Union Of India & Ors vs M/S. Asian Food Industries on 7 November, 2006

Equivalent citations: AIR 2007 SUPREME COURT 750, 2007 AIR SCW 439, 2006 (12) SCALE 105, 2006 (13) SCC 542, (2006) 12 SCALE 105, (2006) 204 ELT 8, (2007) 1 GCD 1 (SC)

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Bench: S.B. Sinha, Markandey Katju

CASE NO.:
Writ Petition (civil) 4695 of 2006

PETITIONER:
Union of India & Ors.

RESPONDENT:
M/s. Asian Food Industries

DATE OF JUDGMENT: 07/11/2006

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:

J U D G M E N T [Arising out of S.L.P. (Civil) No. 17008 of 2006] WITH CIVIL APPEAL NO. 4696 OF 2006 [Arising out of S.L.P. (Civil) No. 17558 of 2006] S.B. SINHA, J :

Leave granted.

Both the appeals involving common questions of law and fact were taken up for hearing together and are being disposed of by this common judgment.

We would, however, notice the fact involved in both the matters separately.

FACT RE: M/S. ASIAN FOOD INDUSTRIES Respondent herein is exporter of various kinds of pulses and grains. It received orders for supply of 20331 MT of pulses from the Overseas Importers of Middle East wherefor several contracts were entered into. The said contracts were executed between 22.4.2006 and 2.05.2006. It received US $294942 being approximately 20% of the contract amount by way of advance towards the said supply from the importers on 9.5.2006. Shipment of 20 containers out of the 107 containers consisting of 415 MT took place during the period between 22.06.2006 and 24.06.2006. The remaining 87 containers were

cleared and Let Export Orders dated 23.06.2006, 24.06.2006 and 26.06.2006 were issued by the custom authorities at Kandla Port. Bills of lading were also issued therefor.

In the meanwhile, a purported decision was taken by the Central Government to ban export of pulses on 22.06.2006. The said decision is said to have been widely reported in the electronic media and print media, but the notification banning the export of pulses was issued by the Central Government only on 27.06.2006 in purported exercise of its power under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (for short "the 1992 Act") wherein the Central Government prohibited export of various goods mentioned therein for a period of six months from the said date, the relevant portion whereof reads as under:

"S.O.(E) In exercise of the powers conferred by Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 (No. 22 of 1992) read with Para 1.3 and Para 2.1 of the Foreign Trade Policy, 2004-2009, the Central Government hereby makes the following amendments in the ITC(HS) Classifications of the Export and Import items, 2004-2009 as amended from time to time.

2. With immediate effect the following new entry may be inserted after entry at Sl. No. 44 in Chapter 7 of Table B under Schedule 2 of ITC(HS):

Sl.

No. Tariff Item HS Code Unit Item Description Export Policy Nature of Restriction A *** *** *** 07131000 Kg.

Peas (Pisum sativum) Prohibited Not permitted to be exported.

07132000 Kg.

Chickpeas (garbanzos) Beans (Vigna spp., Phaseolus spp.):

Prohibited Not permitted to be exported.

***

3. The above amendment shall remain in force for a period of six months from the date of its issue and shall not apply to imports already effected against Advance Licences/Authorisations issued prior to the date of issue of this notification.

4. This issues in Public Interest."

Superintendent (Customs) on or about 28.6.2006 directed the Kandla Port Trust that no further consignment be allowed to be shipped which has passed out of the charge of the customs. However, the Assistant Traffic Manager in a communication made to M/s. Intermark Shipping Agency Pvt. Ltd. dated 29.06.2006 informed that even if goods have been cleared by issuance of Let Export Orders, the same should not be loaded on the shipping vessels in view of the said prohibition.

Another notification was issued by the Central Government on 4.07.2006 purported to be under Section 5 of the 1992 Act permitting export of pulses against irrevocable letter of credit opened prior to 22.06.2006, the relevant portion whereof reads as under:

> "S.O.(E) In exercise of the powers conferred by Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 (No. 22 of 1992) read with Para 1.3 and Para 2.1 of the Foreign Trade Policy, 2004-2009, the Central Government hereby makes the amendment in para 3 of Notification No 15 dated 27th June 2006, to include the following sentence, at the end of the said para:
>
> Further the transitional arrangements notified under para 1.5 of the Foreign Trade Policy, 2006 shall not be applicable for export of pulses against irrevocable Letters of Credit opened on or after 22.6.2006 as the decision of the Government prohibiting the export of pulses was announced and got widely publicised on 22.6.2006 in the electronic and print media.
>
> 2. This issues in Public Interest."

The respondents, however, addressed various correspondences with the authorities to grant permission to shift the 87 containers of vessels in view of the notification dated 4.07.2006 but the same was refused. A writ petition questioning the said action on the part of the authorities filed by them in the Gujarat High Court has been allowed by reason of the impugned judgment.

FACT RE: M/S. AGRI TRADE INDIA SERVICES P. LTD.

M/s. Agri Trade India Services P. Ltd., Respondent No. 1 herein was awarded a contract by Trade Corporation of Pakistan for supply of 3000 MT of chick peas. An irrevocable letter of credit was opened in favour of the respondent on 24.06.2006. On 27.06.2006, the respondent filed shipping invoices and bill with customs authorities for export of chick peas. In view of notification dated 27.06.2006, the Kandla Port Trust issued instructions that loading of chick peas would not be permitted. Thereafter, a notification dated 4.7.2006 was also issued purported to be under Section 5 of the 1992 Act permitting export of pulses against irrevocable letter of credit opened prior to 22.06.2006.

Inter alia questioning the validity of notification dated 4.07.2006, the respondents filed a writ petition before the Delhi High Court which was marked as W.P. (C) No. 11691-11692 of 2006. By reason of the impugned judgment dated 18.08.2006, the said writ petition has been allowed.

STATUTORY PROVISIONS Before adverting to the questions raised in these appeals, we may notice the statutory provisions operating in the field.

The Parliament enacted the Customs Act, 1962 (for short "the 1962 Act") to consolidate and amend the law relating to customs. Section 11 of the 1962 Act empowers the Central Government to prohibit importation and exportation of goods. Section 16 provides for date for determination of rate of duty and tariff valuation of export goods in the following terms:

> "16. Date for determination of rate of duty and tariff valuation of export goods.--
>
> (1) The rate of duty and tariff valuation, if any, applicable to any export goods, shall be the rate and valuation in force,
>
> (a) in the case of goods entered for export under section 50, on the date on which the proper officer makes an order permitting clearance and loading of the goods for exportation under section 51 ;
>
> (b) in the case of any other goods, on the date of payment of duty.
>
> (2) The provisions of this section shall not apply to baggage and goods exported by post."

Section 39 of the 1962 Act prohibits the master of a vessel not to permit loading of any export goods other than baggage and mail bags, until an order has been given by the proper officer granting entry-outwards to such vessel.

Chapter VII of the 1962 Act inter alia provides for the procedures for clearance of export of goods. Section 50 postulates that the exporter of any goods shall make entry thereof by presenting to the proper officer in the case of goods to be exported in a vessel or aircraft, a shipping bill and, while presenting, shall at the foot thereof make and subscribe to a declaration as to the truth of its contents. Section 51 provides for clearance of goods for exportation in the following terms:

> "51. Clearance of goods for exportation.-- Where the proper officer is satisfied that any goods entered for export are not prohibited goods and the exporter has paid the duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance and loading of the goods for exportation."

The Parliament also enacted the 1992 Act to provide for the development and regulation of foreign trade by facilitating imports into and augmenting exports from India and for matters connected therewith or incidental thereto.

> "Export" has been defined to mean taking out of India any goods by land, sea or air. Section 3 of the 1992 Act empowers the Central Government to make provisions by

order published in the Official Gazette for the development and regulation of foreign trade by facilitating imports and increasing exports. Sub-section (2) of Section 3 thereof empowers the Central Government to make provisions 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. Sub-section (3) of Section 3 provides that all goods to which an order under Sub-section (2) applies would be deemed to be the goods of import or export of which has been prohibited under Section 11 of the 1962 Act and all the provisions of that Act shall have effect accordingly.

Section 5 of the 1992 Act provides that the Central Government may from time to time formulate and announce, by notification in the Official Gazette, the export and import policy and in the like manner amend that policy.

POLICY The Central Government announced its Foreign Trade Policy in exercise of its power conferred upon it under Section 5 of the 1992 Act by a notification dated 7th April, 2006. The said policy was issued in public interest.

Chapter 1A of the said policy also provides for legal framework. Clause 1.5 thereof reads as under:

"1.5 In case an export or import that is permitted freely under this Policy is subsequently subjected to any restriction or regulation, such export or import will ordinarily be permitted notwithstanding such restriction or regulation, unless otherwise stipulated, provided that the shipment of the export or import is made within the original validity of an irrevocable letter of credit established before the date of imposition of such restriction."

Clause 2.4 of the policy empowers the Director General of Foreign Trade to specify the procedures required to be followed by an exporter in any case or class of cases for the purpose of implementing the provisions of the 1992 Act, the Rules and the Orders made thereunder and the said policy. Such procedures were to be included in the Handbook which would be published by means of a public notice and such procedures may in the like manner be amended from time to time. It was stated:

"The Handbook (Vol.1) is a supplement to the Foreign Trade Policy and contains relevant procedures and other details. The procedure of availing benefits under various schemes of the Policy are given in the Handbook (Vol.1)"

The Handbook of Procedures which inter alia supplements the Foreign Trade Policy was also issued on 7th April, 2006 upon giving a public notice therefor. It contains nine chapters. Chapter 9 comprises of miscellaneous matters. Paragraph 9.12 lays down the manner in which date of shipment/ dispatch of exports would be reckoned. It inter alia provides:

> "However, wherever the Policy provisions have been modified to the disadvantage of the exporters, the same shall not be applicable to the consignments already handed over to the Customs for examination and subsequent exports upto the date of the Public Notice.
>
> Similarly, in such cases where the goods are handed over to the customs authorities before the expiry of the export obligation period but actual Exports take place after expiry of the export obligation period, such exports shall be considered within the export obligation period and taken towards fulfillment of export obligation."

HIGH COURT JUDGMENTS Whereas the Gujarat High Court invoking Paragraph 9.12 of the Handbook and having regard to the fact that the customs authorities cleared and permitted the loading of the goods and moreover the bill of lading had also been filed, opined that the respondents were entitled to export the goods in terms of the policy decision despite the said notification dated 27.06.2006, the Delhi High Court declared the notification dated 4.07.2006 as ultra vires.

SUBMISSIONS Mr. Vikas Singh, learned Additional Solicitor General for Union of India, has raised the following contentions:

> (i) Clause 1.5 of the Foreign Trade Policy would not apply to a case where the export of goods are totally being prohibited and not merely regulated or restricted.
>
> (ii) Having regard to the definition of export and in particular the provision of Section 51 of the 1962 Act, the procedures laid down thereunder as envisaged under Sections 16 and 39 must be complied and they having not been complied with, the impugned judgment of Gujarat High Court cannot be sustained.
>
> (iii) Although the notification dated 4.07.2006 was wrongly worded but as thereby benefit was sought to be conferred on those who were not aware of the ban before 22.06.2006 and had opened letters of credit prior thereto were exempted from operation of the said notification, the order of prohibition shall be effective even if a concluded contract had been arrived at for export of goods.

The learned counsel for the respondents, on the other hand, submitted:

> (i) In view of the Foreign Trade Policy issued by the Central Government under Section 5 of the 1992 Act, the amendments carried out therein shall only have a prospective effect and not a retrospective effect.
>
> (ii) As the Handbook of Procedures lays down supplemental provisions to the Foreign Trade Policy issued by the Director General of Foreign Trade in exercise of its power under the 1992 Act, the purported prohibition issued under the notification dated 27.06.2006 would not apply to a case where the formalities contained in Section 51 of the 1962 Act had been complied with.

(iii) Clause 1.5 of the Foreign Trade Policy having provided for protection to those who were holders of letter of credit, the retrospective effect purported to have been given in terms of the notification dated 4.07.2006 was unconstitutional being hit by Article 14 of the Constitution of India.

ANALYSIS Would the terms 'restriction' and 'regulation' used in Clause 1.5 of the Foreign Trade Policy include prohibition also, is one of the principal questions involved herein.

A citizen of India has a fundamental right to carry out the business of export, subject, of course to the reasonable restrictions which may be imposed by law. Such a reasonable restriction was imposed in terms of the 1992 Act.

The purport and object for which the 1992 Act was enacted was to make provision for the development and regulation of foreign trade inter alia by augmenting exports from India. While laying down a policy therefor, the Central Government, however, had been empowered to make provision for prohibiting, restricting or otherwise regulating export of goods.

Section 11 of the 1962 Act also provides for prohibition. When an order is issued under Sub-section (3) of Section 3 of the 1992 Act, the export of goods would be deemed to be prohibited also under Section 11 of the 1962 Act and in relation thereto the provisions thereof shall also apply.

Indisputably, the power under Section 3 of the 1992 Act is required to be exercised in the manner provided for under Section 5 of the 1992 Act. The Central Government in exercise of the said power announced its Foreign Trade Policy for the years 2004-2009. It also exercised its power of amendment by issuing the notification dated 27.06.2006. Export of all commodities which were not earlier prohibited, therefore, was permissible till the said date.

The implementation of the said policy was to be made in terms of the procedures laid down in the Handbook. The provisions of the 1992 Act, the Foreign Trade Policy and the procedures laid down thereunder, thus, provide for a composite scheme. In implementing the said provisions of the scheme, in the event an order of prohibition, restriction or regulation is passed, the provisions of the 1962 Act mutatis mutandis would apply.

Section 50 of the 1962 Act provides for entry of goods for exportation. It enjoins a duty upon an exporter to make entry thereof by presenting a shipping bill to the proper officer in a vessel or aircraft. On receipt of the shipping bill, the proper officer has to arrive at its satisfaction that (i) the export of goods is not prohibited; (ii) the exporter has paid the duty assessed thereon and charges payable thereunder in respect of the said goods.

Once he arrives at the said satisfaction, he will make an order permitting clearance and loading of the goods for exportation.

The scheme of the Foreign Trade Policy postulates that when the policy provisions are amended which are disadvantageous to the exporters, the modification would not be attracted.

It furthermore lays down that although actual export had not taken place but in the event goods are handed over to the custom authorities before expiry of the export obligation period but actual export takes place after expiry thereof, the same shall be considered within the export obligation and taken towards fulfillment of such obligation.

Section 51 of the 1962 Act, therefore, does not say that unless and until the shipment crosses the international border, the notification imposing prohibition shall be attracted.

Different stages for the purpose of the said Act would, therefore, be different. For interpretation of the provisions of the 1992 Act and the policy laid down as also the procedures framed thereunder vis-`-vis the provisions of the 1962 Act, the rate of custom duty has no relevance. What would be relevant for the said purpose would be actual permission of the proper officer granting clearance and loading of the goods for exportation. As soon as such permission is granted, the procedures laid down for export must be held to have been complied with.

Strong reliance has been placed by the learned Additional Solicitor General upon a decision of this Court in Principal Appraiser (Exports), Collectorate of Customs and Central Excise and Others v. Esajee Tayabally Kapasi, Calicut [(1995) 6 SCC 536] wherein this Court was concerned with the change in the rate of duty and in that context the construction of Sections 16(1), 39 and 51 of the 1962 Act fell for its consideration. In relation to the rate of duty it was held that the date of "entry outwards" would be the relevant date with reference to which the rate of custom duty on the exported duty is to be worked out.

In that case, the goods were cleared for a vessel known as S.S. Neils Maersk. However, for want of space therein goods were shut out. Necessary space for exporting those were secured in another vessel named S.S. P'Xilas wherefor fresh shipping bill was filed on 9.08.1996. It was in the peculiar fact of that case, this Court opined that the rate of export duty prevalent as on 9.08.1996 would be leviable stating:

> "...It becomes thus clear that the shipping bill as well as the ultimate entry outwards for the goods concerned sought to be exported must have reference to the vessel through which such goods are to be exported. Therefore, before any goods are exported out of Indian territorial waters which vessel is to be utilised for exporting them, becomes a relevant consideration. The shipping bill concerned has to be lodged with reference to a given vessel which is to carry these goods out of the Indian territorial waters and in connection with such a vessel the entry outwards has to be obtained and only thereafter the master of the vessel should allow the loading of the goods for being exported out of India. The rate of duty payable on such exported goods would, therefore, be the rate of duty that was prevalent at the time when entry outwards through a given vessel is obtained. There cannot be an entry outwards in connection with a vessel which does not actually carry such goods for the purpose of export. In the facts of the present case, therefore, conclusion is inevitable that earlier entry outwards for the vessel S.S. Neils Maersk was an ineffective entry outwards for the purpose of computing the rate of customs duty of export on the goods in question.

> Only the subsequent entry outwards for vessel S.S. PXilas which actually carried these goods out of Indian territorial waters and effected the export of these goods was the only relevant and operative entry outwards and the rate of duty prevalent on the date of the said entry outwards for vessel S.S. PXilas was the only effective rate of duty payable on the export of these goods. Consequently it must be held that the respondent has made out no case for refund of Rs 4444.96 for which he lodged the claim."

We may notice that a Constitution Bench of this Court in Gangadhar Narsingdas Agarwal v. P.S. Thrivikraman and Another [(1972) 3 SCC 475] opined that Section 16 of the 1962 Act speaks of the fictional date only in relation to the order of date of entry outwards of the vessel, but the issue with which we are concerned did not arise therein. The fundamental and statutory right of an exporter, in that case, were not sought to be taken away.

Esajee Tayabally Kapasi (supra), therefore, has no application in the instant case.

Reliance has also been placed on Union of India and Others v. M/s. C. Damani & Co. and Others [1980 (Supp) SCC 707] wherein the vires of Exports (Control) Fifteenth Amendment Order, 1979 prohibiting pre-ban commitments was in question. It was held that there was no ground to discredit the policy. The question raised therein, viz., the effect of failure to honour foreign contracts owing to change in law imposing ban on goods covered thereby whether would attract the plea of frustration of contract was not decided stating:

> "...This contention may have to be considered here or elsewhere, but, if we may anticipate our conclusion even here, this question is being skirted by us because the kismet of this case can be settled on other principles. The discipline of the judicial process forbids decisional adventures not necessary, even if desirable."

We may, however, notice that M/s. C. Damani (supra) was explained by this Court in State Trading Corporation of India Ltd. v. Union of India and Others [1994 Supp (3) SCC 40]. It is not necessary for us to advert thereto as the said judgment has no application in the instant case.

We are, however, not oblivious of the fact that in certain circumstances regulation may amount to prohibition. But, ordinarily the word "regulate" would mean to control or to adjust by rule or to subject to governing principles [See U.P. Cooperative Cane Unions Federations v. West U.P. Sugar Mills Association and Others [(2004) 5 SCC 430] whereas the word "prohibit" would mean to forbid by authority or command. The expressions "regulate" and "prohibit" inhere in them elements of restriction but it varies in degree. The element of restriction is inherent both in regulative measures as well as in prohibitive or preventive measures.

We may, however, notice that this Court in State of U.P. and Others v. M/s. Hindustan Aluminium Corpn. and others [AIR 1979 SC 1459] stated the law thus:

> "It appears that a distinction between regulation and restriction or prohibition has always been drawn, ever since Municipal Corporation of the City of Toronto v. Virgo. Regulation promotes the freedom or the facility which is required to be regulated in the interest of all concerned, whereas prohibition obstructs or shuts off, or denies it to those to whom it is applied. The Oxford English Dictionary does not define regulate to include prohibition so that if it had been the intention to prohibit the supply, distribution, consumption or use of energy, the legislature would not have contended itself with the use of the word regulating without using the word prohibiting or some such word, to bring out that effect."

However, in Talcher Municipality v. Talcher Regulated Market Committee and Another [(2004) 6 SCC 178], it was opined that regulation is a term which is capable of being interpreted broadly and it may amount to prohibition. [See also K. Ramanathan v. State of Tamil Nadu and another, AIR 1985 SC 660] The terms, however, indisputably would be construed having regard to the text and context in which they have been used. Section 3(2) of the 1992 Act uses prohibition, restriction and regulation. They are, thus, meant to be applied differently. Section 51 of the 1962 Act also speaks of prohibition. Thus, in terms of the 1992 Act as also the policy and the procedure laid down thereunder, the terms are required to be applied in different situations wherefor different orders have to be made or different provisions in the same order are required therefor.

We, however, need not dilate on the said question as in the case of Agri Trade India Services (P) Ltd., the requirements of Section 51 of the 1962 Act had not been complied with whereas in the case of Asian Foods Industries, it was done.

The Delhi High Court, however, in our view correctly opined that the notification dated 4.07.2006 could not have been taken into consideration on the basis of the purported publicity made in the proposed change in the export policy in electronic or print media. Prohibition promulgated by a statutory order in terms of Section 5 read with the relevant provisions of the policy decision in the light of Sub-section (2) of Section 3 of the 1992 Act can only have a prospective effect. By reason of a policy, a vested or accrued right cannot be taken away. Such a right, therefore, cannot a fortiori be taken away by an amendment thereof.

In construing such a prohibitory order, whereas the rule of strict construction must be followed, the interpretation which subserves the intention of the Central Government as laid down in the policy as well as in the procedure should be given effect to. A statute as is well known may have to be construed in the light of the subordinate legislations framed thereunder. When subordinate legislation has been framed by the same authority which exercises the power under the policy, the intention of such policy maker must be found out from the words used therein albeit having regard to the rights of the exporters which are sought to be protected thereby.

We, therefore, are of the opinion that whereas the judgment of the Gujarat High Court must be upheld, that of the Delhi High Court, albeit for different reasons, cannot be sustained.

For the reasons aforementioned, whereas Civil Appeal arising out of SLP (C) No. 17008 of 2006 is dismissed with costs and counsel's fee assessed at Rs. 1,00,000/-, Civil Appeal arising out of SLP (C) No. 17558 of 2006 is allowed and the parties shall pay and bear their own costs.