

**\*IN THE HIGH COURT OF DELHI AT NEW DELHI**

%

**Date of decision: 3<sup>rd</sup> December, 2015**

+

**W.P.(C) No.3464/2012**

**M/S DATA ENTERPRISES**

**..... Petitioner**

Through: Mr. Priyadarshi Manish, Mr. Karan Chawla and Mrs. Anjali J. Manish, Advs.

Versus

**UNION OF INDIA AND ORS**

**..... Respondents**

Through: Mr. Vikas Mahajan, CGSC with Mr. S.S. Rai and Mr. Rohan Gupta, Advs. for R-1&2

**AND**

+

**W.P.(C) No.3465/2012**

**BEDY ASSOCIATION**

**..... Petitioner**

Through: Mr. Priyadarshi Manish, Mr. Karan Chawla and Mrs. Anjali J. Manish, Advs.

Versus

**UNION OF INDIA AND ORS**

**..... Respondents**

Through: Mr. Vikas Mahajan, CGSC with Mr. S.S. Rai and Mr. Rohan Gupta, Advs. for R-1&2.

**CORAM:-**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

1. These two petitions though by different petitioners were filed together by the same Advocate and have always been listed together for hearing and are taken up together for disposal.

2. The petitioner in W.P.(C) No.3464/2012 has imported old and used LCD monitors to India. The petitioner in W.P.(C) No.3465/2012 has imported old and used LCD monitors and Desktop Computer without hard disk drives and 70 pieces of old cooler fans. Both the petitioners, after the consignments had reached India, realising that for import thereof permission from the Ministry of Environment and Forests of the Government of India is required, applied therefor and which permission has been denied to them vide letter dated 10<sup>th</sup> April, 2012 to each of the petitioners. Impugning the said letters dated 10<sup>th</sup> April, 2012, the present petitions have been filed.

3. The petitions were entertained and counter affidavit has been filed by the respondent Ministry of Environment and Forests. The respondent in accordance with the order dated 24<sup>th</sup> February, 2015 has also filed an additional affidavit.

4. The counsels have been heard.

5. The petitioners, in the petitions have pleaded that at the time of importing the aforesaid goods they were not aware of the permission for such import being required under the Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008 framed by the Central

Government in exercise of powers conferred by Sections 6,8 & 25 of the Environment (Protection) Act, 1986 and hence applied therefor after the goods had arrived in India. It is the contention of the petitioners that the denial of permission to them is bad.

6. The respondents, in the letters aforesaid dated 10<sup>th</sup> April, 2012 have stated (i) that the Expert Committee constituted by the respondents had recommended in general that import of computers for charity should not be allowed; (ii) that the Customs Authorities and the Delhi Pollution Control Committee had been requested to inspect the consignments and submit their Report; (iii) that in the meanwhile during examination of another application seeking permission to import used desktop computers for charity, in view of the availability of low cost computers developed in the country including those promoted by the Ministry of Human Resource Development, a decision was taken that import of second hand computers for reuse should not in general be allowed; and (iv) therefor the import of used computers/computer peripherals which may lead to early generation of e-waste was not considered desirable.

7. Though the counsel for the petitioners was generally challenging the said decision but it was enquired from him whether not judicial review to challenge the executive decision is circumscribed by the well recorded parameters of either the decision being by an Authority not authorised to take the decision or being contrary to the Rules, Laws and Regulations applicable to the taking of the said decision or being so illogical and/or unreasonable which on the face of it appears to be so and could not have been reached by any reasonable person.

8. The counsel for the petitioners has argued that the respondent has denied permission to the petitioners on the basis of a general decision having been taken while considering the application of some other person that import of used computers, computer peripherals would not be permitted. He has contended that while the Rules aforesaid only restrict/regulate the import, the respondent, vis-à-vis used computers and computers peripherals has prohibited the import and which is not permissible in law. Reliance in this regard is placed on *Atul Commodities Private Limited Vs. Commissioner of Customs, Cochin* (2009) 5 SCC 46, particularly to paras 29 to 35 thereof where it has been observed that Director General, Foreign Trade (DGFT) cannot change the categorisation of items from the category *W.P.(C) Nos.3464/2012 & 3465/2012*

of “free” to the category of “restricted” imports as the same is in the sole domain of the Central Government under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (FTDR Act).

9. I have enquired from the counsel for the petitioners as to how the aforesaid judgment would be applicable in the present context. Supreme Court in *Atul Commodities Private Limited* supra was concerned with the comparison of the powers under the FTDR Act of the Central Government and the DGFT and on an examination of the provisions of the said Act particularly Section 5 thereof concluded that thereunder while the Central Government had been vested with the power to frame and amend Import Export Policy, the DGFT had no such power and was only empowered to remove ambiguities and issue clarifications and implement the said Policy.

10. The present is not a case of permission having been refused to the petitioners under the provisions of FTDR Act. The permission was applied for and has been refused by the Central Government in exercise of powers vested in it under the Rules aforesaid.

11. It is not in dispute that in accordance with Rule 3(1)(iii) read with Part-B of Schedule III to the Rules, the said goods fall in the definition of

Hazardous Waste and can only be imported in the country with the permission of the Ministry of Environment and Forests. Rule 12 also constitutes the said Ministry as the nodal Ministry to deal with the transboundary movement of the hazardous wastes.

12. The counsel for the petitioners has relied on Rule 13(2) which provides that the import of hazardous wastes from any country shall be permitted only for recycling or recovery or reuses. He contends that the subject goods are for reuse and it is thus not as if the import thereof into the country is prohibited. On enquiry as to how it can be determined that the subject goods are for reuse and not for cannibalizing or as a waste, he contends that whatever restrictions and conditions need to be imposed on the petitioners in this regard to ensure that the end use of the goods is for reuse, can be imposed.

13. Attention is next invited to Rule 14(2)(ii) to contend that since the subject goods fall in Part B of Schedule-III, the same neither require Prior Informed Consent of the country from where the goods are imported nor the prior written permission of the Central Government before importing the goods. Attention is further invited to entry with Basel No.1110 in Part B,

being the list of “Hazardous Wastes Applicable For Import and Export Not Requiring Prior Informed Consent” which is as under:

“— Electrical and electronic assemblies (including printed circuit boards, electronic components and wires) destined for direct reuse and not for recycling or final disposal.”

and it is contended that the subject goods are covered thereby.

14. I have however invited attention of the counsel for the petitioners to the stars at the end of Part B of Schedule III and the footnote thereafter which provides “All other wastes listed in this Schedule 3 (Part B having no ‘Star/s (\*...) can only be imported in to the country with the permission of MoEF” and to the fact that the entry at Basel No.B1110 to which attention is drawn is without stars and enquired whether not the same is indicative of the import of the subject goods even if are to fall in the said entry requiring the permission of MoEF.

15. The counsel for the petitioners states that it would still not be prior permission.

16. The counsel for the petitioners has next invited attention to Rule 16 titled Procedure for Import of Hazardous Wastes and sub Rule (2) whereof is as under:-

**“16. Procedure for import of Hazardous Waste-**

(2) On receipt of the application in complete, the Ministry of Environment and Forests shall examine the application considering the comments and observations, if any, received from the State Pollution Control Boards, and may grant the permission for import within a period of sixty days subject to the condition that the importer has-

- (i) the environmentally sound recycling, recovery or reuse facilities;
- (ii) adequate facilities and arrangement for treatment and disposal of wastes generated; and
- (iii) a valid registration from the Central Pollution Control Board and a proof of being an actual user, if required under these rules.”

It is contended that in the present case though the comments of the Delhi Pollution Control Board (DPCB) are in favour of the petitioners but have not been considered and the permission has been refused to the petitioners merely on the basis of a so called policy decision to not allow import of used computers and computers peripherals for the reason of availability thereof at low cost in the country. It is contended that such a decision would be bad and contrary to Rule 16(2).

17. Attention is invited to the Certificate dated 11<sup>th</sup> August, 2011 of Rajesh Burman & Associates Consulting Chartered Engineers (in W.P.(C) No.3464/2012) opining that the computer items imported are not e-scrap, mostly in good condition and after repair and testing carried out in India on these items, the working life of these items is expected to be at least five years. Attention is also invited to the Minutes of the 24 Meeting of the Technical Review Committee held in the MoEF on 16<sup>th</sup> November, 2011 containing the conditions for transboundary movement and to the condition that used equipment would normally be considered waste if is not complete – essential parts are missing and the equipment cannot perform its essential key functions and it is destined for disposal operations. Attention is also invited to the Office Memorandum dated 27<sup>th</sup> December, 2011 of the MoEF (in W.P.(C) No.3464/2012) on the application of the petitioner seeking permission for import and deferring decision on the said application upon finding the report of inspection of the goods to be inconclusive. Attention is yet further invited to the 22<sup>nd</sup> Meeting of the Expert Committee to scrutinize applications seeking permission for export of hazardous waste held on 11<sup>th</sup> January, 2012 wherein application of M/s HP India Software India Pvt. Ltd., Bangalore for import of 5000 nos. of E&EA comprising of used

Superdomes, Servers, Switches and Storage Products was recommended for allowing on the statement that the same were required for self use.

18. The counsel for the respondents has invited attention to Section 24 of the Environment (Protection) Act to contend that the provisions thereof prevail over other laws and has thus contended that the reference by the petitioner to the FTDR Act is misconceived. He has further contended that the very fact that even according to the petitioners, the goods imported by them are covered by Part B of Schedule III of the Hazardous Rules amounts to an admission of the goods being hazardous waste. It is contended that thus the contention of the petitioners that to constitute waste, the goods should not be in working condition is erroneous. Attention is invited to Rule 17 which requires hazardous waste illegally imported to be re-exported within a period of 90 days. It is argued that the same is indicative of prior permission being required for import and which the petitioners admittedly did not take. It is argued that the goods are liable to be returned for this reason alone.

19. The counsel for the respondents has also contended that the entries in Part B of Schedule III of the Rules *supra* are from the Basel Convention and

reliance is placed on *Research Foundation for Science (18) Vs. Union of India* (2005) 13 SCC 186 to contend that the parameters fixed by the Basel Convention are only guidelines and the individual countries can provide different criteria in their national law to lay down the limits and when the national law lays down stricter conditions, it has to apply and shelter cannot be taken under the guidelines of Basel Convention.

20. The counsel for the petitioners in rejoinder has cited *Shrishti Digital Solution Vs. Additional Commissioner of Customs, Chennai* 2013 (298) ELT 197 where, finding that the machines were in working condition with residual life, the import was allowed.

21. I have further enquired from the counsel for the petitioners whether not the goods even if had a life of five years, as was opined by the engineer engaged by the petitioner, the said life also is now nearly over and what purpose the permission to import even if were to be granted to the petitioners would serve.

22. The counsel for the petitioners states that the life of five years of the goods would commence from the date they are put to use and would not expire by non-use.

23. I have considered the rival contentions and proceed to adjudicate the same under the following heads:

- (A) Whether the petitioners were required to obtain prior permission for import and if so what is the effect of the petitioners having not obtained prior permission.
- (B) Whether the Hazardous Waste Rules allow / permit import of hazardous wastes for reuse and whether in the face of the said statutory Rules, the Government could take a policy decision not to allow import even if goods are for reuse.
- (C) Whether upon the importer establishing that the goods are for reuse, he is entitled to permission for import as a matter of right.

24. As would be obvious from aforesaid, it is not in dispute that the goods are covered by the Hazardous Wastes Rules. Rule 13(2) provides that the import of hazardous wastes from any country would be permitted only for the recycling or recovery or reuses. Import is defined by Rule 3(n) as bringing into India from a place outside India. Rule 14(1) provides that the import and export of hazardous wastes specified in Schedule III shall be

regulated in accordance with the conditions laid down therein. The footnote to Part B of Schedule III also as aforesaid requires that the said hazardous wastes can only be imported into the country with permission of MoEF.

25. A provision providing for import with the permission of the government, specially in the context of hazardous goods, in my view has to be understood as requiring permission to be obtained prior to bringing the goods which are of hazardous nature, into India. Once the goods have been brought into India as the said goods indeed have been, they are or can be a hazard. It is a different matter that inspite of having been brought into India they may not be released to the importer for diverse reasons. The same, having reached India, would still pose a hazard, even in the custody of the authorities concerned. It is perhaps for this reason only that the Rule 17(2) requires the goods illegally imported into India to be re-exported.

26. However Rule 14 creates some ambiguity. Sub-Rule (1) thereof provides that import and export of hazardous goods specified in Schedule III shall be regulated in accordance with the conditions laid down in the Schedule. Schedule as aforesaid provides for import of the subject goods with permission of MoEF. Rule 14(2)(i) provides that the import or export

of hazardous wastes specified in Part A of Schedule III shall require Prior Informed Consent of the country from where goods are imported and shall require the license from DFGT “and the prior written permission of the Central Government”. Thereafter Rule 14(2)(ii) provides that the import of hazardous wastes specified in Part B of Schedule III shall not require Prior Informed Consent of the country from where the goods are imported. The same suggests that goods other than those mentioned in Part A of Schedule III do not require “prior written permission of the Central Government” and such permission can be obtained even after the goods have been imported i.e. have reached India.

27. However Rule 14(2) has been made subject to the provision contained in Rule 14(1) which as aforesaid makes the import regulated, in accordance with the conditions laid down in the Schedule and which Schedule in the footnote to Part B provides for import with the permission of MoEF and which permission as aforesaid has necessarily to be “prior”.

28. The position is however placed beyond any pale of controversy by Rule 16(1) which provides that a person intending to import hazardous wastes specified in Schedule III shall apply in Form-VII and Form-VIII to

the Central Government of the proposed import and shall send a copy of the application simultaneously to the concerned State Pollution Control Board (SPCB) to enable them to send their comments and observations to the MoEF. The use of the words “intending to import” and “proposed import” clearly show that the permission has to be applied for and obtained at the time when the import is intended and proposed and not when the import has been effected.

29. I therefore answer the question framed at ‘(A)’ above by holding that the permission for import under the Rules has to be ‘prior’. The petitioners admittedly did not obtain the permission. Ignorance of law is no defence.

30. It thus follows that the goods have been illegally imported into India and as per Rule 17(2) are required to be re-exported at the cost of the petitioners.

31. Though the petitions are liable to be dismissed on this ground alone but I nevertheless proceed to decide the other issues also for the sake of completeness.

32. Section 8 of the Environment (Protection) Act prohibits handling of any hazardous substance except in accordance with the procedure and after

complying with the safeguards prescribed. Though Rule 13(2) uses the word “shall” but only to indicate that import of hazardous wastes is permitted only for recycling or recovery or reuse. The same can be by no stretch be read as mandatorily permitting the import of hazardous wastes for reuse. Moreover Rule 14 as aforesaid regulates the import by requiring prior permission of MoEF. It is thus not as if whenever it is established that hazardous waste is being imported for reuse, permission has to follow. If that was so, there would have been no need to provide for the permission of MoEF.

33. Rule 16 lays down the procedure for applying for and grant of permission. I have already hereinabove taken note of Rule 16(1) which provides the procedure for seeking permission. Rule 16(2) to which the counsel for the petitioners has drawn attention lays down the procedure for decision making thereon. It provides for the MoEF to examine the application considering the comments and observations of the SPCB and proceeds to provide that MoEF “may grant permission for import” subject to the importer satisfying the conditions prescribed therein. I have during the hearing enquired from the counsel for the petitioners whether not the use of

the expression “may grant the permission for import” would include within it a power to prohibit.

34. No answer is forthcoming.

35. It is not as if under the Rules aforesaid permission has to be necessarily granted. The condition, of the importer having reuse facility, is to be imposed only if the permission is being granted and it is not as if existence with the importer of reuse facilities entitles the importer as a matter of right to import.

36. Emphasis laid by the counsel for the petitioners on the report of the SPCB also is misconceived. The MoEF is not bound by the report and comments of the SPCB and is only required to ‘consider’ the same and the language of Rule 16(2) permits the MoEF to reject the report of the SPCB or take a decision contrary thereto, though of course for cogent reasons.

37. As would be obvious from the above, the position under the Hazardous Wastes Rules is far different from that with which the Supreme Court was concerned in *Atul Commodities Pvt. Ltd.* supra. While the FTDR Act under consideration therein categorises the decisions to be taken by the Central Government and by the DGFT, under the Rules aforesaid, the

*W.P.(C) Nos.3464/2012 & 3465/2012*

decision has been left to the MoEF and there is nothing to suggest that under the Rules, MoEF is bound to grant permission for import whenever the goods sought to be imported are intended for reuse.

38. I, therefore hold that the hazardous wastes Rules permit import of hazardous wastes if intended for reuse but not as a matter of right and empowers the MoEF to, even if hazardous wastes intended to be imported are for reuse, decline permission.

39. The next question to be adjudicated is that when the Rules require the MoEF to take decision qua each application for import on its own merits and by following the procedure prescribed therefor, whether MoEF is entitled to take a policy decision not to entertain applications for import of any particular category of hazardous goods.

40. The answer to the aforesaid question in my view in the context of hazardous wastes has to be in the affirmative. As the words ‘hazardous wastes’ suggests, the said goods are a danger to humanity and citizenry of the country and none can claim a right to deal therewith. The Rules therefor, though have prohibited import of certain categories of hazardous wastes, qua others, import whereof may be necessary considering our commercial,

economic and political exigencies, do not grant any general permission for import thereof and provide for import thereof with permission. The decision in this respect has been left to the MoEF. The reason therefor is obvious. Though ordinarily it is not in the interest of any country to allow waste, that too hazardous and polluting, of another country to be dumped within its boundaries, but owing to economic, social, commercial and political reasons and to fulfill the demands of ever growing population, the same may be necessary and need to be permitted. The Rules, qua the subject goods, permit such import only for recycling or recovery or reuse. However the fact that import for such limited purpose maybe permitted does not mean that the goods are not hazardous. They remain hazardous. It is just that our country, for certain compulsions, in the Rules did not deem it appropriate to put the subject goods in the category of hazardous goods import whereof is totally prohibited. If in these circumstances, the MoEF takes a policy decision that a particular kind of hazardous waste need not be imported into India, I find no reason or Rule prohibiting the government from taking such a decision. Rather, our country should aim at reaching a stage when it can afford to prohibit import of all and any hazardous waste. Supreme Court also in

***Research Foundation for Science Technology Natural Resource Policy***

(2005) 10 SCC 510 held that efforts are required to be made to minimize dumping of hazardous wastes in our country. It was further held that in the matter of hazardous wastes, the precautionary principle applies. Again, in ***Research Foundation for Science, Technology and Natural Resource Policy Vs. Union of India*** (2012) 7 SCC 764 it was emphasized that the norms laid down in the Basel Convention or in any other subsequent provisions that may be adopted by the Central Government in aid of a clean and pollution free environment, are to be strictly complied with.

41. Mention may be made of an old judgment of this Court in ***Bharat Zink (P) Ltd. Vs. Union of India*** (1997) 43 DRJ 389 in which also it was held that the question whether a particular substance is hazardous or not is of a technical nature and is a policy matter and is to be decided by the Government. Supreme Court since then in ***N.D. Jayal Vs. Union of India*** (2004) 9 SCC 362 also, in the context of apprehensions to the safety of Tehri Dam, held that it is for the Government to decide how to do its job and the Courts are ill-equipped to adjudicate on a policy decision so undertaken. It was further held that the goal of the Environment Protection Act is to ensure sustainable development and which is necessary to guarantee Right to Life under Article 21 of the Constitution. It was yet further held that the object

and purpose of the Act—to provide for the protection and improvement of the environment, could only be achieved by ensuring strict compliance of its directions. The power under the Act was held not to be ‘power’ simplicitor but ‘power’ coupled with ‘duty’ as it is the duty of the State to ensure the fulfillment of conditions or directions in the Act.

42. I therefore answer the questions framed at ‘(B)’ and ‘(C)’ above by holding that the Hazardous Wastes Rules though permit import of certain categories of hazardous waste only if intended for re-use, but not as a matter of right and only with the permission of MoEF and that the Government is entitled to take a policy decision not to permit the category of Hazardous Wastes though permitted under the Rules to be imported for reuse, if the demand thereof is met otherwise or if in the assessment of Government the danger to the country from import thereof is far more than the need thereof for reuse.

43. Otherwise, no ground has been urged with respect to the policy decision to not allow import of such goods for reuse and which decision is to apply across the board and no *mala fides* with respect thereto are attributed. Supreme Court in ***G. Sundarrajan Vs. Union of India*** (2013) 6 SCC 620,

dealing with the issue of setting up of Nuclear Power Plant at Kudankulam held that it is not for the Court to determine whether a particular policy or a particular decision taken in fulfillment of a policy is fair and reasonable; the Courts are concerned only with the manner in which the policy decisions have been taken i.e. whether a decision can be said to be tainted with procedural impropriety; unless the policy framed is absolute, capricious, unreasonable and arbitrary and based on mere ipse dixit of the executive authority or is invalid in constitutional or statutory mandate, Court's interference is not called for. It was held that the issues of dangers from and the harm that a Nuclear Power Plant may cause to human health, environment, marine life etc. are to be addressed by the policy makers and not to the Courts because destiny of a nation is shaped by the people's representatives and not by a handful of Judges, unless there is an attempt to tamper with the fundamental Constitutional principles or basic structure of the Constitution. In the concurring judgment, *parens patriae* theory i.e. the obligation of the State to protect the rights and privileges of its citizens and theory of *maxim salus populi suprema lex* i.e. safety of the State is the supreme law and in case of conflict, an individual must yield to the collective interest was also invoked.

44. The petitions therefore fail and are dismissed.

No costs.

**RAJIV SAHAI ENDLAW, J.**

**DECEMBER 03, 2015**

‘pp/gsr/bs’

*(corrected and uploaded on 13<sup>th</sup> January, 2016)*