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02.01.2024
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IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

W.P.A. No. 16008 of 2023

M/s. P.K. Agri Link Private Limited & Anr.
Vs.
Union of India & Ors.

With
W.P.A. No. 11313 of 2023

M/s. Sethia Oils Limited & Ors.
Vs.
Union of India & Ors.

With
W.P.A. No. 12115 of 2023

M/s. Pragati Agri Products
Private Limited & Anr.
Vs.
Union of India & Ors.
With
W.P.A. No. 12117 of 2023

M/s. Pep Agro Industries
Private Limited & Anr.
Vs.
Union of India & Ors.
With
W.P.A. No. 15037 of 2023

M/s. Nalinaksha Agro Products
Private Limited & Anr.
Vs.
Union of India & Ors.
With
W.P.A. No. 15042 of 2023

M/s. Chhajer Agro Products
Private Limited & Anr.
Vs.
Union of India & Ors.
With
W.P.A. No. 15047 of 2023

M/s. Sukumar Solvent
Private Limited & Anr.
Vs.
Union of India & Ors.

With

W.P.A. No. 24355 of 2023

M/s. Hooghly Agro Products
Private Limited & Anr.
Vs.
Union of India & Ors.

Mr. Arijit Chakraborti,
Mr. Nilotpal Chowdhury,
Mr. Prabir Bera,
Mr. Deepak Sharma
...for the petitioners in all the matters

Mr. Sukumar Bhattacharyya,
Mr. Tirtha Pati Acharyya,
...for the Union of India in
W.P.A. 16008 of 2023
Mr. Debashis Basu,
Mr. Amal Dutta,
Mr. Arun Bandyopadhyay
...for the Union of India in
W.P.A. 11313 of 2023

Mr. Kumar Jyoti Tewari,
Ms. Amrita Pandey,
Ms. Anamika Pandey
...for the respondent nos. 1 to 4
in
W.P.A. 12115 of 2023,
W.P.A. 12117 of 2023 and
W.P.A. 24355 of 2023

Mr. Sauvik Nandy
...for the Union of India in
W.P.A. 15037 of 2023,
W.P.A. 15042 of 2023 and
W.P.A. 15047 of 2023

Mr. Vipul Kundalia,
Mr. K.K. Maiti,
Mr. Bhaskar Prosad Banerjee,
Mr. Tapan Bhanja,
Ms. Aishwarya Rajyashree
...for the Customs-Authorities
in all the matters.

1. The present challenge has been preferred against a Notification dated March 25, 2022 issued by the Government of India through its Joint

Secretary. By the said Notification, a Scheme titled 'Revised Transport and Marketing Assistance (TMA) for Specified Agriculture Products Scheme' dated September 09, 2021 has been foreclosed, apparently to revamp, redesign and refocus it better for better outcomes.

2. Learned counsel appearing for the petitioners in all the matters, which arise out of similar causes of action, contends that the petitioners in all the matters have undertaken huge exports pursuant to the said Scheme, which had been extended vide Notification dated September 09, 2021. As such, the arbitrary withdrawal of the said Scheme by the Notification dated March 25, 2022 would place the petitioners in immense hardship. It is argued that the cardinal principle of promissory estoppel is squarely violated by virtue of the impugned Notification.

3. By placing reliance on the September 09, 2021 Notification, it is pointed out that the Scheme was to be applicable for exports effected from April 01, 2021 to March 31, 2022, but was prematurely withdrawn, with retrospective effect even with regard to the exports undertaken during the period contemplated under the said Scheme.

4. Learned counsel places reliance on the Supreme Court judgments of *Union of India vs.*

Asian Food Industries, reported at *2006 (204) E.L.T. 8 (S.C.)* and *Director General of Foreign Trade vs. Kanak Exports*, reported at *2015 (326) E.L.T. 26 (S.C.)* as well as on a judgment of a coordinate Bench of this Court in *S.J. Fabrics Pvt. Ltd. vs. Union of India,* reported at *2015 (325) E.L.T. 713 (Cal.)* in support of his proposition with regard to promissory estoppel.

5. Learned counsel appearing for the respondent-authorities places reliance on Section 3 of the Foreign Trade (Development and Regulation) Act, 1992 which empowers the Central Government to make provision for the development and regulation of foreign trade by facilitating imports and increasing exports. The said provision also stipulates that the Central Government may also make provision for prohibiting, restricting or otherwise regulating, in all cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the Order, the import or export of goods or services or technology. The proviso to sub-section (2) of Section 3 indicates that the provision of the said sub-section shall be applicable, in case of import or export of services or technology, only when the service or technology provider is availing benefits under the foreign trade policy or is dealing with specified services or specified technologies.

6. Learned counsel places reliance on the judgment of the Supreme Court in *P.T.R. Exports (Madras) Pvt. Ltd. & Ors. Vs. Union of India & Ors,* reported at *(1996) 5 Supreme Court Cases, 268* for the proposition that it is well within the power of the Executive to lay policy by executive decision or by legislation, including the power to withdraw the same unless, in the former case, it is by *mala fide* exercise of power or the decision or action taken is in abuse of power. The doctrine of legitimate expectation, it was held, plays no role when the appropriate authority is empowered to take a decision by an executive policy or under law.

7. Learned counsel appearing in the various matters for the respondents also rely on the judgment in *Census Commissioner & Ors. Vs. R. Krishnamurthy*, reported at *(2015) 2 SCC 796*, where the Supreme Court observed that interference with the policy decision and issue of mandamus to frame a policy in a particular manner are absolutely different. In the said case, it is argued, the Supreme Court deprecated the courts interfering with policy decisions of the executive.

8. It is pointed out that the petitioners took advantage of the previous policy during the relevant period and, thus, are not entitled to seek the amounts claimed in the present case.

9. The question which arises in the present case is whether the respondent-authorities were justified in law in withdrawing the benefits conferred by the September 09, 2021 Notification for a period up to March 31, 2022 by a Notification dated March 25, 2022, which is impugned herein.

10. The proposition laid down in the judgments cited by the petitioners and indicated above holds true in the facts of the present case, since a question of promissory estoppel is undoubtedly involved.

11. The respondent-authorities place reliance on Section 3 of the 1992 Act. However, the said provision empowers the Central Government generally to make provision for development and regulation of foreign trade by facilitating imports and increasing exports. Such power is not in question here, but whether the retrospective withdrawal of benefits already given and acted upon by the petitioners is justified.

12. The proviso to sub-section (2) of Section 3, in any event, is not attracted to the present case. The said proviso stipulates that the provisions of sub-section (2) shall be applicable in case of import and export of services or technology, only when the service or technology provider is availing benefits under the foreign trade policy.

13. In the present case, the subsidies offered by the concerned Scheme relates to transport and marketing of agricultural products which falls neither under the head "services" nor "technology".

14. Section 3 confers general powers on the Central Government to frame policies regarding import and export, which is indisputable. However, the present case concerns a situation when a particular subsidy was given to exporters for a particular sort of exports, which was withdrawn during the subsistence of the originally contemplated period of the said Scheme.

15. The first judgment cited by the respondents, that is, *P.T.R. Exports (supra)* dwells in a different factual scenario altogether. In the said case, a quota system was made available as a policy decision by the executive. The Government of India had committed to phase out incentives or quota by a particular period with regard to garment quota policy. The argument of the petitioners in the said case was that the petitioners therein had invested huge amounts in upgrading their machinery and other resources for obtaining the said quota. However, it was not a case that the petitioners had acted in terms of a particular subsidy which was available at the relevant juncture, but were deprived of the benefit *post facto*, after having acted in terms of the Subsidy Scheme. In the cited report, the petitioners had merely invested in anticipation of obtaining the quota, which was withdrawn prior to the petitioners undertaking any activity in terms of the said provision. It was held by the Supreme Court in such perspective that an applicant has no vested right to have export or import licence in terms of the policies in force at the date of his making application, but granting of licence depends upon the policy prevailing on the date of the grant of the licence or permit.

16. In the present case, the petitioners have not anticipated or invested amounts in anticipation of any future prospects or any subsidy, but have undertaken exports in terms of an existing and prevalent Scheme at the relevant juncture, which was later on withdrawn by the impugned Notification. At the juncture when export was done by the petitioner in each of the cases, the original Scheme dated September 09, 2021 was very much prevalent and in force and, as such, the petitioners did not act on any future anticipation but acted under the then existing Scheme. Thus, the ratio laid down in *P.T.R. Exports (supra)* regarding legitimate expectation is not attracted to the present case at all. Legitimate or illegitimate, this is not a case of mere expectation, but acts done by the petitioners on the basis of a prevalent subsidy scheme of the Central Government.

17. Insofar as the judgment in *Census Commissioner (supra)* is concerned, there the Supreme Court clearly distinguished between interference in policy decision and issue of a mandamus to frame a policy in a particular manner. The latter was deprecated.

18. In the present case, the petitioners have not prayed for any mandamus to frame a policy in a particular manner at all. The petitioners acted on the basis of a policy decision taken by the Central Government on September 09, 2021 and are now being sought to be deprived of the benefits of the said policy by a *post facto* decision after the work was duly done by the petitioners in terms of the policy which was existing at the relevant juncture. Hence, the factual matrix of the present cases is entirely different from those cited by the respondent-authorities.

19. Insofar as whether the petitioners have actually obtained any subsidy in terms of exports done by them during the relevant period, such factual aspects are not required to be gone into in this case since the present challenge has been thrown to the retrospective withdrawal of the Scheme dated September 09, 2021, immediately prior to expiry of the said scheme period, after the petitioners have acted in terms of the said Scheme for a substantial period.

20. In the present case, the September 09, 2021 Notification in no uncertain terms declared that the Central Government had decided to introduce the revised TMA for specified agricultural products for the exports effected on or after April 01, 2021 and that the Scheme would be applicable for the exports effected from April 01, 2021 to March 31, 2022. The purported expectation of the petitioners that the Scheme would continue till March 31, 2022 has not fallen for consideration in the present case. The petitioners merely say that since the petitioners have acted on the basis of the said Scheme, which was to operate till March 31, 2022, the subsidy to which the petitioners are entitled to at least till the said Scheme was rescinded on March 25, 2022 should be given to the petitioners.

21. There is sufficient justification in such contention of the petitioners.

22. Even if the Central Government acted within its powers to withdraw the Scheme on March 25, 2022 from that date onwards, the Scheme was fully operational when the petitioners' exports took place prior to that date and, thus, the then prevalent Subsidy Scheme has to be honoured by the respondents at least till the date of withdrawal of the same.

23. In view of the above observations, the respondent-authorities acted arbitrarily and entirely on an unreasonable footing and in a capricious manner in withdrawing the benefit of the subsidies under the Scheme dated September 09, 2021 with retrospective effect vide the impugned Notification dated March 25, 2022, after the petitioners had acted in terms of the said Scheme during prevalence of the said Scheme.

24. Accordingly, W.P.A. No. 16008 of 2023, W.P.A. 11313 of 2023, W.P.A. 12115 of 2023, W.P.A. 12117 of 2023, W.P.A. 15037 of 2023, W.P.A. 15042 of 2023, W.P.A. 15047 of 2023 and W.P.A. 24355 of 2023 are disposed of by declaring that the withdrawal of the Subsidy Scheme dated September 9, 2022 by the impugned Notification dated March 25, 2023 shall operate on and from March 26, 2023 onwards but shall not have any retrospective effect for exports undertaken till March 25, 2023 and otherwise covered by the September 9, 2022 Scheme.

25. It is made clear that all exporters who acted in terms of the said original Notification dated

September 09, 2021 under the TMA Scheme shall be entitled to benefits under the said Scheme till March 25, 2022 when the impugned withdrawal Notification was issued.

26. The respondents are directed to disburse the dues of the petitioners in all the respective cases after ascertaining the veracity of the said claims otherwise in the light of the above observations as early as possible, positively within one month from this date.

27. There will be no order as to costs.

28. Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance of all necessary formalities.

29. After the above judgment and order is passed, the respondents seek stay of operation of the above judgment and order.

30. In view of the far-reaching financial implications of the above order, the operation of the above judgment and order is stayed till January 31, 2024, subject to orders of the appellate court, if appeals are preferred against the same.

(Sabyasachi Bhattacharyya, J.)