

OD-14

IN THE HIGH COURT AT CALCUTTA  
SPECIAL JURISDICTION  
ORIGINAL SIDE

CUSTA/31/2018  
COMMISSIONER OF CUSTOMS (PREVENTIVE), WEST BENGAL  
VS.  
SAVITRI SALES PVT. LTD.

BEFORE :  
THE HON'BLE JUSTICE T.S. SIVAGNANAM  
And  
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA  
Date : 4<sup>th</sup> November, 2022

Appearance :  
*Mr. Bhaskar Prosad Banerjee, Adv.*  
*Ms. Aishwarya Rajyashree, Adv.*  
*... for appellant*

The Court : This appeal by the revenue filed under Section 130 of the Customs Act, 1962 (the Act, for brevity) is directed against the order passed by the Customs, Excise and Service Tax Appellate Tribunal, East Zonal Bench, Kolkata (the Tribunal) dated 28<sup>th</sup> November, 2017.

The appeal was admitted on 11<sup>th</sup> March, 2022 on the following substantial questions of law :-

- i) Whether the order of the Learned Tribunal is against the provisions of law and a nullity in the eye of law since the said order failed to consider the provisions of the Foreign Trade (Development and Regulation) Act, 1992; notification issued by the Central Government in fixing the minimum price for importation of betel nuts; the judgement of the Division Bench of the

Calcutta High Court in upholding the power of the Director General of Foreign Trade in issuing notification for fixation of the minimum price for importation of betel nuts?

- ii) Whether the order of the Learned Tribunal have made the provisions of the Foreign Trade (Development and Regulation) Act, 1992 and the authority of the Central Government to regulate the importation of betel nuts otiose resulting in creating a precedence by which the Central Government shall not have the power to regulate and/or control the importation of any item, which might hamper the interest of the domestic growers?
- iii) Whether the Learned Tribunal has come to a perverse finding by not taking into consideration the power and competence of the DGFT to issue notification restricting the importation of betel nuts below the CIF value fixed by the DGFT and also failed to consider that the subject goods becomes liable for confiscation if the same is imported below the CIF value by the DGFT?
- iv) Whether the Learned Tribunal failed to appreciate that the tariff value fixed by the importer and duty paid thereunder is not at all applicable in the facts and circumstances of the case nor the same has any legal validity in view of the fact that the tariff value fixed by the importer in its shipping bill has been annulled and/or overridden due to the notification issued by the DGFT in fixing the CIF value of betel nuts for the purpose of importation?

We have heard Mr. Bhaskar Prosad Banerjee, learned standing Counsel appearing for the appellant/revenue. Though notice had been served on the respondent, none appears for the respondent.

The issue involved in this appeal is as regards the effect of the notification issued under the provisions of the Foreign Trade (Development and Regulation) Act, 1992. The learned Tribunal had followed the decision of the Co-ordinate Bench of the Tribunal in the case of International Seaport Dredging Ltd. vs. C.C. & S.T., Visakhapatnam, 2016 (342) E.L.T. 123 (Tri.-Hyd.) and held that the betel nuts which were imported by the respondent by declaring the prices which were less than the minimum import price specified by the DGFT cannot be held as import of prohibited goods. Consequently, the order of confiscation was set aside along with the order for payment of redemption fine and penalty.

As rightly pointed out by the learned standing counsel for the revenue, the law on the subject as settled by this Court and subsequently by the Hon'ble Supreme Court could not be placed before the Tribunal for its consideration, the first of the decisions being the Hon'ble Division Bench of this Court in the case of Union of India vs. Navin Kr. Jha, 2016 (341) E.L.T. 561 (Cal.). An identical issue arose for consideration in the said case where the intra-court appeal by the Union of India was against an order passed in a batch of writ petitions whereby the notification dated 13<sup>th</sup> May, 2013 imposing price restrictions by exercising the powers under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 was set aside. The said order was reversed by the Hon'ble Division Bench and while doing so has held as follows:

**“5.** We are unable to agree with the learned Trial Court that no such exercise was permissible. The Foreign Trade (Development and Regulation) Act, 1992 is an Act both for the purpose for development and regulation of foreign trade. There cannot be any development without regulation. For a planned development regulations are necessary. The Central Government is authorised to formulate the form of regulation under the provisions of the aforesaid Foreign Trade (Development and Regulation) Act, 1992. The question for consideration was whether the revision effected by the impugned notification dated 13<sup>th</sup> May, 2013 from Rs.75/- to Rs.110/- was valid in law. We are inclined to think that if the Central Government was authorised to fix the value at Rs.75/- then they were also authorised to revise it. Power to fix a rate without any power to revise the same does not amount to any power, to fix the rates, any more than there can be a power to appoint without a corresponding power to dismiss. The leaned Trial Court has held “the DGFT functions as a limb of the Central Government and not as a delegatee and mere non-mentioning of the specific source of power does not invalidate the entire executive action.” Having done so it could not have been held that the impugned notification was not an act of the Central Government under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992. Reliance placed by the learned Trial Court upon Paragraph 2.6 of the Foreign Trade policy, quoted above, is altogether misplaced for the simple reason that the impugned policy, at Page 104 of the Paper Book, is deemed to have been issued by the Central Government which is the policy making body whereas DGFT, in Para 2.6 of the Foreign Trade Policy, is a mere implementing authority. Any restrain on the power of implementing authority cannot be treated also as a restrain or limitation on the power of Central Government. Therefore, both the grounds assigned by the learned Trial Court are without any merit and therefore cannot be sustained.

**7.** In that view of the matter, we are of the opinion that the proper order shall be to set aside the order as regards the legality of the aforesaid

*notification dated 13<sup>th</sup> May, 2013 and to remand the matter for re-hearing on all the points pertaining thereto agitated by the writ petitioners.*

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

In terms of the above decision, the remand to the authority was only with regard to other aspects other than the validity of the Customs notification which had attained finality.

The decision of the Hon’ble Supreme Court in the case of Union of India and Others vs. AGRICAS LLP and Others, 2020 SCC Online SC 675 is also of relevance. While considering the effect of the notification issued under the FTDR Act, the Hon’ble Supreme Court pointed out as follows :

**“65.** *The provisions of FTDR Act, therefore, are in addition to, and not in derogation of, the provisions of any other law for the time being in force. This would be the correct way to harmoniously read and interpret sub-section (4) to Section 3 and Section 18A of the FTDR Act. We may, at this stage, notice that the original amendment had used the phrase ‘notwithstanding anything contained in any other law, rule regulation, notification or order’, but the Standing Committee had noticed the contradiction and also the object and purpose behind enacting sub-rule (4) and had recommended that the said expression should be replaced with the expression ‘without prejudice to anything contained in any other law, rule, regulation, notification or order’. Sub-section (4) to Section 3 of the FTDR Act, therefore, in the context of import and exports or prohibition of imports or exports of goods states that no permit or licence shall be necessary or required except as may be required under the FTDR Act, rules or orders made thereunder. The expression ‘order’, as per clause (h) to Section (2) of the FTA means any Order made by the Central Government under Section 3.*

*It is, therefore, clear to us that there is no violation of Section 3 of the FTDR Act in the issuance of the impugned notifications or orders, which are intra vires and not ultra vires.*

**66.** *We have already reproduced and quoted Article XI<sup>31</sup> of the GATT-1994 and have to say that the same has not been statutorily made a subject of 'act of transformation' and incorporated in the domestic legislation, i.e. the FTDR Act. The FTDR Act does not legislate and transform Article XI of the GATT-1994. As noticed above, Section 3 of the FTDR Act empowers and authorises the Central Government, i.e. the Union of India to frame policy, rules or regulations for import or export of goods. The policy is framed under Section 5 of the Act, which reads as under:*

**“5. Foreign Trade Policy.** – *The Central Government may, from time to time, formulate and announce, by notification in the Official Gazette, the foreign trade policy and may also, in like manner, amend that policy:*

*Provided that the Central Government may direct that, in respect of the Special Economic Zones, the foreign trade policy shall apply to the goods, services and technology with such exceptions, modifications and adaptations, as may be specified by it by notification in the Official Gazettee.”*

**67.** *Thus, the Central Government i.e. the Union of India has been given the necessary discretion and election with regard to framing of policies for import and export of goods, services and technology. Therefore, implementation of GATT-1994, including Article XI, is left to the Central Government by means of delegated legislation.*

**69.** *Reference to this position is necessary and required when we interpret Section 9A of the FTDR Act which we would accept incorporates into the domestic law Article XIX of GATT-1994, but neither Article XI and nor all exceptions by implication. Consequently, Section 9A for the FTDR Act, is to be understood an enabling provision empowering imposition of 'quantitative restrictions' after following the procedure in the situations referred to therein. However it does not limit and restrict the expans and power of the Central Government to prohibit, regulate or restrict imports of goods in terms*

of Section 3(2) of the FTDR Act. As a sequitur, it has to be held that notwithstanding Section 9A, the Central Government continues and has authority to impose quantitative restrictions by an order under Section 3(2) of the FTDR Act. Principle of *Lex specialis derogat legi generali*, therefore, is not applicable to the case in hand.

**74.** In other words, the impugned notifications would be valid as they have been issued in accordance with the power conferred in the Central Government in terms of sub-section (2) to Section 3 of the FTDR Act. The powers of the Central Government by an order imposing restriction on imports under sub-section (2) to Section 3 is, therefore, not entirely curtailed by Section 9A of the FTDR Act.

**75.** To be fair, learned counsel appearing for the importers had conceded that they cannot enforce or claim violation of paragraph (1) of Article XI of GATT-1994 in the domestic courts in India unless the said Article has been expressly or by necessary implication incorporated and transposed in the domestic law, that is, the FTDR Act.

**79.** Accordingly, we uphold the impugned notifications and the trade notices and reject the challenge made by the importers. The imports, if any, made relying on interim order(s) would be held to be contrary to the notifications and the trade notices issued under the FTDR Act and would be so dealt with under the provisions of the Customs Act 1962. The Writ Petitions subject matter of the Transfer Petitions, subject to E above (What is not decided) are dismissed. Writ Petitions filed by the intervenors before the respective High Courts shall stand dismissed in terms of this decision. Pending application(s), if any, also stand disposed of in the above terms. No order as to costs.”

The Hon’ble Supreme Court in *Union of India and Others vs. Raj Grow Impex LLP and Others*, 2021 SCC Online SC 429 while considering the effect of

the notification issued by the Central Government under the FTDR Act and also consequential Trade notices issued by the DGFT held as follows:

**“178.** *It needs hardly any elaboration to find that the prohibition involved in the present matters, of not allowing the imports of the commodities in question beyond a particular quantity, was not a prohibition simpliciter. It was provided with reference to the requirements of balancing the interests of the farmers on the one hand and the importers on the other. Any inflow of these prohibited goods in the domestic market is going to have a serious impact on the market economy of the country. The cascading effect of such improper imports in the previous year under the cover of interim orders was amply noticed by this Court in Agricas (supra). This Court also held that the imports were not bona fide and were made by the importers only for their personal gains.*

**179.** *The sum and substance of the matter is that as regards the imports in question, the personal interests of the importers who made improper imports are pitted against the interests of national economy and more particularly, the interests of farmers. This factor alone is sufficient to find the direction in which discretion ought to be exercised in these matters. When personal business interests of importers clash with public interest, the former has to, obviously, give way to the latter. Further, not a lengthy discussion is required to say that, if excessive improperly imported peas/pulses are allowed to enter the country's market, the entire purpose of the notifications would be defeated. The discretion in the cases of present nature, involving far-reaching impact on national economy, cannot be exercised only with reference to the hardship suggested by the importers, who had made such improper imports only for personal gains. The imports in question suffer from the vices of breach of law as also lack of bona fide and the only proper exercise of*

*discretion would be of absolute confiscation and ensuring that these tainted goods do not enter Indian markets. Imposition of penalty on such importers; and rather heavier penalty on those who have been able to get some part of goods released is, obviously, warranted.*

**184.** *In regard to the submissions invoking equity, noticeable it is that various such features of equity were taken into consideration by the Adjudicating Authority, in the orders-in-original dated 28.08.2020 and by the High Court, in the impugned order dated 15.10.2020 while directing release of goods. We have already disapproved the orders so passed by the Adjudicating Authority and the High Court. Therefore, no leniency in the name of equity can be claimed by these importers. In fact, any invocation of equity in these matters is even otherwise ruled out in view of specific rejection of the claim of bona fide imports by this Court in Agricas (supra). Once this Court has reached to the conclusion that a particular action is wanting in bona fide, the perpetrator cannot claim any relief in equity in relation to the same action. Absence of bona fide in a claimant and his claim of equity remain incompatible and cannot stand together.”*

The above decisions are of much relevance to the case on hand. However, as observed earlier, they could not be placed before the Tribunal because these decisions were rendered much after the order was passed by the Tribunal. However, on the date when the Tribunal passed the impugned order, the decision in the case of Navin Kr. Jha (supra) passed by the Hon’ble Division Bench of this Court was very much available and that decision being one of the jurisdictional authority of the Court would bind the Tribunal.

So, considering these facts, we are of the view that the matter should be re-heard by the Tribunal and a fresh decision should be taken on merits after taking note of the legal position as pointed out above.

For the above reasons, the appeal is allowed. The order passed by the Tribunal is set aside and the matter is remanded to the Tribunal for fresh consideration to take note of the decisions referred above as well as the other decisions and submissions that may be placed before the Tribunal during the course of hearing and a reasoned and speaking order be passed by the Tribunal on merits and in accordance with law.

Consequently, the substantial questions are left unanswered.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)