

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

WRIT PETITION NOs.21399, 21443 & 24398 of 2015

W.P.No.21399 of 2015

Between :

Mahadev Metaliks Pvt. Ltd.,
Rep. by its Director,
Sri Lokesh Kumar Agarwal
S.o.Sri Narayandas Agarwal

... Petitioner

AND

Union of India
Ministry of Finance
(Department of Revenue)
Rep. by its Secretary,
New Delhi
and two others.

... Respondents

DATE OF JUDGMENT PRONOUNCED: 09.09.2015

**THE HON'BLE SRI JUSTICE G. CHANDRAIAH
AND
THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM**

1. Whether Reporters of Local newspapers may be allowed to see the Judgments? Yes/No

2. Whether the copies of judgment may be marked to Law Reporters/Journals? Yes/No

3. Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment? Yes/No

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HON'BLE SRI JUSTICE G. CHANDRAIAH
AND
HON'BLE SRI JUSTICE CHALLA KODANDA RAM
+ WRIT PETITION NOS.21399, 21443 & 24398 of 2015

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% Dated 09.09.2015

Mahadev Metaliks Pvt. Ltd., Rep. by its Director, Sri Lokesh Kumar Agarwal

....Petitioner

VERSUS

\$ Union of India,,Ministry of Finance,(Department of Revenue),Rep.

by its Secretary, New Delhi and two others.

... Respondents

! Counsel for Petitioner: Sri Ch. Pushyam Kiran

^ Counsel for Respondents: Sri V. Gopalakrishna Gokaley

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> HEAD NOTE:

? CITATIONS:

2011 (267) E.L.T. 483 (Del.)

HON'BLE SRI JUSTICE G. CHANDRAIAH
AND
HON'BLE SRI JUSTICE CHALLA KODANDA RAM

WRIT PETITION NOs.21399, 21443 & 24398 of 2015

COMMON ORDER: *(Per Hon'ble Sri Justice Challa Kodanda Ram)*

In these three writ petitions common questions of fact and law are involved, hence they are taken up for hearing together. Even though these writ petitions came up for admission, at the request of both parties, they are being disposed of.

2. The writ petitions are filed challenging the communication dated 06.07.2015 issued by the 3rd respondent-Deputy Commissioner of Customs which reads as under:

“As per revised instructions all bills of entry for importing goods at concessional rate of duty under FTA Notifications viz., 46/2011 cuz. Dated 01.06.2011 etc., needs to be assessed provisionally for purpose of verification of documents. Hence you are advised to produce bond along with full purpose of verification of documents. Hence you are advised to produce bond along with full financial guarantee to cover the differential duty.”

3. For the sake of convenience, the facts in W.P.No.21399 of 2015 are discussed hereunder.

4. The averments in W.P.No.21399 of 2015 are that the writ petitioner, which is a private limited company and is engaged in trading of gold jewellery, has been importing the gold jewellery from Indonesia. The gold jewellery has HS classification 7113191000 and the same would attract customs duty at 15% advalorem. However, by virtue of

notification No.46 of 2011 dated 01.06.2011 the same is exempted from the payment of customs duty on account of the fact that there is an agreement with the Government of Indonesia commonly known as 'ASEAN-India Free Trade Area' (AIFTA). This agreement is on account of notification No.189/2009-CUSTOMS (N.T.) dated 31.12.2009 issued under Section 5 (1) of the Customs Tariff Act, 1975 (for short, 'the Act'). The petitioner has imported certain gold jewellery and filed its bill of entry on 23.06.2015 along with the certificate of origin issued by the designated authority at Surabaya of Indonesia. The 3rd respondent had communicated the impugned intimation. The sum and substance of the intimation is that though the petitioner imported gold jewellery at nil rate of duty, he was directed to produce bond along with full financial guarantee to cover the differential duty for the purpose of making a provisional assessment.

5. It is the specific contention of the petitioner that the necessary formalities that are required to be complied by it have been complied with, consequently in terms of notification No.189/2009 dated 31.12.2009 the petitioner is entitled to the benefit of notification No.46/2011. Thus the demand for providing of financial guarantee to the extent of differential duty is totally unauthorized and beyond the scope of making a provisional assessment under Section 18 of the Act.

6. The matters came up for admission and underwent several adjournments.

7. As the matters involve the issue of import of products under the bilateral agreement and as the imported goods are lying with the Customs Authorities, the cases were taken up for hearing at the request of both the parties.

8. Counter-affidavit dated 04.08.2015 and additional counter-affidavit dated 21.08.2015 have been filed on behalf of the respondents. Reply affidavit to the counter affidavits is also filed.

9. In the counter-affidavit by making a reference to Rule 16 of the Customs Tariff (Determination of Origin of Goods under the Preferential Trade Agreement between the Government of Member States of the Association of Southeast Asian Nations (ASEAN) and the Republic of India Rules, 2009 (for short, 'the Rules'), the 3rd respondent stated that to enable the provisional release of goods in terms of Customs (Provisional Duty Assessment) Regulations, 2011, the petitioner was asked to provide for a demand bank guarantee pending enquiry with regard to the origin of goods. It is also stated that the enquiry had become necessary on account of the information gathered by the Authorities about the total production of gold in Indonesia, as confirmed by the official channels, being only 65 tons and there being flood of gold articles from Indonesia, which is in excess of availability and very refining capacity of Indonesia. It is further stated that doubt has been entertained with regard to the origin of the goods as emanating from Indonesia and these aspects of the matter

are required to be enquired into and necessary steps are already been taken for verification of the same. In paras 10 to 12 of the counter affidavit, which are relevant, are extracted hereunder:-

10. In the petitioner's case, the exporter is a private company – PT. Untung Bersama Sejahtera and can only source Gold from other refiners or by import for the manufacture of jewellery. The exporter cannot be in position to either state that the gold is wholly produced in Indonesia or verify its originating content.

11. It may be mentioned that over the last few months gold jewellery of over 11 tons involving a suspected duty evasion of approximately Rs.1500 crore have been imported by a handful of importers in suspected close collusion with a handful of exporters in Indonesia and Malaysia. There is reasonable belief that the imports suspectedly involve a systemic abuse of the provisions of free trade between India & ASEAN countries and origin criterion laid therein.

12. In view of the above, for reasons of equity of uniformity of treatment, instructions have been issued so as to obtain such security from all importers seeking to claim benefit of the duty concessions envisaged under notification 46/2011/Cus dated 1.6.2011 as amended.

10. In the additional counter-affidavit, a reference also has been made with respect to bill of entry No.9694074/25.06.2015 (not relating to the petitioners) and the enquiry conducted with respect to said bill of entry and a confirmation received from M/s.PT ANTAM (a Government

of Indonesia enterprises). A further reference was also made about the capacity of the Indonesia's mines ability to refine 200 Metric tons of gold dore. In the additional counter affidavit, a reference was also made about there being no pre exportation examination in terms of Rule 6 of the Rules of Annexure-III, II(a) to the FTA notification. A further reference was also made to the assessing officers receiving an all India Alert Note issued by the Directorate of Revenue Intelligence regarding import of gold jewellery from Indonesia and Malasia under FTA Notification, which directed the field formations all over India to secure the revenue including in all the cases retroactive verification by way of bank guarantee covering the full differential duty amount.

11. A specific objection was also raised about the maintainability of the writ petition under Article 226 of the Constitution of the India. A further reference was made to the orders passed by the Hon'ble Madras High Court in W.P.No.22749 of 2015 in the case of M/s.Nakoda Unique Gold Private Limited, in which a similar importer imported gold jewellery from Indonesia under the FTA Notification. The said Madras High Court dismissed the said writ petition by holding that the writ petition is premature and the petitioner therein was directed to file his objections to the Authorities concerned to enable them to pass orders. It is further asserted in the additional counter-affidavit that the 3rd respondent had sent and prepared a proposal for retroactive verification with all the attendant enclosures and

forwarded the same to the Director, International Customs Division, Central Board of Excise & Customs (CBEC) Department of Revenue, Ministry of Finance, New Delhi for taking up further action with Indonesian Government through the Ministry of External Affairs, New Delhi. A reference was made to Rules 7 (c) and 16(a)(iv) of the Rules. It is further stated that FTA notification is a self contained code and Regulation 4 of the Customs (Provisional Duty Assessment) Regulations, 2011 (for short, the Regulations') provides for "such surety or security or both" as the assessing officer deems fit in addition to the 20% of duty deposit stipulated under Regulation 2 of the Regulations. The Provisional Duty Regulations also empowered the Authorities to demand Bank Guarantee for 100% differential duty. All the steps are in fact only on account of there being a prima facie doubt about the origin of the goods. The administrative measure of calling for Bank Guarantee for full differential duty has been taken up at all India level, so as to avoid discriminative treatment from officer to officer.

12. The communication letter addressed by the 3rd respondent to the Commissioner of Customs, Hyderabad dated 04.08.2015, in turn, the Commissioner of Customs addressed a letter dated 12.08.2015 to the Director (International Customs Division), Central Board of Excise and Customs, New Delhi, and they were placed on record.

13. With the above contentions, the respondents prayed

for dismissal of the writ petition.

14. We have heard learned senior counsel for the petitioners and Additional Solicitor General appearing on behalf of the respondents.

15. The principle contention of the petitioners is that demanding for financial security by way of provisional bank guarantee is onerous and unwarranted especially considering the fact that under the FTA notification read with Notification No.45/2011, the petitioners are entitled to import the gold jewellery from the ASEAN Countries at nil rate of duty. There is a specific procedure notified under FTA and in every aspect, the method and manner of issuance of certificate of origin, the method and manner of authentication and verification of the same and the terms framed within which is required to be made, have all been specified in detail. The respondent Authorities, without following the procedure as prescribed in the Regulations, merely on suspicion, had issued the impugned communication, thereby putting the onerous condition on the petitioners, which is otherwise unwarranted. The action of the respondents is totally contrary to the notified procedure and thus is in contravention of the Regulations affects the right to carry on the trade, apart from being arbitrary, is liable to be interfered with as offending Article 14 of the Constitution of India.

16. On the other hand, the learned Additional Solicitor General appearing on behalf of the respondents asserts that the writ petition is premature, the communication is not

an order passed under Section 18 of the Act and that the communication is only a kind of offer given to the petitioners to get the goods released, if they so desire subject to the condition. The impugned communication has been necessitated on account of the material available with the department with respect to excessive import of the goods by misusing the FTA notification. As there was a surge of gold jewellery, particularly, from the Indonesia and Malaysia, a uniform trade alert was issued to the Field Officers to release the goods by securing the differential duty by way of a financial bank guarantee. In this regard, alert Circular No.10/2015 dated 19.06.2015 is also issued, wherein the Government has taken up a decision to maintain uniformity and to avoid discriminative treatment of the individual cases by the Authorities.

17. The facts are not in dispute. The gold jewellery is permitted to be imported and same is not in the prohibited and restricted list from the ASEAN countries. The ASEAN countries have been given preferential treatment in import of goods as specified in the notification read with Notification No.46/2011. The goods from “ASEAN countries” attract nil rate of duty. There is an agreement known as “Agreement on Trade in Goods under the Framework Agreement on the Comprehensive Economic Co-operation between the Republic of India and the Association of Southeast Asian Nations (ASEAN)”. The terms of agreement is defined in Rule 2(a) of the Rules. Analysis of the said agreement so far as relevant for our purposes would reveal; terms in

agreement are defined in Rule 2(a) of the Rules, Rule 3 speaks out the origin criteria, Rule 3(a) deals with products which are wholly obtained or produced in the exporting party as specified in rule 4, or (b) products not wholly produced or obtained in the exporting party provided that the said products are eligible under rule 5 or 6.

18. Rule 4 elaborates 'wholly produced or obtained products'. Rule 4(e) read with (j) are relevant for the present cases. Rules 7 to 11 are not required to be referred to for the purpose of this case. Rule 12 deals with methodology of determination of origin of a product, when it is manufactured utilizing both originating and non-originating materials, mixed or physically combined, the origin of such materials can be determined by generally accepted accounting principles of stock control applicable or inventory management practiced in the exporting party.

19. Rule 13 deals with 'Certificate of Origin', which reads as under.

'Any claim that a product shall be accepted as eligible for preferential tariff treatment shall be supported by a Certificate of Origin as per the specimen in the Attachment to the Operational Certification Procedures issued by a Government authority designated by the exporting party and notified to the other parties in accordance with the Operational Certification Procedures as set out in Annexure III annexed to these rules.'

20. In terms of Annexure III to the Notification, Operational Certification Procedures for issuance and verification of the

AIFTA (ASEAN-India Free Trade Area) Certificate of Origin and other related administrative matters are notified. Under these Rules, there is a clear procedure laid down with respect to the Authorities for issuance of AIFTA Certificate of Origin. There is a procedure contemplated for making application for Certificate of Origin by the exporter and/or the manufacturer. The Authorities who are empowered to issue the same shall, to the best of their competence and ability, carry out proper examination upon each application for the AIFTA Certificate of Origin. Rules 5 and 6 deal with methodology and procedure that is required to be followed by the exporting party in issuance of the Certificate of Origin, authentication and notification of issuance of certificate to the exporting country. Rule 7(b) deals with while issuance of AIFTA Certificate of Origin, the original copy shall be forwarded, together with the triplicate, by the exporter to the importer. Only the original copy will be submitted by the importer to the Customs Authority at the port or place of importation.

21. Rule 7 (c) provides in cases where an AIFTA Certificate of Origin is not accepted by the Customs Authority of the importing party, such AIFTA Certificate of Origin shall be marked accordingly in box 4 and the original AIFTA Certificate of Origin shall be returned to the Issuing Authority within a reasonable period but such period not to exceed two months and the Issuing Authority shall be duly notified of the grounds for the denial of preferential tariff treatment. Rule 7(c) is an important Rule provided for the

procedure that is required to be followed in case AIFTA Certificate of Origin issued by the exporting country is not accepted. The Issuing Authority also should be notified of the grounds for the denial of preferential tariff treatment. Rule 7(d) requires, the issuing Authority shall provide with a detailed exhaustive clarification addressing the grounds for the denial of preferential tariff treatment raised by the importing party. The Customs Authority of the importing party shall accept the AIFTA Certificate of Origin and grant the preferential tariff treatment if the clarification is found satisfactory. Rules 13 to 15 deal with submission of original AIFTA Certificate of Origin to the Customs Authorities at the time of lodging the import entry. Rule 15 makes it clear that if there are minor discrepancies, the same are required to be ignored. Rule 16 deal with verification and the process that is required to be followed for further verification. Great emphasis has been placed by the learned Additional Solicitor General on Rule 16(a)(iii).

22. Rule 16 provides verification, which reads as under.

Rule 16(a): The importing party may request a retroactive check at random and/or when it has reasonable doubts as to the authenticity of the document or as to the accuracy of the information regarding the true origin of the good in question or of certain parts thereof. The Issuing Authority shall conduct a retroactive check on the procedure/exporter's cost statement based on the current cost and prices within a six-months timeframe prior to the date of exportation subject to the following procedures.

- (i) the request for a retroactive check shall be accompanied by the AIFTA Certificate of Origin concerned and specify the reasons and any additional information suggesting that the particulars given in the said AIFTA Certificate of Origin may be inaccurate, unless the retroactive check is required on a random basis;
- (ii) the Issuing Authority shall respond to the request promptly and reply within three months after receipt of the request for retroactive check;
- (iii) In case of reasonable doubt as to the authenticity or accuracy of the document, the Customs Authority of the importing party may suspend provision of preferential tariff treatment while awaiting the result of verification. However, it may release the goods to the importer subject to any administrative measures deemed necessary, provided that they are not subject to import prohibition or restriction and there is no suspension of fraud; and
- (iv) The retroactive check process, including the actual process and the determination of whether the subject good is originating or not, should be completed and the result communicated to the Issuing Authority within six months. While the process of the retroactive check is being undertaken, sub-paragraph (iii) shall be applied.

23. The learned Additional Solicitor General while making a reference to Rule 16(a)(iv) submits that at any rate there is six months time period provided for the Authorities to conduct enquiry and to ascertain whether the goods in issue are made in the country of origin i.e, Indonesia.

24. We may note that there appears to be a mistake in Rule 16(a)(iv) particularly in making a reference to the

'Issuing Authority', which should be read in the context as "Importing Authority".

25. The contention of the learned Additional Solicitor General that there is six months timeframe available for the purpose of conducting a retroactive check, the same is liable to be rejected, for the reason that the time limit provided to the Issuing Authority in Rule 16(a)(ii) is itself three months after receipt of the request for retroactive check, which contemplates two kinds of check one is a longtime check, which is not relating to any party and the other relating to a specified party. Further Rule 16(a)(iii) deals with where reasonable doubts have arisen with respect to authenticity or accuracy of a document, which is required to be verified. In which event, there is a provision for suspension of preferential tariff treatment while awaiting result of the verification. In contrast Rule 16 (a)(iv) would come into play in cases where the origin of goods is in doubt. So far as the cases where the origin of goods is in doubt, which is relatable to Rule 3 to 6 of the Rules. The outer limit of six months is provided to the exporting party and not to the Customs Authorities in considering the validity or otherwise of the certificate. Further, Rule 16(a)(i) makes it clear that the entire process of retroactive enquiry would commence only after the Customs authorities of Importing party notifying about the non-acceptance or rejection of the Certificate of Origin in terms of the procedure. In other words the question of conducting retroactive enquiry itself would not arise unless and until

such procedure is followed as contemplated under the agreement and there is no binding obligation on the part of the Issuing Authority to conduct a retroactive enquiry/verification, if any request is made beyond two months as the timeframe agreed to in the Operational Certification Procedure for rejection of a certificate in terms of Rule 7(c) of the Rules is only two months.

26. In the present case, the bill of entry was filed on 23.06.2015 and time within which the Customs Authorities could have refused the certificate and commenced the request for retroactive check would be 22.08.2015.

27. The question of conducting a retroactive check even assuming that there is no requirement of rejection (in fact there is no rejection of the Certificate of Origin in the present case), but there being a doubt that is required to be verified into, the same ought to have been commenced as soon as the bill of entry was presented or within a reasonable time of presentation of the bill of entry. Whereas in the present case to a specified query that was put by the Court to the learned Additional Solicitor General submitted, on instructions, that as on date the only action which has been taken by the authorities are the letters written by the 3rd respondent to the Commissioner and who in turn addressed a letter to the Director, International Customs Division, seeking an enquiry to be conducted. In other words even as on today, there are no steps which have been taken in terms of Rule 16(a) for the purpose of retroactive enquiry.

28. We may take note of the fact that the writ petition

came to be filed in July 2015. The counter-affidavit filed by the 3rd respondent into the Court on 10.08.2015 and the aspect of the communication dated 04.08.2015 of the 3rd respondent addressing the letter to the Commissioner is not mentioned in the counter-affidavit. Even in the additional counter-affidavit, the respondents have not stated about the steps thereafter. Obviously, the Customs Authorities are under the impression that there is six months time available to them to conduct these enquiries and verification. However, a careful reading of Rule 16 read with 7 (c), leave no manner of doubt that the same is not correct. One should not lose sight of the fact that FTA settlement negotiated between two independent Nations and the adherence to respective countries solemn promises is of utmost importance to the bilateral trade between the two Nations.

29. We are also not impressed with the arguments of the learned Additional Solicitor General that the writ petition is not maintainable as there is no order passed by the Authorities and it is only a take it or leave offer communication made to the petitioner. If the argument of the learned Additional Solicitor General has to be accepted the natural consequence of sending of such communication is totally outside the purview of the Act and Rules, in which event the Authorities themselves are acting outside the framework of the Rules. If what has been done by the Authorities in issuing the communication is out the statutory

framework, the petitioner is entitled to approach this Court as the same is not contemplated under the Rules and such communication is liable to be quashed under Article 226 of the Constitution of India. Imposing of a arbitrary and onerous condition, which is otherwise not contemplated under the provisions of the Act and Rules can certainly be challenged under Article 226 of the Constitution of India.

30. The further aspect that is required to be considered by this Court is with regard to the relief that can be granted in a case of this nature. So far as the respondent Authorities are concerned they assert that there is information and material available with the Government of India that there is a surge of importing gold from Indonesia and Malaysia and there is an element of doubt with regard to the production capacity of the same in those countries. The specific aspect that Indonesia has the production capacity of only 65 tons of gold is being disputed by the petitioners by making a reference to the information available in public domain, particularly by placing on record a document titled 'GFMS Gold Survey 2014, update 2' prepared by Thomson Reuters, wherein Indonesia was stated to have produced 109 tons of gold. However, even a well intended action is to be taken to prevent unwarranted and excessive gold in to the country on a preferential treatment basis the same would have to be done in accordance with law and by adhering to the prescribed procedure. Mere entertaining of suspicion cannot be basis to put a citizen's right to do business in jeopardy, which is a

guaranteed freedom under Article 19(1)(g) of the Constitution of India. In the present set of facts, we are satisfied that the Authorities though acted in good faith, unfortunately the same is not being in conformity with the procedure prescribed, the demanding of 100% security cannot be justified.

31. To safeguard the interests of revenue the statute has specifically conferred power in the Authorities in Customs Provisional Duty Assessment Regulations 1963 and also in terms of Rule 16(a), 3 and 4 of the FTA Regulations. A close reading of Rule 16(a)(iv) of the Rules, would reveal that authorities may release of goods provisionally pending retroactive check subject to any administrative measures which is deems fit and necessary. The word administrative measures is not defined under the Act. However, there is a guidance provided under the Customs Provisional Duty Assessment Regulations 1963, the only regulations which are available with respect to import of goods and releasing of the goods on provisional basis. Considering these regulations, the Division Bench of Delhi High Court in **Navashakti Industries Pvt. Ltd. v. Commr. Of CUS., ICD, TKD, New Delhi**^[1], having considered the facts in that particular case, directed to release the goods to the appellants therein on furnishing a bond for 20% of the differential duty to the satisfaction of the concerned Commissioner of Customs.

32. In view of the facts and circumstances, we conclude

that the authorities have failed to adhere to the procedure with respect to entertaining of the doubt within the timeframe which is allowed under the Regulations. In the result, impugned communication is set aside. In the facts of the present cases, we are inclined to direct the respondents to release the goods on condition of the petitioner in each case paying 30% of the duty on the goods being imported and also furnishing a surety bond to the satisfaction of the Custom Authorities for the balance 70% of the differential duty. Authorities may ascertain the financial capacity of the petitioners. Further, the release of the goods by virtue of this order is subject to the final orders that may be passed by the Authorities in terms of Section 18 of the Act. Entire exercise shall be completed within a period of 10 days from the date of receipt of the order.

33. With the above direction, the writ petitions are disposed of. No costs.

34. Miscellaneous Petitions, if any, shall stand dismissed.

G. CHANDRAIAH, J

CHALLA KODANDA RAM, J

9th September 2015.
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[\[1\]](#) 2011 (267) E.L.T. 483 (Del.)