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

Judgment reserved on: 04.11.2025

% Judgment delivered on: 10.12.2025

\+ **W.P.(C) 9463/2024**

CHILLIES EXPORTERS ASSOCIATION INDIA .....Petitioners

Through: Mr. Manish Mishra, Adv. with Ms.Shikha Parmar and Mr. Shubh Dixit, Advs.

versus

DIRECTORATE GENERAL OF FOREIGN TRADE & ANR.

.....Respondent

Through: Mr.Ripudaman Bhardwaj, CGSC withMr. Amit Kumar Rana, Adv. for UOI.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

J U D G M E N T

DEVENDRA KUMAR UPADHYAYA, C.J.

-: CHALLENGE :-

1. Proceedings of this petition filed under Article 226 of the Constitution of India by an association of chillies exporters have been instituted challenging an order dated 19.03.2024 passed by the Directorate General of Foreign Trade, Department of Commerce, Government of India (*hereinafter referred to as* 'DGFT') in compliance of an order dated 28.11.2023 passed by this Court in *W.P. (C) 15279/2023*, which too was filed by the

petitioner/association. By the said order dated 28.11.2023, this Court had directed the said writ petition to be treated as a representation and to be decided by the competent authority in the office of the DGFT by way of a reasoned order.

The petitioner/association has also prayed for issuing an appropriate writ declaring the notification dated 25.03.2022, issued by the Government of India, Department of Commerce, Ministry of Commerce, whereby a Scheme titled "Revised Transport and Marketing Assistance (TMA) for Specified Agricultural Products" *vide* notification dated 09.09.2021 was foreclosed, and accordingly the notification dated 09.09.2021 was withdrawn, as *ultra vires*. Prayer is, thus, to set aside the notification dated 25.03.2022.

-: FACTS :-

2. *Vide* notification dated 27.02.2019 read with notification dated 29.03.2019, the Department of Commerce, Government of India introduced TMA Scheme with the object of providing assistance for the international component of trade and marketing of agricultural products, which was likely to mitigate disadvantage of higher cost of transportation of export of specified agricultural products. The Scheme also aimed to promote brand recognition for Indian agricultural products in the specified overseas markets. Clause 4 of the notification dated 27.02.2019 provided that the Scheme shall be applicable for a period as specified from time to time. It further provided that the benefits of the Scheme would be available for exports effected from 01.03.2019 to 31.03.2020.

3. *Vide* notification dated 17.03.2020, the TMA Scheme was extended for a further period of one year, i.e. till 31.03.2021. Thereafter, a revised TMA Scheme was notified *vide* notification dated 09.09.2021, which provided that the earlier Scheme would remain in operation for exports effected between 01.04.2021 and 31.03.2022. Thus, during the period from 01.04.2021 till 08.09.2021, the TMA Scheme was not in operation, however, *vide* notification dated 09.09.2021 the Scheme was made applicable with retrospective date, i.e. 01.04.2021 which was to operate till 31.03.2022.

4. It is the aforesaid notification dated 09.09.2021, which was withdrawn by means of the impugned notification dated 25.03.2022. The reason indicated for issuing the notification dated 25.03.2022 is that the Government had decided to foreclose the Scheme to revamp, redesign and refocus it better for better outcomes. The incentive, thus, available to the chilli exporters under the Scheme stood withdrawn on account of operation of the notification dated 25.03.2022. It is in the background of these facts that the petitioner/association instituted writ petition, being *W.P. (C) 15279/2023*, with the prayer to direct the DGFT to permit the members of the petitioner association – chilli exporters to apply for incentives under the Scheme promulgated*vide* notification dated 09.09.2021, which stood withdrawn by means of the notification dated 25.03.2022 (which is under challenge herein).

5. A Co-ordinate Bench of this Court disposed of the said writ petition, by means of an order dated 28.11.2023, whereby it was directed that the said writ petition shall be treated as representation, which would be decided by the competent authority in the Office of the DGFT by way of passing a

reasoned order. In compliance of the said order dated 28.11.2023 passed by this Court, the DGFT passed an order on 19.03.2024, whereby the representation of the petitioner/association was decided in negative by the DGFT, recording a finding that the representation was devoid of merit. The prayers made by the petitioner/association in the representation preferred pursuant to the order dated 28.11.2023 was, thus, rejected.

6. It is this order dated 19.03.2024, passed by the DGFT, which is under challenge herein apart from the challenge to the notification dated 25.03.2022, whereby the Scheme has been foreclosed by withdrawing the notification dated 09.09.2021.

-: SUBMISSIONS ON BEHALF OF THE PETITIONER :-

7. It has been argued on behalf of the petitioner/association that the notification dated 25.03.2022, in fact, operates retrospectively in as much as that it forecloses the Scheme which had operated by dint of the notification dated 09.09.2021 from 01.04.2021 till 31.03.2022.

8. In this respect, it has been argued that the Scheme as notified *vide* notification dated 09.09.2021 is a piece of subordinate legislation which is referable in Section 3 and Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (*hereinafter referred to as* 'FTDR Act') and since neither Section 3 nor Section 5 of the FTDR Act permits the Central Government to make any notification regarding foreign trade policy or to make any provision relating to import and export retrospectively, as such the impugned notification dated 25.03.2022, which has rescinded the policy retrospectively, is not sustainable.

9. It is also the submission on behalf of the petitioner that rights accrued to the chilli exporters on account of the Scheme being in operation from 01.04.2021 till 31.03.2022 on the strength of notification dated 09.09.2021, could not be taken away by making any retrospective provision and therefore, the action on the part of the respondents in not extending the benefit of incentives, which is otherwise available to the chilli exporters in terms of notification dated 09.09.2021, cannot be permitted to be sustained. On the strength of the said argument, it has also been submitted on behalf of the petitioner that since neither Section 3 nor Section 5 of the FTDR Act permit issuance of notification having retrospective effect, as such the notification dated 25.03.2022 which forecloses the Scheme and withdraws the notification dated 09.09.2021, is also not liable to be sustained in the eyes of law.

10. In support of his submissions, various judgments have been cited by the learned counsel for the petitioner. The sheet anchor of the arguments of the petitioner is based on a judgment of Hon'ble Supreme Court in ***Director General of Foreign Trade & Anr. v. Kanak Exports & Anr.,2016 (2) SCC 226.***

11. Our attention has been drawn to the observations made by Hon'ble Supreme Court in ***Kanak Exports*** (*supra*) in paragraph 113, wherein the Apex Court has clearly returned a finding that Section 5 of the FTDR Act does not give any power specifically to the Central Government to make rules with retrospective effect. It has further been held by Hon'ble Supreme Court that though Section 5 confers upon the Central Government power to amend the policy, however, that by itself would not mean that such a

provision empowers the Government to do so retrospectively. Paragraph 113 of ***Kanak Exports*** (*supra*) is extracted herein below: -

> ***"113.*** *We may, in the first instance, make this legal position clear that a delegated or subordinate legislation can only be prospective and not retrospective, unless the rule-making authority has been vested with power under a statute to make rules with retrospective effect. In the present case, Section 5 of the Act does not give any such power specifically to the Central Government to make rules retrospective. No doubt, this section confer powers upon the Central Government to "amend" the policy which has been framed under the aforesaid provisions. However, that by itself would not mean that such a provision empowers the Government to do so retrospectively. This legal position is rightly discussed by the Bombay High Court in the impugned judgment in the following words : (Kanak Exports case [Kanak Exports v. Union of India, 2005 SCC OnLine Bom 1678] , SCC OnLine Bom paras 26-29)*
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> > *"26. We are unable to accept the submissions of the learned Additional Solicitor General. The word 'amend' does not give power to make amendment retrospectively if it is used in relation to the power to make a piece of delegated legislation. The connotation of the word 'amend' when it is used for the exercise of power by a legislature cannot be pressed to construe the word 'amend' in relation to the power to make delegated legislation. In this regard the following observations of the Supreme Court in Accountant General v. Doraiswamy [Accountant General v. S. Doraiswamy, (1981) 4 SCC 93 : 1981 SCC (L&S) 574] are pertinent : (SCC p. 99, para 7)*
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> > > *'7. The next question is whether clause (5) of Article 148 permits the enactment of rules having retrospective operation. It is settled law that unless a statute conferring the power to make rules provides for the making of rules with retrospective operation, the rules made pursuant to that power can have prospective operation only. An exception, however, is the proviso to Article 309. In B.S. Vadera v. Union of India [B.S. Vadera v. Union of India, AIR 1969 SC 118] , this Court held that the rules framed under the proviso to Article 309 of the Constitution could have retrospective operation. The conclusion followed from the circumstance that the power conferred under the proviso to Article 309 was intended to fill a hiatus, that is to say, until Parliament or a State Legislature enacted a law on the subject-matter of Article 309. The rules framed under the proviso to Article 309 were transient in character and were to do duty only until legislation was enacted. As interim substitutes*

for such legislation it was clearly intended that the rules should have the same range of operation as an Act of Parliament or of the State Legislature. The intent was reinforced by the declaration in the proviso to Article 309 that "any rules so made shall have effect subject to the provisions of any such Act". Those features are absent in clause (5) of Article 148. There is nothing in the language of that clause to indicate that the rules framed therein were intended to serve until parliamentary legislation was enacted. All that the clause says is that the rules framed would be subject to the provisions of the Constitution and of any law made by Parliament. We are satisfied that clause (5) of Article 148 confers power on the President to frame rules operating prospectively only. Clearly then, the 1974 Rules cannot have retrospective operation, and therefore sub-rule (2) of Rule 1, which declares that they will be deemed to have come into force on 27-7-1956 must be held ultra vires.'

27. The reliance placed on the power to regulate under Section 3 of the Act is equally misconceived. Section 5 gives express power to formulate the policy and to amend it. This is specific power. The power to regulate, therefore, cannot be read as a power to amend when a specific power to amend is given. If the power to regulate does not include the power to amend retrospectively such a power cannot be read into Section 3 of the Act.

28. Section 21 of the General Clauses Act on which reliance is placed by the learned Additional Solicitor General is also of no assistance to sustain the retrospective operation of the notification. Section 21 of the General Clauses Act embodies a rule of construction, nature and extent of application of which must inevitably be governed by the relevant provisions of the statute which confers power to issue the notification. The said power must be exercised within the limits prescribed by the provisions conferring the said power. (See Gopichand v. Delhi Admn. [Gopichand v. Delhi Admn., AIR 1959 SC 609 : 1959 Cri LJ 782] , Lachmi Narain v. Union of India [Lachmi Narain v. Union of India, (1976) 2 SCC 953 : 1976 SCC (Tax) 213] and State of Kerala v. K.G. Madhavan Pillai [State of Kerala v. K.G. Madhavan Pillai, (1988) 4 SCC 669] .) The ratio in H.C. Suman case [H.C. Suman v. Rehabilitation Ministry Employees' Coop. House Building Society Ltd., (1991) 4 SCC 485] also cannot be applied because in that case it was found that Section 88 of the Delhi Cooperative Societies Act, 1972 contained the power to exempt and if the provisions of Section 12 of the said Act were to be exempted the provisions which provided that bye-laws are effective from the date of registration. The notification issued under Section 88 would exempt it and Section 88 would contain the power to exempt retrospectively.

Similarly, Section 14 of the General Clauses Act has no application as it merely provides that where any power is conferred on the Government, then that power can be exercised from time to time as occasion requires.

29. Under that Scheme the status-holder is eligible for benefits upon achieving the incremental growth of 25% of the FOB value of exports in the current year over the previous year. It, therefore, follows that no sooner the status-holder achieves 25% incremental growth, the status-holder would be entitled to the benefits under the Scheme. Immediately upon attaining the prescribed incremental growth, the status-holder becomes eligible to certificate for duty-free import and thereby a right vests in the exporter to receive the same.""

12. The petitioner has next relied upon a Division Bench's judgment of this Court in ***Indian Flexible Intermediate Bulk Container Assn. v. Director General of Foreign Trade, 2023 SCC OnLine Del 7177,*** wherein the legal principle as enunciated in ***Kanak Exports*** (*supra*) has been followed and it has been held that neither the Central Government nor the DGFT possesses the authority to modify the foreign trade policy or rescind any export benefit retrospectively. The Division Bench has held that the validity of retrospective amendment cannot be upheld unless the same is expressly permitted by the governing statute. This Court in paragraph 10 of ***Indian Flexible Intermediate Bulk Container Assn.***(*supra*) has held as under: -

"10. The Supreme Court's verdict in the case of Kanak Exports [Director General of Foreign Trade v. Kanak Exports, 2015 SCC OnLine SC 1123; (2016) 2 SCC 226.] emerges as a cornerstone when discussing the retrospective application of the impugned notification. The crux of this case centred on challenging multiple notifications relating to the Export Import Policy 2002-2007 and Exim Import Policy 2004-2009 ("EXIM Policies"). Notably, some of the notifications retrospectively, removed certain items which were earlier eligible for incentives/scaled down the incentive, under the EXIM Policies. Although the apex court observed that the power to grant or retract benefits, exemptions, and incentives, squarely sits with the Government as a matter of policy decision, it also underscored a significant limitation. The court clarified that even if a benefit is rescinded in the

broader public interest, it does not necessarily legitimize a retrospective withdrawal without clear legislative backing. Diving deeper into the statutory framework, it was unequivocally stated that section 5 of the FTDR Act, 1992, lacks any provision that permits the Central Government to promulgate rules with a retrospective effect. Consequently, the scope to "amend" any policy under section 5 does not imply a carte blanche authority to make retrospective changes. This judgment is not an isolated stand; it derives its strength from the foundational legal principle that secondary or delegated legislation, by default, is prospective. Retrospective application is an exception and can only be permitted if explicitly provided by the parent statute. Supporting this line of thought, the Supreme Court, in Asian Food Industries [Union of India v. Asian Food Industries, 2006 SCC OnLine SC 1162.] , reiterated that prohibitive measures encapsulated in any statutory order under the FTDR Act, 1992, read with relevant provisions of the policy decision under section 3(2) of the FTDR Act, 1992, should inherently be prospective. Additionally, reinforcing this stance, in Malik Tanning [Malik Tanning Industries v. Union of India, 2014 SCC OnLine Del 6963.] , adjudicated by a Single Judge of this court, ruled that neither the Central Government nor the DGFT possesses the authority to retrospectively, modify the Foreign Trade Policy or rescind any export benefit. In sum, the jurisprudential trend, backed by these landmark judgments, establishes a formidable legal argument against the validity of retrospective amendments unless expressly permitted by the governing statute."

13. Laying emphasis on the submission that notification issued under Section 5 read with Section 3 of the FTDR Act could not have retrospective operation, learned counsel for the petitioner has relied upon yet another judgment of Hon'ble Supreme Court in ***Union of India & Ors. v. Asian Food Industries, (2006) 13 SCC 542***.

14. The reliance has also been placed by the petitioner on ***Mallik Tanning Industries v. Union of India, 2014 SCC Online Del 6963***. Paragraph 23 of the said judgement is quoted hereunder: -

"23. A bare reading of the provisions of Section 5 of the Act indicates that a policy cannot be made with retrospective effect. The expression 'formulate and announce' used in Section 5 clearly means that the power is to be

exercised prospectively. The Supreme Court in Union of India v. Asian Food Industries: (2006) 13 SCC 542 held as under:-

> *"48. The Delhi High Court, however, in our view correctly opined that the Notification dated 4-7-2006 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.""*

15. The petitioner has also relied upon a judgment dated 02.01.2024 passed by the Calcutta High Court in ***W.P. (A) 16008/2023 and other connected matters***, whereby the learned Single Judge has held that the respondents have acted unreasonably in withdrawing the benefit of the incentive under the Scheme dated 09.09.2021 with retrospective effect *vide* the notification dated 25.03.2022. The learned Single Judge of Calcutta High Court has further held in the said judgment that the notification dated 25.03.2022 shall operate on and from 26.03.2022 onwards but will not have any retrospective effect for exports effected till 25.03.2022 and otherwise covered by the notification dated 09.09.2021.

16. However, we may note that the judgment of the learned Single Judge of Calcutta High Court was set aside by a Division Bench of the said High Court by means of an order dated 24.02.2025 and the matter has been remitted to the learned Single Judge for decision afresh.

17. The principle of legitimate expectation has also been sought to be invoked by the learned counsel for the petitioner on the ground that during currency of the Scheme on account of notification dated 09.09.2021, a right

had accrued to the chilli exporters of getting benefit of incentive under the Scheme, however, such right cannot be taken away by the impugned notification dated 25.03.2022. It has been argued in this regard that as per the notification dated 09.09.2021, the chilli exporters had changed their position depending on the representation available to them by the said notification that they shall entitled to incentive for the exports effected from 01.04.2021 till 31.03.2022 and, accordingly had effected the export, therefore, the respondents could not have rescinded the said notification by issuing the impugned notification dated 25.03.2022 taking away the benefits which had accrued and vested in the chilli exporters on issuance of the notification dated 09.09.2021. Reliance in this regard has been placed on the judgment of Hon'ble Supreme Court in the case of ***Sivanandan C.T. v. High Court of Kerala & Ors., (2024) 3 SCC 799***, where the doctrine of legitimate expectation under Indian law has been discussed at length and it has been concluded that public authorities should be held accountable for their representation and that good administration requires public authorities to act in a predictable manner and honour the promises made or practices established, unless there is good reason not to do so. Hon'ble Supreme Court has also opined in the said judgment that underlying basis for application of doctrine of legitimate expectation has evolved to include the principle of good administration and that principles of good administration require that the decisions of public authorities must withstand the test of consistency, transparency and predictability otherwise same would be regarded as arbitrary and violative of Article 14 of the Constitution of India.

18. Hon'ble Supreme Court has further held in ***Sivanandan C.T.*** (*supra*) that the principle of legitimate expectation is entrenched in Indian

Administrative Law, of course, subject to the limitations on its applicability in given factual situations. The Apex Court, however, in the same breath has also observed that doctrine of legitimate expectation cannot serve as an independent basis for judicial review of any action of the public authorities and such limitation is recognized considering the fact that a legitimate expectation is not a legal right, it is rather merely an expectation to avail the benefit of relief based on an existing promise or practice.Paragraph 40, 45 and 46 of ***Sivanandan C.T.*** (*supra*) are extracted below: -

> *"40. The principle of fairness in action requires that public authorities be held accountable for their representations, since the State has a profound impact on the lives of citizens. Good administration requires public authorities to act in a predicable manner and honour the promises made or practices established unless there is a good reason not to do so. In Nadarajah [R. (Nadarajah) v. Secy. of State for the Home Deptt., 2005 EWCA Civ 1363] , Laws, L.J. held that the public authority should objectively justify that there is an overriding public interest in denying a legitimate expectation. We are of the opinion that for a public authority to frustrate a claim of legitimate expectation, it must objectively demonstrate by placing relevant material before the court that its decision was in the public interest. This standard is consistent with the principles of good administration which require that State actions must be held to scrupulous standards to prevent misuse of public power and ensure fairness to citizens."*
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> *"45. The underlying basis for the application of the doctrine of legitimate expectation has expanded and evolved to include the principles of good administration. Since citizens repose their trust in the State, the actions and policies of the State give rise to legitimate expectations that the State will adhere to its assurance or past practice by acting in a consistent, transparent, and predictable manner. The principles of good administration require that the decisions of public authorities must withstand the test of consistency, transparency, and predictability to avoid being regarded as arbitrary and therefore violative of Article 14."*
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> *"46. From the above discussion, it is evident that the doctrine of substantive legitimate expectation is entrenched in Indian administrative law subject to the limitations on its applicability in given factual situations. The development of Indian jurisprudence is keeping in line with the developments in the common law. The doctrine of substantive legitimate expectation can be successfully invoked by individuals to claim substantive benefits or entitlements based on an existing promise or practice of a public authority. However, it is important to clarify that the doctrine of legitimate*

expectation cannot serve as an independent basis for judicial review of decisions taken by public authorities. Such a limitation is now well recognised in Indian jurisprudence considering the fact that a legitimate expectation is not a legal right. [Union of India v. Hindustan Development Corpn., (1993) 3 SCC 499; Bannari Amman Sugars Ltd. v. CTO, (2005) 1 SCC 625; Monnet Ispat& Energy Ltd. v. Union of India, (2012) 11 SCC 1; Union of India v. P.K. Choudhary, (2016) 4 SCC 236 : (2016) 1 SCC (L&S) 640; State of Jharkhand v. Brahmputra Metallics Ltd., (2023) 10 SCC 634.] It is merely an expectation to avail a benefit or relief based on an existing promise or practice. Although the decision by a public authority to deny legitimate expectation may be termed as arbitrary, unfair, or abuse of power, the validity of the decision itself can only be questioned on established principles of equality and non-arbitrariness under Article 14. In a nutshell, an individual who claims a benefit or entitlement based on the doctrine of legitimate expectation has toestablish : (i) the legitimacy of the expectation; and (ii) that the denial of the legitimate expectation led to the violation of Article 14."

19. Learned counsel for the petitioner has also placed reliance on following judgments: -

(i) Indian National Congress (I) v. Institute of Social Welfare, (2002) 5 SCC 685;

(ii) Sukhlal v. Collector: Satna, 1968 SCC Online MP 44;

(iii) Ridge v. Baldwin, [1964] A.C. 40;

(iv) Associated Cement Companies v. P.N. Sharma, AIR 1965 SC 1595;

20. It is also the submission of the learned counsel for the petitioner that the impugned order and action is not liable to be sustained which suffers from the vice of manifest arbitrariness in as much as that the chilli exporters effected the exports and were entitled to the incentive under the Scheme on account of operation of the notification dated 09.09.2021, however, the said benefit has been arbitrarily denied by issuing the notification dated 25.03.2022 and arbitrariness in this regard is writ large. Reliance in this

regard has been placed on behalf of the petitioner on the judgment of Hon'ble Supreme Court in ***Shayara Bano v. UOI, 2017 (9)SCC 1.***

-: SUBMISSIONS ON BEHALF OF THE RESPONDENTS :-

21. Opposing the prayers made in the writ petition vehemently, learned counsel representing the respondents has submitted that the notification dated 25.03.2022 was issued with a rationale and the reason for issuing the said notification was to revamp, redesign and refocus the Scheme for better outcomes. It has further been argued that unless any malice is established, a policy decision cannot be subjected to judicial review and is not liable to be interfered with by this Court for the reason that in matters of complex economic issues, the Government should be allowed the requisite flexibility to take the decision in public interest. Reliance in this regard has been placed by the respondents as well on certain observations made by the Apex Court in ***Kanak Exports*** (*supra*), especially the clause occurring in paragraph 109 of the judgement, which is extracted hereunder: -

> ***"109.*** *Therefore, it cannot be denied that the Government has a right to amend, modify or even rescind a particular scheme. It is well settled that in complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call trial and error method and therefore, its validity cannot be tested on any rigid prior considerations or on the application of any straitjacket formula. In Balco Employees' Union v. Union of India [Balco Employees' Union v. Union of India, (2002) 2 SCC 333] , the Supreme Court held that laws, including executive action relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. that the legislature should be allowed some play in the joints because it has to deal with complex problems which do not admit of solution through any doctrine or straitjacket formula and this is particularly true in case of legislation dealing with economic matters, where having regard to the nature of the problems greater latitude require to be allowed to the legislature. The question, however, is as to whether it can be done retrospectively, thereby taking away some right that had accrued in favour of another person?"*

22. Placing reliance on ***Balco Employees' Union v. Union of India, (2002) 2 SCC 333***, it has also been argued by the learned counsel for the respondents that executive actions relating to economic activities should be viewed with greater latitude in comparison to the action and laws touching the civil rights, such as freedom of speech, religion, etc. It is, thus, stated on the basis of the said judgment on behalf of the respondentsthat in economic matters the legislature should be allowed some play in the joints as it has to deal with complex problems which do not admit of solution to any doctrine or straight jacketed formula. It has also been argued by the learned counsel representing the respondents that in the matters of Government policy, the scope of judicial review is limited and in such challenges the Courts do not and cannot act as appellate authorities examining the correctness or suitability or appropriateness of a policy. In this regard, the respondents have also relied upon a judgment of Hon'ble Supreme Court in ***Ugar Sugar Works Ltd. V. Delhi Administration &Ors., (2001) 3 SCC 635.***

23. About the power of the Central Government to issue order or notification under Section 3 and 5 of the FTDR Act, it has been contended on behalf of the respondents that the Central Government is empowered to issue such a notification having retrospective application in public interest. It is also the submission on behalf of the respondents that there can be no estoppel against the Government in exercise of its legislative, sovereign or executive powers as held by Hon'ble Supreme Court in ***Kasinka Trading v. Union of India, (1995) 1 SCC 274.***

24. It is also argued on behalf of the respondents that in view of what has been held by Hon'ble Supreme Court in ***Kasinka Trading*** (*supra*), the Government is the ultimate authority to make a decision on policy matters and since in a policy decision public interest element is involved and the same cannot be nullified on the ground of legitimate expectation.

25. Most importantly, the respondents have submitted that the petitioner/association has not disclosed in this petition as to how any right of the chilli exporters has been infringed on principle of legitimate expectation keeping in view of the fact that from 01.04.2021 till 08.09.2021, no TMA Scheme was in existence as it was only on issuance of the notification dated 09.09.2021 that the Scheme was introduced with retrospective effect. In this background, it is stated on behalf of the respondents that before 09.09.2021, the Scheme was not in vogue from 01.04.2021 to 08.09.2021 and therefore, it was not possible for any chilli exporter to have effected any export legitimately expecting that such an exporterwould be eligible to the incentive under the TMA policy.

26. On the aforesaid counts, it has been urged by the learned counsel for the respondents that the instant writ petition does not bear any good ground which in the facts of the case and the law as canvassed on behalf of the respondents, is liable to be dismissed.

-: DISCUSSION AND CONCLUSION :-

Permissibility of retrospective operation of any order made or notification issued under Section 3 or 5 of the FTDR Act

27. The said issue, in our considered opinion, is no more *res integra*. Hon'ble Supreme Court in ***Kanak Exports*** (*supra*) has unambiguously held,

after considering the provisions contained in Section 3 and 5 of the FTDR Act, that a delegated or subordinate legislation can have only prospective and not retrospective effect unless the rule making authority has been vested with power under the statute permitting it to make the rules with retrospective effect. In ***Kanak Exports*** (*supra*), the Apex Court has clearly held that Section 5 of the FTDR Act does not give any such power specifically to the Central Government to make rules retrospectively. It has further been observed that though power is available to the Central Government to amend the policy, however, that in itself would not mean that Section 5 of the FTDR Act empowers the Government to amend the policy retrospectively. The said observations have been made by the Apex Court in paragraph 113 of the report, which has already been extracted above.

28. While making the aforesaid observations and clearly returning a finding that the Central Government has not been vested with any power under Section 5 of the FTDR Act to make any notification retrospectively, the Hon'ble Supreme Court has, *inter alia,* considered that there is no denial that the Government has a right to amend, modify or even rescind a particular Scheme and further that in complex economic matters every decision is necessarily empiric which is based on experimentation or trial and error method and therefore, its validity cannot be tested on any rigid prior considerations. The Hon'ble Supreme Court has even referred to the law laid down in ***Balco Employees' Union*** (*supra*) and has noticed that the executive action relating to economic activities should be viewed with greater latitude than the laws touching civil rights, such as freedom of speech and religion, etc. and further that the legislature should be allowed

some play in the joints because it has to deal with complex economic problems. Noticing the said legal principle about the scope of interference by a Court in exercise of its power of judicial review in such matters, the Hon'ble Supreme Court has further posed a question which was, "*as to whether such alteration, amendment, modification or recession of a Scheme can be done retrospectively thereby taking away some right that had accrued in favour of some other persons?"* These observations have been made in paragraph 109 of the report in ***Kanak Exports*** (*supra*), which has been quoted herein above. This question posed has been replied in paragraph 113.

29. Accordingly, the submission being urged on behalf of the respondents that the Central Government is empowered in public interest to issue notification under Section 5 of the FTDR Act having retrospective effect stands considered by Hon'ble Supreme Court in ***Kanak Exports*** (*supra*). We may notice that considering the said aspect of the matter, the Hon'ble Supreme Court has clearly held that Section 5 of the FTDR Act does not empower the Central Government to issue any notification with retrospective effect.

30. Similarly, on the aforesaid legal principle, we are of the opinion that any order made by the Central Government under Section 3 of the FTDR Act, being a piece of subordinate legislation, cannot have retrospective effect.

We, thus, conclude that Central Government lacks any power or authority available to it under Section 3 and Section 5 of the FTDR Act to either make an order or notification having retrospective effect.

Whether any right can be said to have vested in or accrued to chilli exporters in respect of the exports effected by them between 01.04.2021 to 08.09.2021

31. From the narration of the facts as above, it is clear that the TMA Scheme was first introduced by way of the notification dated 27.02.2019 read with the notification dated 29.03.2019 and the incentive under the said Scheme was admissible to the chilli exporters for exports effected from 01.03.2019 to 31.03.2020. Before the expiry of the period for which the TMA Scheme was effected in terms of the notification dated 27.02.2019 read with notification dated 29.03.2019, a notification on 17.03.2020 was issued making the said Scheme applicable and effective till 31.03.2021. Accordingly, so far as the applicability of the Scheme and the incentive admissible therein between the period 01.09.2019 till 31.03.2021 are concerned, there is no dispute and in fact, there cannot be any dispute.

32. However, what is noticeable is that after expiry of the Scheme on 31.03.2021, a notification was issued only after a period of about six months, i.e. on 09.09.2021, whereby revised Scheme was introduced for exports effected between 01.04.2021 and 31.03.2022. As a matter of fact, the notification dated 09.09.2021 issued by the Central Government has retrospective effect.

So far as the period 01.04.2021 till 08.09.2021 is concerned, we may notice with emphasis that during this period, i.e. between 01.04.2021 and 08.09.2021, the Scheme was not in vogue, rather the Scheme was made effective by means of the notification issued after this period of six months, i.e. on 09.09.2021 and it is only on account of the retrospective application of the notification dated 09.09.2021 that the Scheme was continued after

01.04.2021 that the Scheme can be said to be operative from 01.04.2021 till 08.09.2021 and thereafter, till 31.03.2022.

33. The question which needs our consideration, at this juncture, is that once we have held that the Central Government lacks any authority or power under Section 3 read with Section 5 of the FTDR Act to issue any notification or make any order having retrospective effect, so far as the applicability of the notification dated 09.09.2021 for the retrospective period from 01.04.2021 till 08.09.2021 is concerned, can it be said that during this period if any chilli exporter had effected the export, any right would have accrued or vested in such a chilli exporter for seeking the benefit of the incentive Scheme?

The answer to the aforesaid question posed by us is not far from sight. Once it is settled legal position that no notification under Section 5 or an order under Section 3 of the FTDR Act can be issued or made having retrospective effect, applying the notification dated 09.09.2021 before its issuance, i.e. for the period from 01.04.2021 to 08.09.2021, in our opinion, will be absolutely impermissible.

34. As a matter of fact, the chilli exporters could not have envisaged that in future any such notification would be issued on 09.09.2021 and therefore, they would have kept on exporting the chillies between this period, i.e. 01.04.2021 to 08.09.2021 legitimately expecting that the incentive available to the exporters under the TMA Scheme, term of which had already ended on 31.03.2021, would be made available to them in future.

35. It is abundantly clear from the aforesaid facts that between 01.04.2021 till 08.09.2021, no Scheme was in operation which however was sought to be operated with retrospective effect by issuing the notification dated 09.09.2021.

In view of the aforesaid discussion, we have no hesitation to conclude that no right can be said to have accrued to the chilli exporters' during the period from 01.04.2021 to 08.09.2021, even if they had exported the chillies as admittedly during this period no incentive policy was prevalent (which was made applicable with retrospective effect only by issuing the notification dated 09.09.2021). In this regard, it is noticeable that the submission made on behalf of the petitioner that no order or notification could be made by the Central Government under Section 3 or Section 5 of the FTDR Act with retrospective effect, shall be true for the notification dated 09.09.2021 as well for the reason that we have already held that the Central Government is not empowered to make order or issue notification retrospectively under its power or authority available to it under the FTDR Act.

36. Having observed as above, in our opinion, the notification dated 09.09.2021 shall operate prospectively and therefore, if any exporter is found to have exported the chillies on and after 09.09.2021 till 24.03.2022, such an exporter shall be eligible to claim incentive under the TMA Scheme for this period alone, if he is otherwise entitled and eligible for claiming incentive.

37. For the discussions made and reasons given above, we hold that the chilli exporters, who effected the exports between 09.09.2021 and

24.03.2022 are eligible to claim incentive under the notification dated 09.09.2021 for this period alone, if such exporters are otherwise eligible to claim the incentive. In this view, we declare that the notification of foreclosure of the Scheme, dated 25.03.2022, shall have no application so far as the claims of incentive for the exports effected between 01.04.2021 and 08.09.2021 are concerned.

38. The writ petition is, thus, partly allowed and the respondents are directed to process the claims of those chilli exporters under the TMA Scheme issued *vide* notification dated 09.09.2021, who are found to have affected the exports only between 09.09.2021 and 24.03.2022. For the said purpose, the members of the petitioner/association shall be at liberty to lay their respective claims before the concerned authority of the respondents within a period of three weeks from today which shall be considered and decided in accordance with law and keeping in view the observations made herein above, expeditiously.

39. There will be no order as to costs.

(DEVENDRA KUMAR UPADHYAYA)
CHIEF JUSTICE

(TUSHAR RAO GEDELA)
JUDGE

DECEMBER 10, 2025
"shailndra"/S.Rawat