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

Date of decision: 19.07.2018

+ **W.P.(C) 16905/2004**

NATIONAL CO-OPERATIVE CONSUMERS
FEDERATION OF INDIA LTD.

..... Petitioner

Through: Mr. Mukul Talwar, Sr. Advocate with
Mr. Aman Bhalla, Ms. Anju
Bhattacharya and Ms. Deepika
Kumar, Advocates.

versus

UOI & ORS.

..... Respondents

Through: Mr. Sanjeev Narula, Sr. Standing
Counsel for Customs with
Mr. Abhishek Ghai, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

HON'BLE MR. JUSTICE S. RAVINDRA BHAT (ORAL)

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CM APPL. 31542/2017 (for condonation of delay)

For the reasons mentioned in the application, the delay of 75 days in filing the application seeking restoration is hereby condoned.

Application stands disposed of accordingly.

CM APPL. 31541/2017 (for restoration)

2. In view of the orders passed in CM No.31542/2017, this application is also allowed. The writ petition is restored to its original position in the file of this Court.

Application stands disposed of accordingly.

W.P.(C) 16905/2004

3. The writ petitioner – National Cooperative Consumers Federation of India Ltd. is a federation of cooperative consumers in India and is the apex body. It entered into commercial contracts for import of 5000 metric ton (mt) of garlic pursuant to the special licences issued by the Director General of Foreign Trade (D.G.F.T.). The garlic was a restricted item under the Export & Import Policy 2002-07 till 16.01.2003 and could not be imported and such foreign commodity/goods could not be traded. This was to encourage the growth and trade of domestic products. During the concerned season there was a garlic shortage. On account of this even the D.G.F.T. enabled individuals and other entities to import garlic as a restricted item and issued special licences for this purpose. Outer limit for such importation and the corresponding licences were to the tune of 4000 mt. The petitioner obtained special licences to import 5000 mt. Prior to the Customs Notification No.11/2003 issued on 15.01.2003 the pre-existing rate of customs duty was 30% however, by this Notification of 15.01.2003 the customs duty was increased to 100%.

4. The petitioner had imported and cleared 3000 mt of the consignments which it had contracted for; the special licences to that extent were exhausted. As on 15.01.2003, it appears that the balance goods, i.e. 2000 mt, had arrived at the port but the Bill of Entry could not be filed on account of certain documentary formalities. Consequently, when the question of clearance of the goods arose, the

Customs authorities insisted upon the payment of 100% duty. Aggrieved, the petitioner approached this Court by filing WP(C) 1755/2003. In that writ petition, the proceedings from time to time indicate that the Court was of the opinion that the respondents, especially the Customs Authorities ought to consider the issue reasonably. The writ petition was disposed of on 17.02.2004 on the ground that since the dispute primarily concerns to government bodies, the Committee of Disputes headed by the Cabinet Secretary ought to examine it. Subsequently, the Customs Authorities appear to have turned down the petitioner's request and omitted to grant relief to the petitioner with respect to its request for an order under Section 25(2) of the Customs Act, 1962 (hereinafter 'the Act'). In these circumstances, the petitioner's grievance that the differential rate of duty i.e. balance 70% (i.e. the difference between the pre-existing/original duty of 30% prior to the Notification dated 15.01.2003 and duty of 100% brought in on that day) ought to be paid, has been highlighted in these proceedings.

5. Learned Senior Counsel for the petitioner urges that the power under Section 25(2) of the Act is a stand-alone one and that in special or exceptional circumstances the Central Government may pass, on good and various grounds, such orders exempting a particular consignment from such rate of customs duty as may be appropriate. Learned Senior Counsel relied upon the judgment of a learned Single Judge of the Madras High Court reported as "Kodali Sathyanarayana Vs. Union of India, 1994 (70) ELT 194". The Court had then

occasion to deal with the request of a disabled individual for partial exemption in terms of an existing notification. The Central Government rejected the request stating that the exemption notification had lapsed.

The Madras High Court observed as follows:-

“11. A perusal of the two orders shows that neither order has considered the request of the petitioner in the light of Section 25(2) of the Act. It is argued by learned counsel for the respondents that there can be no question of public interest in granting ad hoc exemption in favour of the petitioner who is an individual and, therefore, Section 25(2) of the Act cannot be invoked by him. But neither of the orders as pointed out already has given its reasons for rejecting his request under Section 25(2) of the Act. The only reason given in the two orders is that the Notification No. 160/84 dated 22-5-1984 has already lapsed on 31-7-1984 and the benefit of the notification was no longer available to the petitioner. Reliance is placed by learned counsel for the respondents on the last sentence in the first part of the order dated 22-8-1984. It is submitted by him that the respondent has given a reason that as a matter of policy exemption is not granted to handicapped persons not the relevant dates. The sentence does not in any way show that the circumstances set out in Section 25(2) of the Act are considered by the concerned authority. That sentence if read with the earlier sentence in the order will only show that as a corollary to the lapse of Notification on 31-7-1984, the authority is of the view that the petitioner will not be entitled to any exemption as the policy had changed after 31-7-1984. Even if the policy has changed in general it is applicable to all the general public but it is open to the Government under Section 25(2) of the Act to consider whether in a particular case, the exemption should be granted. For that purpose, the Government should

consider whether there are exceptional circumstances and whether public interest will be satisfied by granting an order of exemption in favour of the appellant. In the present case, such consideration has not been made by the authorities in either of the orders.

12. It is clear therefore that both the orders are vitiated by errors apparent on the face of the record in so far as they failed to consider the request of the petitioner for grant of ad hoc exemption. Hence, the orders are quashed and the respondents are directed to consider the petitioner's request under Section 25(2) of the Act for grant of ad hoc exemption and pass appropriate orders. Liberty is given to the petitioner to make additional representation to the concerned authorities setting out such circumstances on which he may place reliance for the purpose of consideration by the authorities under Section 25(2) of the Act. The petitioner is directed to send such additional representation if any, within eight weeks from this date. The first respondent shall consider the representations of the petitioner and pass appropriate orders within eight weeks from the date of receipt of such representation. The first respondent shall give a personal hearing to the petitioner. The bank guarantee furnished by the petitioner pursuant to the interim order of this Court in W.M.P. No. 709 of 1985 shall continue to be in force till final orders are passed by the first respondent on the representation of the petitioner. The writ petitions are allowed on the above terms. No costs."

6. The petitioner further states that the concerned Nodal Ministries, i.e. the Department of Agriculture, Department of Consumer Affairs as well as the Ministry of Commerce, had unanimously recommended to the Ministry of Finance that the old rates of customs duty of 30% ought to apply to the concerned consignment of imported garlic. It was emphasized that these

Ministries highlighted that it would be unfair and unjust to subject the petitioner to a higher rate of duty, given that it imported the products for distribution to the general public.

7. The Central Government in its counter affidavit as well as before the Court urges that the question as to what ought to be the rate of customs duty, for that matter for any other tax is one of policy and that even as to whether a particular case falls within the exceptional category under Section 25(2) of the Act is a matter to be gone into exclusively by the appropriate authority, which is the Central Government, having regard to not merely one or two but several circumstances. The learned senior counsel relied upon *Manglam Organics Ltd. vs. Union of India*, (2017) 7 SCC 221 in this regard and submitted that the question as to the exemption in a class of cases or a particular case is a matter of policy and in fact exercise pursuant to the statutory delegation. It was also emphasized that the Supreme Court ruling in *Union of India and Ors. vs. Apar Private Ltd. and Ors.*, (1999) 6 SCC and *Garden Silk Mills vs. Union of India*, (1999) 8 SCC 744 is forthright that the rate of duty prevailing at the time of clearance of goods has to be applied and paid.

8. In view of these facts it is submitted that no relief can be claimed by the petitioner.

Section 25(1) & (2) of the Act reads as follows:-

“25. Power to grant exemption from duty.—(1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the

Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification goods of any specified description from the whole or any part of duty of customs leviable thereon.

(2) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from the payment of duty, under circumstances of an exceptional nature to be stated in such order, any goods on which duty is leviable.”

9. It is quite apparent that when the Central Government exercises a power under Section 25 of the Act. It does so as a delegate of Parliament; the rate and the conditions applicable have the effect of altering the customs duty prescribed in the Customs Tariff Act, 1975. This power is relatable and is exercised concurrently with Section 8 of the Customs Tariff Act. Therefore, there is certain amount of deliberation and exclusive consideration based upon the economic factors variant. Section 25(2) of the Customs Act which seems to suggest an exception to Section 25(1) of the Act i.e. enabling the Central Government to make and issue “a special order in each case exempting from the payment of duty, in the circumstances under which such exemption is to be granted”. The placement of Section 25(2) of the Act leaves one in no doubt that this power is an extension and amplification of general power under Section 25(1) of the Act.

10. If one takes into account the nature of power, the fact that the Nodal Ministries recommended to the concerned Department i.e. the Finance Ministry to consider the issue of exemption of the differential

duty in this case only means that there was some view within the Government that the exercise of power under Section 25(2) of the Act had to be considered as reasonable. That however cannot be elevated to a right entitling the Court to issue a mandamus or any direction of that nature requiring the Central Government to pass an order under Section 25(2) of the Act.

11. In this context the Central Government has stated on record of this Court that the increased customs duty rate was necessary because after D.G.F.T. issued special import licences; indicating an annual cap on the import of the garlic, the licences were traded and the beneficiaries were not importing the allotted quantities. The Central Government in its counter affidavit explains these events in the following terms:-

“It is submitted that garlic was in the Restricted List before 17th January, 2003 and the DGFT was issuing import licenses on the basis of the annual ceiling for the import of the item indicated by the Ministry of Agriculture (MoA), based on the demand supply gap of the item in the market. The practice of allotting licenses led to Public Interest Litigation before this Hon'ble Court. The cooperative societies who had already been issued import licenses were not importing the allotted quantities. The prices in the retail market remain high which resulted in a high and unjustified premium on the import license for the item. The Ministry of Agriculture agreed to the suggestion of the Ministry of Commerce that the garlic should be removed from the restricted list. However, to protect the interest of the producers, the Ministry of Agriculture suggested that duty on import of garlic should be raised to 100% before quantitative restriction is removed on the import of the item. In view

of above, the Respondent No. 1 issued notification NO.11/2003-Customs, dated 15th January, 2003 invoking the emergency power under section 8A of the Customs Tariff Act, 1975. If the duty rate on garlic would have been 30% after bringing the product under freely importable category, cheap imported garlic would have flooded Indian market, which would have denied remunerative prices to Indian farmers and disastrous consequences for the farming community. Thus, circumstances existed which rendered it necessary to take immediate action and it was in the public interest to increase customs duty on garlic.

It is submitted that as per the law, a resolution was moved in the Lok Sabha within a period of 15 days from the date on which the notification was laid in the Lok Sabha. This resolution was then debated and was accepted in both the Houses of the Parliament and notification has been approved by the both houses of Parliament without any modification. The Parliament accepted the resolution and therefore, this notification has same effect as Finance Act.”

12. In the light of the explanation given by the Central Government, it is apparent that the purpose for which the restricted or special licences were issued, was defeated for two reasons – firstly, that the price in the retail market continued to remain high despite the authorisation to import; the authorization to import was based upon the assessment of shortage of the item in the market at that stage; secondly, the import licences were sold and traded at unjustified premium. Both these had the consequences of driving up the garlic prices. As a result, the D.G.F.T. removed the item from restricted category and placed it in OGL category. The Finance Ministry also responded by increasing the rate of duty to 100%. Given all these

considerations – which this Court had no reason to doubt – we are of the opinion that it would not be appropriate to direct the Central Government, at this stage, and after this lapse of time to consider the petitioner’s case on the ground of special or exceptional circumstances. It is not disputed that the petitioner also trades in garlic and presumably had its own retail outlet chains.

13. In these circumstances, without delving too deep into as to what constitute “exceptional circumstances”, even the petitioner’s case does not fall in that category. The law prevailing i.e. the rate of duty as on the date of import (Section 15 of the Act) covers petitioner’s case.

14. For the above reasons, the writ petition has to fail and is accordingly dismissed.

Interim order is hereby vacated.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

JULY 19, 2018

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