

**INTERNATIONAL CEMENT TRADERS (PVT) LTD
vs
PRIME MINISTER AND 30 OTHERS**

SUPREME COURT

SARATH N. SILVA, C. J.

K. SIRIPAVAN, J. AND

P. A. RATNAYAKA, J.

S. C. APPEAL NO. 62/2003

C. A. NO. 801/2000

MARCH 20TH, 2009

Revenue Protection Act, No. 19 of 1962 - Section 2 - Order made imposing a preferential rate of Import duty on cement of Indian origin - Was the order arbitrary and ultra vires?

The Minister of Finance and Planning purporting to act under Section 2 of the Revenue Protection Act No. 19 of 1962 made an order imposing a preferential rate of Import Duty of 9.5% on cement of Indian origin and increased the Import Duty on cement imported from other countries from 10% to 25%. The Petitioner challenged the said order on the basis that the said order is *ultra vires*, arbitrary, capricious and discriminatory against the petitioner and grossly unreasonable, misconceived in law and is an abuse of the provisions of Section 2 of Act No. 19 of 1962. The Petitioner moved for a Writ of Certiorari to quash the said order made under Section 2 of the Revenue Protection Act and also sought an Order of Mandamus to a refund of the duty paid in excess during the relevant period.

Held:

- (1) Though Acts of Parliament have sovereign force, the legislation made under delegated power can be valid so long as it conforms exactly to the power granted.
- (2) In the exercise of discretionary power, the Court cannot question the propriety of the discretionary decision of the Minister or the manner of exercising of such discretionary decision of the Minister or the manner of exercising of such discretionary power except in cases of *mala fides* Per Siripavan, J.

“Granting a waiver or exemption of the Import Duty may be absolute or conditional. It may be used for regulating the economy or to encourage or discourage the import of cement from certain countries or for securing the social objectives of the State”

- (3) The impugned Revenue Protection Order which was subsequently approved by Parliament is not open to attack on the ground that it imposes an import duty on a discriminating basis amongst different countries as the State has a wide discretion in selecting persons, countries or objects it will tax.
- (4) If the petitioner has paid duty in excess of what was due, it should have resorted to the provisions contained in Section 18 of the Customs Ordinance. The petitioner, without resorting to the provisions of Section 18 of the Customs Ordinance, cannot seek an order of Mandamus from the Supreme Court for a refund.

Per Sripavan, J.

“It has been constantly held by this Court that mandamus is not granted at the fancy of mankind. Since the Petitioner has failed to make any claim for a refund as provided in Section 18 of the Customs Ordinance, the Writ of Mandamus sought is also refused.”

Cases referred to:-

Ashwathanarayana Setty v State of Karnataka 1989 Sup. ISCC 696.

L. C. Seneviratne, P. C. with Dinal Phillips and R. Panabokke for Petitioner.

Ms. Farzana. Jameel, Deputy Solicitor General for the Respondents-Respondents.

Cur. adv. vult

May 28, 2009

SRIPAVAN, J.

The Petitioner-Petitioner (hereinafter referred to as the Petitioner) is a limited liability company engaged in the import of Portland cement into Sri Lanka in bulk from Malaysia. The petitioner company alleges that on or about 23rd June 2000, the then Minister of Finance and Planning purported to act under Section 2 of the Revenue Protection

Act No. 19 of 1962, made an order imposing a preferential rate of import duty of 9.5% on cement of Indian origin and increased the Import duty on cement imported from other countries from 10% to 25%. The said Order was published in the Government Gazette (Extra Ordinary) No. 1137/36 dated 23rd June 2000, marked P6, in terms of Section 2 (5) of the said Act.

The Petitioner challenges the said Order in so far as it relates to the importation of cement from countries other than India on the following grounds:

- (1) That the said Order is ultra vires the powers conferred upon the Minister of Finance under Section 2 of the Revenue Protection Act.
- (2) That it is arbitrary, capricious and discriminatory against the petitioner, the foreign investors and Malaysian nationals/companies who export cement to Sri Lanka.
- (3) That it is grossly unreasonable, misconceived in Law and is an abuse of the provisions of Section 2 of Act No. 19 of 1962 in that it is contrary to all notions of fair trading and favouring Indian Manufacturers to enable them to secure virtual monopoly of the Sri Lankan market.

Thus, the petitioner sought a Writ of Certiorari to quash the Order made by the then Minister of Finance and contained in the Customs notification (Revenue Protection Order No. 2 of 2000) marked **P6** in so far as it relates to cement imported from countries other than India. The petitioner also moved for a Writ of Mandamus on the Director General of Customs to refund the excess Duty paid from 23rd June 200 till the date of filing this application aggregating Rs. 8,445,996/=.

The Respondents-Respondents (hereinafter referred to as the Respondents), in their statement of objections filed by

the Director General of Customs took upon the position that in view of the Bi-lateral Free Trade Agreement signed with India, the Import duty on cement had to be phased out over a period of 8 years commencing with a reduction of Duty at 9.5%. Thus, the Import duty on cement from India was reduced to 9.5% and a rate of 25% Import duty was levied in respect of import of cement from all countries including Malaysia.

The reliefs sought by the petitioner was refused and the application was dismissed by the Court of Appeal on 25th March 2003. Special Leave to Appeal was granted by this Court on 11th September 2003 on the following questions of Law:

- (1) Whether the notification in the Government Gazette marked P6 constitutes delegated legislation, the validity which would be determined by a Court of Law.
- (2) Whether the notification marked P6, was arbitrary and ultra vires the provisions of Section 2 of the Revenue Protection Act, No. 19 of 1962.
- (3) Has the Court of Appeal erred in Law in failing to consider whether the reasons given for the increased Duty on imported cement (other than from India) to 25% can be accepted in the light of the fact of this case as being genuine or justified.
- (4) Whether the Court of Appeal has erred in law in failing to consider that the Gazette notification marked **P6** is not law, having regard to the fact that the Gazette notification marked **P12**© annexed to Dr. P. B. Jayasundera's affidavit deals with another Revenue Order.

- (5) Whether the Petitioner, in Law, is entitled to a refund of the Duty paid in excess of 10% during the relevant period.
- (6) Though the Government has wide latitude in imposing tax provisions, the increase of import duty on cement was without any acceptable or valid grounds and was unreasonable, arbitrary and hence illegal.

Delegated legislation takes place when the legislature delegates its law making power relating to a subject matter to another body or authority. Though Acts of Parliament have sovereign force, the legislation made under delegated power can be valid so long as it conforms exactly to the power granted. It is therefore the duty of the Court of see that the statutory authority keeps itself within the bounds set forth by the Act. Though the notification in the Government Gazette marked **P6** is delegated legislation, I am unable to conclude that the Minister has transgressed the bounds so set forth by publishing the Gazette marked P6. In the case of an exercise of discretionary power, the Court cannot question the propriety of the discretionary decision of the Minister or the manner of exercising of such discretionary power except in cases of mala fides. In the present application, it is observed that no malice is specifically pleaded against the Minister. Granting a waiver or exemption of the Import duty may be absolute or conditional. It may be used for regulating the economy or to encourage or discourage the import of cement from certain countries or for securing the social objectives of the State.

The power to select the persons or goods on whom the import duty is to be imposed, the power to amend the schedule of exemption, the determination of the rates at which the imported goods are to be charged etc. are matters that fall within the competence of the legislature. The learned

D. S. G. submitted that the Revenue Protection Order marked P6 was approved by the Parliament by way of a resolution made in terms of Section 10 of the Customs Ordinance on 16th August 2000 and published in the Government Gazette (Extra Ordinary) No. 1156/5 dated 30th October 2000. Thus, it is observed that the Revenue Protection Order marked P6 was in fact approved by the Parliament, by a resolution made in terms of Section 10 of the Customs Ordinance and published in Gazette as provided by law. Accordingly, the relevant gazette notification which approved the decision contained in the Revenue Protection Order marked P6 is not the Gazette notification marked P12©, but the Gazette (Extra Ordinary) No. 1156/6 dated 30th October 2000 and annexed in these proceedings marked X.

If the relief of Writ of Certiorari is granted by Court as sought by the petitioner, then cement could be imported from any country other than India without payment of any import duty. It may be appropriate to reproduce the following passage from the determination made by the Supreme Court in S. C. Special Determination No. 17/97 (Decided on 10.6.97) which followed the judgment of *Venkatachaliah J.* in the case of *Ashwathanarayana Setty vs. State of Karnataka* 1989 Sup. 1 SCC 696:-

“Though other legislative measures dealing with economic regulations are not outside article 14, it is well recognized that the State enjoys the widest latitude where measures of economic regulations are concerned. These measures for fiscal and economic regulations involve an evaluation of diverse and quite often conflicting economic criteria and adjustment and balancing of various conflicting social and economic values and interests. It is for the State to decide what economic and social policy it should pursue and what discriminations advance those social

and economic policies. In view of the inherent complexity of these fiscal adjustments, courts give a larger discretion to the legislature in the matter of its preferences of economic and social policies and effectuate the chosen system in all possible and reasonable ways”.

In view of the foregoing, I hold that the impugned Revenue Protection Order marked P6, which was subsequently approved by Parliament is not open to attack on the ground that it imposes an import duty on a discriminating basis amongst different countries as the State has a wide discretion in selecting persons, countries or objects it will tax.

If the contention of the Petitioner Company is that it has paid Duty in excess of what was due, then it should have resorted to the provisions contained in Section 18 of the Customs Ordinance which deals with the manner in which any excess payment be refunded. The Petitioner, without resorting to the provisions of Section 18 of the Customs Ordinance cannot seek an Order of Mandamus from this Court for a refund. It has been constantly held by this Court that mandamus is not granted at the fancy of mankind. Since the Petitioner Company has failed to make any claim for a refund as provided in Section 18 of the Customs Ordinance, the Writ of Mandamus sought is also refused. For the reasons stated, the judgment of the Court of Appeal dated 25.03.2003 is affirmed. The appeal is dismissed in all the circumstances without costs.

SARATH N. SILVA C. J. - I agree

P. A. RATNAYAKE J. - I agree

Appeal dismissed.