

(1995) 03 MAD CK 0137

In the Madras High Court

Case No : Writ Petition No's. 4566 and 4567 of 1987

Chemicals and Plastics India Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 02-03-1995

Acts Referred:

Constitution of India, 1950 — Article 14

Customs Act, 1962 — Section 159, 25

Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 — Section 10

Citation : (1995) 1 CTC 452 : (1995) 52 ECC 92 : (1995) 78 ELT 410

Hon'ble Judges : Kanakaraj, J

Bench : Single Bench

Advocate : Shri Habibullah Badsha for M/s. S. Subramanian and R. Sasidharan, for the Appellant; Shri C.A. Sundaram, for the Respondent

Judgement

1. The petitioner is engaged in the manufacture of PVC resins, pipes and fittings with its factory at Mettur Dam. They have also an Industrial Plant at Krishangiri for the manufacture of Industrial alcohol. Finding that the power supply from the State Electricity Board is insufficient and often interrupted, the petitioner decided to have a satisfactory 100 per cent power supply to maintain its PVC factory. Accordingly, they decided to have a Power Project for the generation of the electricity to meet its requirements. They obtained a no objection certificate from the Tamil Nadu Government and Electricity Board. They obtained a licence for the import of a 4.8 M.W. combined Cycle Power Project from Japan. It is a Gas Turbine Power Project. The Power Project fell under Heading 84.66 of the Ist Schedule to the Customs Tariff Act, 1975. The first respondent had issued a Notification u/s 25(1) of the Customs Act, 1962 namely, Notification 132/85, dated 19-4-1985 exempting the goods falling under the Heading 84.66 when imported into India for the industrial plants or projects (other than Power Projects including gas turbine Power Projects and fertiliser projects) from so much of the duty of Customs, specified in the schedule to the Act as is in excess of the amount calculated at the rate of 20 per cent ad valorem. The first

respondent also issued a Notification No. 133/85 on 19-4-1985 exempting the goods falling under the Heading 84.66 for power projects (including the turbine power project) from the whole of duty of Customs leviable thereon. Under the Project Imports (Registration of Contract) Regulations, 1965, the petitioner applied on 1-10-1985 for the registration of the contract, reiterating that they are eligible for concessional rate of duty under Notification 133/85. On 7-10-1985 the second respondent granted registration under the Heading 84.66. When the policy was changed the project import came to be classified under Heading 98.01. Similarly new Regulations were annexed as Project Import Regulations, 1986. By way of abundant caution, the petitioner applied on 12-5-1986 seeking approval of the earlier registration. By communication dated 20-5-1986 approval was granted confirming the clearance under entry 98.01. The communication also points out that the subject import will be assessable to duty at 30% plus 25% and not at "Nil" plus 25% ad valorem as applicable to "Power Projects" because the power unit set up by the petitioner was in respect of an on-going project, involved in the manufacture of PVC resin. The ship carrying first part of the consignment arrived at Madras Harbour on 27-5-1986. It has to be noticed that by a Notification 306/86, dated 5-5-1986 an Explanation [was inserted in Notification] No. 133/85. The explanation was as follows :-

"Explanation. - For the purpose of this notification, the expression "Power Projects (including gas turbine power projects)" shall mean such projects whose output or end-product is power, but shall not include captive power plants set up by units engaged in activities other than power generation."

On the basis of the above explanation, the petitioner was required to pay in respect of the entire shipments between 29-5-1986 and 22-9-1986 the Customs duty at 55 per cent. Having regard to the requirement, the petitioner paid the duty under protest and the same worked out to Rs. 2,76,35,382/-. According to the petitioner he had paid an excess duty of Rs. 151 lakhs because the benefit of the Notification 133/85 had been wrongly denied to him on the basis of the said explanation. The petitioner has filed these two writ petitions, one for a declaration that the Explanation introduced by Notification No. 306/86 dated 5-5-1986 is unconstitutional, ultra vires and void and the other for a mandamus to assess the goods under Tariff 98.01 read with Notification No. 133/85 ignoring Notification No. 306/86. In effect the petitioner seeks refund of the alleged excess duty paid to the tune of Rs. 151 lakhs. According to the petitioner Notification No. 306/86 is wholly arbitrary and discriminatory. It seems to bring out clarification which has no nexus with the objects of the exemption notification. Alternatively, it is contended that the petitioner has sought for the sale of the excess power generated by them and permission had been so granted by the State Electricity Board. Therefore, in any event, the petitioners are entitled to get the benefit of Notification No. 133/85. It is also contended that an explanation cannot alter or take away the benefit granted by the impugned notification.

2. A counter affidavit has been filed by the respondents stating that the subject consignments arrived at the Madras Port only after the said Notification 306/86, dated 5-5-1986 and therefore, the meaning given to the word "Power Project" has to be understood only in accordance with the said explanation. It is pointed out that the petitioner had imported the goods with wide open eyes knowing the contents of Notification 306/86. The allegations that the impugned Notification 306/86 is arbitrary and introduces an invidious discrimination between two classes of Power Projects are denied. According to the respondents, the explanation has reasonable nexus to the object sought to be achieved by Notification 133/85. The power plant installed by the petitioners is only for captive consumption of the electricity and the mere fact that they are selling the excess production cannot alter the situation. It is pointed out that the Government has sufficient power to grant, withdraw and annual or modify the exemption granted under the Act.

3. It is an undisputed fact that the petitioners are only engaged in the manufacture of PVC resins, pipes and fittings. It is only for the purpose of meeting their own power requirements that they had decided to set up a Power Project. It is also not disputed that only if they have an excess power they will sell the same to others. These facts are admitted in the affidavit of the petitioner. It is also not disputed that if the explanation, as such, applies to the case of the subject imports the petitioner will not get the benefit of the concessional rate of duty as provided in Notification No. 133/85. This is precisely the reason why explanation is challenged as arbitrary and discriminatory. In projecting the case of the petitioner, Mr. Habibullah Badsha, learned Senior Counsel raises the following points :-

1. The purpose of the exemption is to encourage power production and private generation of electricity. Therefore, there is no purpose in differentiating between Power Projects which exclusively engage in the production of electricity and captive Power Projects set up by Units engaged in activities other than power generation. The argument is both the Power Projects are generating electricity and the purpose of exemption being to encourage such power generation plants, no differentiation can be made between two. In other words, it is pointed out that by supplying themselves the electricity needed for their PVC factory, the petitioners to that extent do not draw electricity from the State Electricity Board. To that extent, therefore, the State Electricity Board saves power, otherwise the petitioner's PVC factory will be drawing a huge amount of power from the State Electricity Board. The argument is the production of electricity for captive consumption or otherwise goes to the benefit of the State.

2. The second arguments is the purpose of an explanation is only to explain the meaning of the main provision and it cannot take away the benefit granted under the main provision.

3. Thirdly, it is pointed out that Section 25 of the Customs Act does not empower the Government to issue a notification like 306/86 and the same is not within the

four corners of the said section.

4. Lastly, it is contended that in as much as the Tamil Nadu Government has permitted the petitioner to sell the excess electricity produced by the petitioner to the outsiders, the petitioner cannot be deemed to be a captive power plant.

4. At the outset I must point out that there is a judgment of the Orissa High Court on the very notification which fully supports the case of the petitioner and if the said judgment is followed the present writ petitions have to be allowed. On the other hand, Mr. C.A. Sundaram, for the respondents says that certain important points were not brought to the notice of the High Court and therefore, this Court should independently consider the issue and hold against the petitioners. I therefore, do not propose to straightway refer to the Orissa High Court Judgment which is reported in *Indian Charge Chrome Ltd. Vs. Union of India (UOI)*, and I will independently consider the arguments on first principles and then refer to the Orissa High Court Judgment. In support of his arguments, Mr. Habibullah Badsha first refers to the judgment of the Supreme Court in *I.E. Newspapers (Bombay) P. Ltd. v. Union of India*, . That case related to the import of Newsprint involved in the production of Newspapers. By a Notification u/s 25 of the Customs Act certain concessions had been extended, with regard to the duty leviable on the import of Newsprint. The petitioners in that case were aggrieved by another Notification u/s 25(2) of the Customs Act, dated 1-3-1981 and 28-2-1982 which deny the importers the exemption that was available to them earlier. The Apex Court was concerned with the question whether the petitioners in that case were entitled to a particular rate of exemption and whether the subsequent notifications issued under the Customs Act were invalid and arbitrary. It is in this connection that the Supreme Court observed as follows :-

"We do not, therefore, find much substance in the contention that the courts cannot at all exercise Judicial control over the impugned notifications. In cases where the power vested in the Government is a power which has got to be exercised in the public interest as it happens to be here, the Court may require the Government to exercise that power in a reasonable way in accordance with the spirit of the Constitution.

The fact that a notification issued u/s 25(1) of the Customs Act, 1962 is required to be laid before Parliament u/s 159 thereof does not make any substantial difference as regards the jurisdiction of the court to pronounce on its validity".

Holding that a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute and that such a subordinate legislation may be questioned on any grounds on which the plenary legislation can be questioned. The Supreme Court observed :

"Hence the claim made on behalf of the Government that the impugned notifications are beyond the reach of the administrative law cannot be accepted without qualification even though all the grounds that may be urged against an

administrative order may not be available against them".

5. It must however, be observed that the Supreme Court was particularly concerned with the freedom of speech in that case and they had repeatedly observed that by levying a high customs duty the freedom of press cannot be interfered with. Ultimately, however, the Apex Court only directed the Government of India reconsider the question of levy of import duty or auxiliary duty on the import of Newsprint within a period of six months from the date of the judgment. Learned counsel then relies on the judgment of the Orissa High Court for the proposition that the introduction of the explanation is arbitrary, irrational and has no nexus with the objects sought to be achieved. The Orissa High Court held that the Government had not placed any material to indicate the nexus for making a classification between Power Projects generating power alone and the projects generating power as well as manufacturing some other products.

6. On the question of propriety of an introducing explanation to deprive class of Power Projects from the benefit of the main notification, it is argued that an explanation cannot be used for such a purpose. Reliance is placed on in S. Sundaram Pillai and Others Vs. `R. Pattabiraman and Others, . The Apex Court was considering an explanation added to the proviso to Section 10(2) of the Tamil Nadu Buildings (Lease and Rent Control) Act, the meaning of the word "default" was sought to be explained by an explanation, the majority decision upheld the validity of the explanation. It was observed :-

"It is now well settled that an explanation added to a statutory provision is not a substantive provision in any sense of the term but as the plain meaning of the word itself shows it is merely meant to explain or clarify certain ambiguities which may have crept in the statutory provision."

Again the Supreme Court observed :-

"52. Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an explanation of a statutory provision is -

- (a) to explain the meaning and intendment of the Act itself,
- (b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,
- (c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,
- (d) an explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and
- (e) it cannot, however, take away a statutory right with which may person under

a statute has been clothed or set at naught the working of the Act by becoming a hindrance in the interpretation of the same."

7. In my opinion, the observations of the Supreme Court with regard to the object of an explanation will not directly apply to the subject explanation issued u/s 25 of the Customs Act. As rightly pointed out by Mr. C. A. Sundaram, for the respondents, customs duty is levied under the Indian Customs Act in the interest of the public and with a view to augment the revenue of the Government. An exemption is given u/s 25 of the Customs Act in appropriate cases, if the Government is satisfied that there is some other corresponding public interest, justifying such exemption. In other words, in the absence of any such exemption on a justifiable cause the mandate of the Parliament to collect Customs duty at the prescribed rate cannot be avoided. It is contended that every section of the society has to bear its share of the economic burden of the State. It is therefore, pointed out by Mr. C. A. Sundaram, only where there is a justifiable cause for exempting a class of objects or products from the levy of duty, a notification is issued u/s 25 of the Customs Act. In this case, if the notification, as earlier issued in Notification No. 133/85 had stated that only power projects which are exclusively engaged in the production of power are eligible for exemption, nobody could have questioned the same because it is a policy decision taken in the interest of the public. The intention of the Government is very clear that the power projects intended for their own use should not get benefit of the exemption. Says Mr. C. A. Sundaram that it does not matter whether the intention is made clear either by way of an explanation or by some other method. In other words, when the intention is clear, the Court cannot nullify the intention by merely pointing out that it cannot be by way of an explanation and that it must be by way of a separate notification. It is no doubt true that the same intention can be achieved by introducing a proviso or by some other method of legislation. It appears to me that the intention of the Government is very clear and they did not want the exemption to be given to captive power plants. Therefore, merely because the intention is expressed in the form of explanation, I do not propose to set aside the Notification 306/86. On the other hand, the more important question is whether the Notification makes an invidious discrimination between two classes who are similarly situated.

8. On this question of discrimination, I would do well to extract the main Notification 133/85. It is as follows :-

"In exercise of the powers conferred by sub-section (1) of section 25 of Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods falling under the Heading No. 84.66 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when imported into India for power projects (including gas turbine power projects), from the whole of the duty of customs leviable thereon which is specified in the said First Schedule, subject to the condition that the importer produces a certificate from an officer not below the rank of a Joint Secretary to

the Government of India in the Ministry administratively concerned with the said projects that the goods in question are required for the said projects and recommending grant of the above exemption."

There is no dispute that the certificate required under the notification was produced in this case. Therefore, the argument of the petitioner is that the intention of the Government was to give exemption to all power projects from the levy of duty. The idea is that power generation is below the requirements of consumers leading to frequent power cuts and load shedding. Such irregular supply of electricity does affect many industries especially factories where continuous process is involved. There are cases where to restart an oven in steel industries several hours are required and huge amount of money is involved. A policy decision had been taken to encourage private generation of power and that was only the reason and object of the said notification. In any event the counter-affidavit filed by the respondents does not refer to any other object or purpose to be achieved by the notification. In fact, the Notification 133/85 does not refer to the end-use of the product. According to the respondents the inherent intention to exclude captive power projects can be seen from the original notification itself. I am unable to accept this contention because Notification 133/85 does not spell out any such intention. The repeated reference to the fact that the end-product in the petitioner's industry Poli-Vinyl Chloride resin is not only misleading but fails to advance the case of the respondents. This is because the subject import was with reference to the establishment of a Power Project. The end-product of the power project is only electricity. The fact that the electricity thus produced is used in the petitioner's industry itself and because of such captive consumption the petitioner should be denied the benefit of exemption, does not appeal to me.

9. We will now refer to the Notification 306/86 which introduced the explanation. It is as follows :-

"In the said notification, the following Explanation shall be inserted at the end, namely :-

Explanation. - For the purpose of this notification, the expression "Power Projects (including gas turbine power project" shall mean such projects whose output or end-product is power, but shall not include captive power plants set up by units engaged in activities other than power generation."

The explanation seems to give a meaning to the word "Power Projects". There is no difficulty in understanding the meaning and there is no quarrel about the definition portion. It says that Power Projects shall means projects whose output or end-product is power. So far, there could be no objection and the petitioner is not disqualified on the basis of this definition. I have already pointed out that the subject imports were for a project whose end project was indeed electricity. It is only the last clause of explanation which seeks to exclude captive power plants set up by industries engaged in activities other than power generation which is

called in question by the petitioner. The argument is why should captive power plants be excluded and what is the nexus with the object sought to be achieved by the Notification 133/85 ? The element of distribution has not been spoken to either in the notification or in the counter affidavit. It is only at the stage of argument learned counsel for the respondents emphasises the distribution of power as an important aspect of the notification. The argument of the respondents is, that captive power plant distributes electricity to itself and does not distribute the power to the general public. In other words, the argument is, it is only when a power plant distributes its production of power to other members of the public, the question of exemption will arise and that was the purpose of the notification. I have to once again point out that Notification No. 133/85 does not so many words refer to the distribution aspect of the case and therefore, it is only the explanation which seeks to make an invidious discrimination between Power Projects in general and captive power plants. Learned counsel for the respondents agrees that if the Court comes to the conclusion that it is an invidious discrimination necessarily the explanation has to be struck down.

10. Reliance is placed on R. K. Garg v. Union of India AIR 1981 SC 2138, for the proposition that the presumption of the validity of the legislation is very strong and the Court may take into consideration matters of common knowledge, the matters of common report, the history of times and every other state of affairs which existed at the time of legislation. It is also pointed out that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights, such as freedom of speech, religion etc. It is on this basis that the learned counsel is also seeking to distinguish the judgment of the Supreme Court in I.E. Newspapers (Bombay) P. Ltd. v. Union of India . Even applying the above Rule, I am unable to see how at the time of Notification No. 133/85 there was any intention to exclude captive power projects. The court can take judicial notice of the fact that power generation was below the requirements in many States. Therefore, when Power Project is established, be it, for captive consumption or for distribution to others, the respective State Electricity Boards are saved to that extent because that much of the power is not drawn from the State Electricity Boards. Therefore, in my opinion, on the date of the Notification 133/85, the intention was to exempt all power generation plants. It is only later on, in the year 1986 when the impugned Notification 306/86 was introduced on 1-5-1986 that the respondents have introduced this invidious discrimination excluding captive power plants. The same judgment is used by the respondents for the proposition that Article 14 of the Constitution of India does not forbid reasonable classification of persons, objects and transactions for the purpose of attaining specific ends. He relies on the words in R. K. Garg v. Union of India AIR 1981 SC 2138 :-

"What is necessary in order to pass the test of permissible classification under Article 14 is that the classification must not be "arbitrary, artificial or evasive" but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislature".

To me, it appears that the distinction sought to be made between an exclusive Power Project and a Captive Power Project is artificial and arbitrary. The reason is, both produce electricity and both help the State Electricity Boards to the extent of their power production. The only distinction between the two is that the captive power plant is selfish in supplying power to itself whereas an exclusive Power Project supplied power to others. The main criterion is the production of the power and to that extent helping the State power Boards. The distribution of the power to itself or to others does not have any relation to the purpose of exemption. M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others, is relied upon to suggest that court should not substitute its own judgment for that of the legislature or its agents as to matters within the province of either. It was held in that case that Courts should not supplant the "feel of the expert" by its own views. There can be no quarrel about this proposition because if Notification 133/85 had itself spelt out the purpose of the notification, as an exemption in respect of power plants who not only generated power but distributed the same exclusively to others. That is not the case with the present notification. Even then it might have been open to challenge on the ground of discrimination.

10A. We will now take up the Orissa High Court judgment and how the learned counsel for the respondents is seeking to avoid the same. As already pointed out the facts of the same case as reported in Indian Charge Chrome Ltd. Vs. Union of India (UOI), are as follows :-

The petitioner in that case was a manufacturer of high carbon ferro-chrome/charge Chrome as a 100 per cent Export-oriented unit.

Since the power position in the State of Orissa was very poor, the petitioner set up a captive power plant for generation of power. The very same Notification 133/85 was sought to be availed of for the import of machineries for the captive power plant. The amendment dated 1-5-1986 was challenged as a discriminatory and ultra vires the Constitution of India. There is reference to the industrial policy resolution of the year 1956 and the listing of "generation and distribution of electricity" in the first category of industries in Schedule A of the policy. The argument is that the Orissa High Court having referred to the above aspect of the distribution did not keep in mind that aspect of the case while giving its conclusions. Secondly, it is pointed out that the industry in that case was 100 per cent Export-oriented one. The Orissa High Court has concluded as follows :-

"Thus while classification may be founded on different bases, what is necessary is that there must be a nexus between the basis of classification and the object of Act under consideration. The case in hand classifies "Power Projects" into two groups, namely, (i) projects generating power alone and (ii) projects generating power as well as engaged in manufacturing some other products. The Union Government has not placed any material to indicate the nexus for such classification and the object sought to be achieved by such classification."

In my opinion, the above conclusion has absolutely no relevance to the fact that the industry was 100 per cent Export-oriented. Equally, the question of the distribution of electricity had not been referred to because no material had been placed before the court that exemption was granted in Notification 133/85 only to those industries who were engaged in distributing the power produced by them. I am therefore, in entire agreement with the judgment of the Orissa High Court which applies in all fours to the facts of the present case. I have independently considered the question raised before me and I have noticed that the distinction made between captive power plants and exclusive power plants does not have any nexus to the object sought to be achieved and that both produce power and to that extent help the State Electricity Board. If the petitioner had not established his own..... of power from the State Electricity Board. Therefore, one does not see any difference between the two power projects. Learned counsel for the respondents points out that if the argument of the petitioner is to be accepted it will mean that even generators would qualify for exemption. The case of generators is totally different. They are used only to supplement the regular power supply and they do not supplant the regular supply as in the case of power projects. Further the court is not called upon to decide hypothetical questions.

11. For all the above reasons, I hold that the petitioner is entitled to succeed and accordingly both the writ petitions are allowed. The later part of the Notification 306/86 is quashed. There will however, be no order as to costs.