being very often talked of in these days. The democratic set up to which the polity is so deeply committed cannot function properly unless each of the three organs appreciates the need for mutual respect and supremacy in their respective field.”
(emphasis supplied)

40. In *Secretary to Govt. of Madras v. P.R. Sriramulu* the Supreme Court observed (SCC p. 358):

“15. As pointed out earlier with reference to the decisions of this Court **the State enjoys the widest latitude where measure of economic regulations are concerned.** These measures for fiscal and economic regulation involve an evaluation of diverse and quite often conflicting economic criteria, adjustment and balancing of various conflicting social and economic value and interests. **It is for the State to decide what economic and social policy it should pursue.** It is settled law that in view of the inherent complexity of the fiscal adjustments, the Courts give a large discretion to the legislature in the matter of its references of economic and social policies and effectuate the chosen system in all possible and reasonable ways. If two or more methods of adjustment of an economic measure are available, the legislative preference in favour of one of them cannot be questioned on the ground of lack of legislative wisdom or that the method adopted is not the best or there are better ways of adjusting the competing interests and the claims as the legislature possesses the greatest freedom in such areas. It is also well settled that **lack of perfection in a legislative measure does not necessarily imply its unconstitutionality as no economic measure has so far**

been discovered which is free from all discriminatory impact and that in such a complex area in which no fool proof device exists, the Court should be slow in imposing strict and rigorous standard of scrutiny by reason of which all local fiscal schemes may be subjected to criticism under the Equal Protection clause.” (emphasis supplied)

41. In *P.T.R. Exports (Madras) P Limited v. Union of India*, the Supreme Court observed:

“5. It would, therefore, be clear that grant of licence depends upon the policy prevailing as on the date of the grant of the licence. The Court, therefore, would not bind the Government with a policy which was existing on the date of application as per previous policy. A prior decision would not bind the Government for all times to come. **When the Government are satisfied that change in the policy was necessary in the public interest, it would be entitled to revise the policy and lay down new policy. The Court, therefore, would prefer to allow free play to the Government to evolve fiscal policy in the public interest and to act upon the same.** Equally, the Government is left free to determine priorities in the matters of allocations or allotments or utilisation of its finances in the public interest. It is equally entitled, therefore, to issue or withdraw or modify the export or import policy in accordance with the scheme evolved. We, therefore, hold that the petitioners have no vested or accrued right for the issuance of permits on the MEE or NQE, nor the Government is bound by its previous policy.” (emphasis supplied)

42. In *Ugar Sugar Works Limited v. Delhi Administration* the Supreme Court observed thus (SCC p. 643):

“18. It is well settled that the Courts, in exercise of their power of judicial review, do not ordinarily interfere with the policy decisions of the executive unless the policy can be faulted on grounds of mala fide, unreasonableness, arbitrariness or unfairness etc. Indeed, arbitrariness, irrationality, perversity and mala fide will render the policy unconstitutional. However, if the policy cannot be faulted on any of these grounds, the mere fact that it would hurt business interests of a party, does not justify invalidating the policy. In tax and economic regulation cases, there are good reasons for judicial restraint, if not judicial deference, to judgment of the executive. The Courts are not expected to express their opinion as to whether at a particular point of time or in a particular situation any such policy should have been adopted or not. It is best left to the discretion of the State.”

43. As far as the present case is concerned, it is not possible to hold that the transition from the dual policy to a unified policy was either arbitrary or irrational. The decision-making process itself appears to be a well deliberated one where matters were considered at different levels. The Respondents were faced with an unenviable task of accommodating several competing interests. How these should in fact be resolved should be left to the Respondents. The court cannot be expected to sit in appeal over the decision of the government to introduce a requirement for eligibility for grant of an import licence and opine that one criterion is more appropriate than the other.

44. This court finds that no case of mala fides or unreasonableness in the issuance of the impugned circular and notification has been made out by the petitioner. No doubt the criterion of ownership of a gang saw machine was introduced at a late stage thus rendering it impossible for the petitioner to get licences for the last two quarters of 2009-2010. However, in the considered view of the court, that by itself cannot render the requirement arbitrary when viewed in the overall context of a unified policy requiring the fulfilment of uniform criteria by all applicants. Any policy change is bound to adversely affect some marble trader or the other and perhaps some more than the others. If one were to go only by that yardstick, then every imperfect policy that does not cater to every description of a marble trader will fall foul of Article 14. Our Supreme Court has time and again emphasised that “imperfect” policies are not necessarily arbitrary or unreasonable policies. What has to be seen is whether the object of encouraging domestic industry, while not discouraging imports, is advanced by the impugned measure. In the context of the present case, the answer to that question has to be in the affirmative.

45. The Respondents need not have waited till 23rd October 2009 to introduce the gang saw ownership criterion given the fact that it takes four to five months to instal a gang saw machine. This does cause a degree of inconvenience to applicants like the petitioner. But as already observed, every change is bound to adversely affect some trader or the other in varying degrees. The “mere inconvenience to a trader cannot by itself render the policy arbitrary or unreasonable.” This criterion was in fact mooted by the sub-committee of the COS in October 2007 itself. It appears to have been

anticipated by some of the importers themselves as is evident from the fact that for the last quarter of 2009-2010, 23 of the 29 (erstwhile) SIL category importers who applied did have gang saw machines. As much as a government has to keep apace with changes in the industry and the markets, the traders have to adapt to the changing norms. In a competitive market, regulated by the State, this is only to be expected.

46. Likewise, while it is arguable that the petitioner cannot be compelled to switch to processing of imported marble and that the gang saw machines it would instal would in any event remain idle, these are factors that should be evaluated by the policy maker. It will be for the Respondents to consider if they need to make further policy/criteria changes which will cater to the needs of persons like the petitioner who sell the imported marble as such in the domestic market. Likewise, the question: if in fact a gang saw machine can process up to 8000 MT of marble, then why restrict the limit on the first one to 3000 and the subsequent ones to 1500 MT? This court cannot take upon itself the task of determining if the policy needs to be changed depending on the answer to these questions. It is only called upon to examine if the policy as it presently stands meets the tests of reasonableness. This court does not find it possible to conclude to the contrary.

Conclusion

47. The writ petition is accordingly dismissed with costs of Rs.10,000/- which will be paid by the Petitioner to the Respondents within a period of four weeks from today. The application is disposed of.

Contempt Case (C) No. 43 of 2010

48. The question that arises in the present contempt petition is whether the Respondents have wilfully disobeyed the order dated 11th November 2009 passed by this court whereby they were directed not to reject the petitioner's application.

49. The records of the DGFT were summoned by the Court and perused. It appears that the decision to reject the Petitioner's application was taken on 10th November 2009 itself. However when this Court heard the case on 11th November 2009 it could not be informed of the said decision since learned counsel for the Respondent had not been instructed and was therefore not aware of it. Consequently, this Court's order dated 11th November 2009 directing the Respondent not to reject the application filed by the Petitioner was passed at a time when the application had already been rejected. Learned counsel for the Respondents states that although the said order dated 11th November 2009 was communicated to the Respondents it was opined that since the decision to reject the Petitioner's application had already been taken by them. No further action was required to be taken to reverse that decision. It is denied that the rejection letter was back dated. The date 30th October 2009 shown on top of the letter is actually the date pertaining to the file number. The rejection letter is in fact dated 16th November 2009. The rejection letter was issued pursuant to the decision taken on 10th November 2009. It is stated that although the letter dated 5th November 2009 to the Petitioner pointed out the deficiencies, it was decided not to wait beyond 11th November 2009 as the import licence was to be issued for two quarters ending on 31st March 2010. The noting on the file

shows that separate lists were prepared of persons who fulfilled the criteria and those who did not. The Petitioner's name figured in the latter list.

50. It appears that the decision to reject the Petitioner's application was taken on 10th November 2009 itself, prior to this court's order dated 11th November 2009. Although this decision was communicated to the petitioner in writing later, there is nothing to doubt that the decision was itself taken on 10th November 2009. In the circumstances it is not possible to hold that the Respondents were in contempt of this Court's order dated 11th November 2009 when they communicated the decision of rejection to the Petitioner by the letter dated 16th November 2009. There is no merit in the contempt petition and it is dismissed as such.

S. MURALIDHAR, J.

March 4, 2010

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