

(2004) 09 DEL CK 0143

In the Delhi High Court

Case No : Writ Petition (C) No's. 12438-39 of 2004

Go-Go International and Another

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 15-09-2004

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2004) 113 DLT 577 : (2004) 77 DRJ 145 : (2005) 191 ELT 51

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : Jayant Bhushan and Raja Chatterjee, for the Appellant; P.P. Malhotra, A.S.G., Rajeev Mehra and Arvind Kumar for Respondent No.1 and G.L. Rawal and Kuljeet Rawal for Respondent No. 2/AEPC, for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Kishan Kaul, J.—The petitioners being garment exporter and an association of garment exporters respectively are aggrieved by the quota policy instruction and circular imposing conditions for transfer of quota under the Garment Export Quota Policy.

2. The EXIM Policy covers the issue of exports and specifically for garment export Garment Export Entitlement Policy (GEEP) is formulated. The Policy is stated to derive its legislative sanction from the Foreign Trade (Development and Regulation) Act, 1992 (hereinafter to be referred to as "the said Act"). A notification was issued dated 12.11.1999 bringing into force the GEEP for 2000-2004 and the entitlements were permitted to be transferred, which were valid till 30th September of the year and could be extended till 31st December on payment of Bank Guarantee (BG) / Earnest Money Deposit (EMD) at specified rates. There are various categories of quotas including Past Performance Entitlement (PPE), Non-Quota Export Entitlement (NQE) and First Cum First Serve Entitlement (FCFS). In respect of PPE category, allotment till 31st May was transferable; while in case of allotment valid till 30th September, transfer was

allowed till 20th September. In case of NQE, transferability norms of PPE category were to apply and these norms are stated to have been followed for the year 2000-2003.

3. The grievance of the petitioners is the modification in this Policy for transfer of entitlements in quotas for Categories 340/640, 347/348 in USA, Group-II of EU Categories 4, 6, 7 and 26 and Canada Category 5 leaving all other categories for transfer as it is, whereby the entire quota in these categories was prevented from transfer. The petitioners claim to have got information in this behalf in view of the message dated 5.7.2004 for release of quotas under FCFS system instead of the usual transfer.

4. The sole contention advanced by learned Senior Counsel for the petitioners is that such quota is a license to export and when the quota is granted, vested rights accrue which cannot be defeated by amendment of the Policy. The contention, thus, advanced is that the Policy can be amended prospectively, but the bar for transfer created amounts to a retrospective amendment of the Policy. This contention is sought to be substantiated by reference to provisions of the said Act, as the submission is that Section 5 authorises the Central Government to formulate and announce the Export and Import Policy and the right to amend the Policy. It is, thus, submitted that the parent Act itself does not permit any retrospective change in the Policy and the EXIM Policy being at best in the nature of a subordinate legislation cannot be retrospectively made applicable unless authorized by the parent Statute.

5. Respondent No. 2, Apparel Export Promotion Council (AEPC) distributes the quota in terms of the policy of Union of India, respondent No. 1. A circular dated 5.7.2004 was issued in respect of the subject matter and the relevant extract of the same dealing with the matter in issue is as under:

"2. As you are aware, the Quota Policy allows limited flexibility of transfer of quotas under PPE/NQE systems till 20th September. This flexibility is not available to the other systems viz. NIE/FCFS systems.

3. In this context, it has been noticed that during the current year, the actual utilization of quotas in most of traditionally fast moving categories has been low, though quantities have been allocated far in excess of the annual quota limits imposed by the restraining countries. This gives rise to a nagging suspicion that certain vested interests are indulging in increased activity of speculation and hoarding of quotas thereby creating artificial scarcity especially in categories where there has traditionally been a good demand. According to the trade circles, lately there is a spurt in premium for these categories in the market, which if allowed unchecked would affect the genuine exports of the country. Uncertainty in the market would result in some of the genuine exporters not being able to export goods, and there is a possibility that big importers of Indian goods may shift their buying to other textile exporting countries, It might also cause under utilisation of precious quotas and thereby loss to the country-export exchequer,

4. In view of the above, it is felt that there is a need to step in using the power conferred under Para 20 of the policy to control these unwanted tendencies in the market. Accordingly, it has been decided to stop the transfer of quotas under the PPE and NQE systems for YS Categories 340/640, 347/348, Group-II, EU Categories 4, 6, 7 and 26 and Canada Category 5, with immediate effect. This would facilitate genuine exporters and would definitely check the premium in quotas,

5. It has also been decided to agree with the recommendations of QAA for release of quantities under FCFS on 12th July, 2004, as given in his letter dated 29th June, 2004, with the following modifications:

a) EU Category 4 10% b) US Category 347/348 10% c) US Group-II 5MSME d) Canada Category 5 10%"

6. It may be noticed that AEPC is a Section 25 company under the Companies Act, 1956 and performs a dual role of protecting the interest of the exporters and also administering the quota in terms of the policy of the Government of India. A representation was made to the Minister on 6.7,2004 in respect of the aforesaid matter against the change in the Policy. The text of the letter is as under:

"We are very grateful to the Ministry that you have taken our recommendation and agreed to open the quantity. But we found in that order that stopping of transfer of quantities under PPE and NQE systems for US categories 340/640, 347/348, Group-II, EU Categories 4, 6, 7 and 26 and Canada Category 5 with immediate effect.

I have already received representations from all over India that stopping of transfer of quotas will bring great ill to the exporters. The reasons are being--

The change of policy in the mid of the year and end of the quota regime will definitely upset the smooth flow of exports. Simultaneously exporters taken the order thinking that they will apply under FCFS and if they are not able to get it they will buy the quota from the open market to execute their orders.

Now I learnt that more than Rs. 500/- crores worth of orders are in the pipeline and exporters will not be in a position to export if they are not getting quota under FCFS and no opportunities to buy quota from the open market. Not only this will create a panic amongst the exporters, but also will have very adverse affect with the buyers. Buyers may also go out of our country to buy the goods from other countries and it would permanently affect the buyers to come back to India.

The exporters have PPE quota on their hand and may not have order for the category and may have orders in other categories. Usually exporters will sell their unutilised quantities and buy the required categories from the open market. Now this will not be possible and this will also create a very bad impact on exporters" business. Also this will encourage the third party shipments and there is a big risk involved in the third party shipments because the exporters may not

pay the money realized by them to the actual user. Moreover, with the CENVAT regulations, exporters have to go through lot of formalities and hurdles to execute these third party shipments.

We have requested with a rider for 347/348 that it should be exported within 15 days. But this has been allowed to 75 days. This will bring an embargo situation because utilization is Very high and already exists fear amongst the buyers. I hereby request you to have a rider of 15 days for this particular category.

Sir, even though your proposal is good to control the quota premium but it will have a more adverse effect. Hereby, I request you to withdraw your proposal of stopping of transfer of quota immediately so that the trade will have a smooth exports in the wake of end of quota regime."

7. On representation of the Members of AEPC, the matter was reviewed and a communicated dated 14.7.2004 was issued in respect of the matter in question making a relaxation. This was reproduced in the letter of respondent No. 2 of the same date and is as under:

"2. The matter has been considered in the Ministry and it has been felt that there seems to be the genuine case for protecting the small and genuine exporters. Therefore, such exporters may be asked to apply to the AEPC for allowing them purchase of quota, AEPC may check whether the applicant actually does not have the required quota as per the order obtained by him. If the contention is found correct, permission to purchase under transfer may be given to the exporter with the following conditions:

i) The transfer certificate may be issued only against the confirmed orders from specific and reputed buyers with predetermined date of shipment.

ii) The exporters should be ready to export the goods within 10 days.

iii) The exporters have to give the EMD/BG as per the rates prescribed in the FCS system for ensuring export performance.

iv) If the export is not made within the validity of transfer certificate, 50% EMD/BG may be forfeited.

3. The Head Office of AEPC in Delhi shall closely monitor such cases and shall ensure that no irregularities take place. Regular feed back to the Ministry should also be given regarding the progress.

4. You are requested to take further necessary action accordingly and inform the trade suitable under intimation to the Ministry."

8. The policy instruction No. 4/05 was accordingly issued and 2 of the conditions of the Policy referred to by learned Senior Counsel for the petitioners are as under:

"6. The TEC should be stamped as valid for 10 days only.

8. The exporter shall also give an EMD/BG as per rates prescribed in the FCFS for ensuring export performance."

9. A representation was once again made by the members of AEPC in the following terms:

"1. Exporters are not in a position to confirm further orders because they are not sure whether they will get the quota at later stage or not.

2. They cannot fix the price to buyer because they are not able to know the premium while buying the quota at later stage because of these problems, exporters are not able to confirm orders for delivery starting from August onwards.

3. Those exporters who got PPE also cannot back further order because they have to utilise their quantities and then only they can buy to go for further orders.

4. In this system after September 20 which is the last date for transfer of quota, there will not be any exports because they will not be in a position to buy quota after September 20.

5. That 3% HMD is unnecessary burden on exporters.

Sir, the present quota system is arrived after many experimental procedures. It is working for the past 10 years successfully. Now the changing of Policy in the end of quota regime is bring uncertainly among the exporters and also with the buyers.

This is the request of all the exporters from all over India. I hereby humbly request you to please consider to go back to the old systems so that exporters will go ahead with their exports, which they have planned well in advance."

10. There has been one further development during pendency of the matter as on the representations of the trade, the aforesaid issue was settled inasmuch as the restriction of 10 days for execution of the orders was removed. This was communicated by respondent No. 2 in terms of a communication dated 27.8.2004, which reads as under:

"1. This has reference to Chairman, AEPC letter number AEPC/T/CH/2004/10,000 dated 15th July, 2004 and this Ministry's fax message of even number dated 14th July, 2004 regarding permission for transfer of quotas with certain conditions. There have been representations in the Ministry from various Exporters Associations / Confederation and other individual exporters also. They have expressed practical difficulties in executing their orders within 10 days, in the light of restrictions on transfer of quotas in certain categories.

2. It has been found that the last date of transfer of quota being 20th September, 2004, along with the restriction of 10 days of validity of PPT/NQT, the exporters who are not having adequate quota in a particular country / category,

will face problems in respect of export of their goods after 30th September, 2004. Keeping in view the genuine difficulties of exporters for shipment of their goods and for ensuring exports for the period after 30th September, 2004, it has been decided to do away with the condition of exports of goods within 10 days.

3. The other conditions of this Ministry's fax message of even number dated 14th July, 2004 would remain unchanged.

4. The Head Office of AEPC in Delhi shall closely monitor such cases. Regular feedback to the Ministry should also be given regarding the process.

5. You are requested to take further necessary action accordingly, and inform the trade suitably under intimation to the Ministry."

11. At the inception of the arguments itself, learned Senior Counsel for the petitioners fairly stated that the petitioners were not resting the case either on the principles of promissory estoppel or legitimate expectation as the scope of the modification of the Government Policy is much wider in these two cases, but such change is not permissible in the case of vested right. It is for this reason that the complete edifice of the arguments has been built only on the issue of vested right.

12. Learned Senior Counsel referred to judgment of the Supreme Court in S.B. International Ltd. and Others Vs. Asstt. Director General of Foreign Trade and Others, . The matter in issue related to the application for an advance import license. The value-addition norms were specified, but subsequently, the same were changed pursuant to a policy decision. It was held that the date of issue of license and not the date of application would govern the value to be applicable and that no vested right accrued to the licensee for issuance of advance license. It was observed in paras 8 and 10 as under:

"8. The first question in these appeals is whether a vested right accrued to the appellant for issuance of advance licenses as per the value addition norm in vogue on the date of filing of the said applications the moment it made those applications and whether any subsequent change in policy effected before the issuance of licenses, is not applicable to such licenses. For answering this question, one has to look to the policy itself, the material clauses of which have already been set out. The said provisions make it clear that the object behind the Scheme is to enable the exporter to import raw materials, components, etc., required for the purpose of producing goods for export. It is a facility provided by the Government -- an incentive. There is no right to advance license apart from the policy. No citizen has a advance license, the licensing authority tells the licensee -- "I am permitting you to import raw material, components, etc. of a particular value free of duties but you must export goods of a particular value (determined as per value addition norm in vogue on the date of license) within a particular date. If you fail to do so, you will be liable to levy of penalties and other action according to law." The duty-free import of raw materials, etc. is permitted to enable the exporter to sell his goods abroad at a more competitive

price, thereby fetching precious foreign exchange for the country. Mere making of application does not create any right in the applicant since he has no pre-policy. The situation could have been different if the policy had said that a person exporting goods of a particular value shall be entitled to an port license of a particular value, in such a case, the export of goods can be said to create a right in the applicant to get an import license of the specified value. Here is a case, where one has to ask for an import license promising to export goods of a particular value within a particular time. It is difficult to appreciate how can it be said in such a situation that mere filing of an application creates a vested legal right to obtain a license according to the value addition norm in vogue on the date of the application. It is the date of the license shat it is relevant and not the date of application therefore. It is obvious that the norm (value addition norm) in vogue on the date of grant of license shall govern the license. The mere fact that the authorities have a discretion to take into account the exports made after the date of application for advance licenses makes no difference to this position; it is the nature of yet another concession. What is relevant is that the license granted under Chapter VII of the policy is an advance license. It is granted in advance of export --rather to enable the export. The theory of a vested right accruing to the applicant to get a license as per the norms in force on the date of application is inconceivable in such a situation -- unless, of course, the policy itself says so.

10. We are, Therefore, of the opinion that the contention that a vested right accrues to an applicant for issuance of advance license on the basis of the norm obtaining on the date of application is unacceptable. The scheme and the context militate against the contention. The fact that the policy is statutory in nature (delegated legislation) has no relevance on the question at issue. It would be wrong to equate the filing of an application for advance license with the filing of a suit where it is held that appeal being a substantive right, the right of appeal inhering in the party on the date of filing of the suit cannot be taken away by a subsequent change in law."

13. Learned Senior Counsel contended that the quota was like a license and, thus, once the license was granted (being the quota), a vested right accrued, which could not be affected by the change of the Policy.

14. Learned Senior Counsel referred to judgment of the Supreme Court in Dr. Indramani Pyarelal Gupta Vs. W.R. Nathu and Others, . The reference was made to the minority judgment of Subba Rao, J. on the ground that in respect of the matter relied upon, the majority had not expressed any view and that this minority view had been subsequently followed in another judgment of the Supreme Court. The observations referred to are at pages 763 and 766 to 768 dealing with the issue of the delegated legislative power being exercised retrospectively. It was observed at page 763 as under:

"... Learned Counselor the respondents contends that, as the Legislature can make a law with retrospective operation, so too a delegated authority can make a bye-law with the same effect. This argument ignores the essential distinction

between a Legislature functioning exercise of the powers conferred on it under the Constitution and a body entrusted by the said Legislature with power to make subordinate Legislation. In the case of the Legislature, Article 246 of the Constitution confers a plenary power of Legislation subject to the limitations mentioned therein and in other provisions of the Constitution in respect of appropriate entries in the Seventh Schedule. This Court in *The Union of India Vs. Madan Gopal Kabra*, held that the Legislature can always Legislature retrospectively, unless there is any prohibition under the Constitution which has created it. But the same rule cannot obviously be applied to the Central Government exercising delegated Legislative power for the scope of their power is not co-extensive with that of Parliament. This distinction is clearly brought out by the learned Judges of the Allahabad High Court in *Modi Food Products Ltd. Vs. Commr. of Sales Tax, U.P., ...*"

It was further observed at pages 766 to 768 as under:

"... It is true that this is a case of a license issued by an authority in exercise of a statutory powers conferred on it, but the same principle must apply to a bye-law made by an authority in exercise of a power conferred under a statute. Our Constitution promises to usher in a welfare State, It involves conferment of powers of subordinate legislation on Government and Governmental agencies affecting every aspect of human activity. The regulatory process is fast becoming an ubiquitous element in our life. In a welfare State, perhaps, it is inevitable, for the simple reason that Parliament or Legislature cannot be expected to provide for all possible contingencies. But there is no effective machinery to control the rule-making powers, or to prevent its diversion through authoritarian channels. If the conferment of power to make delegated Legislation proprio vigore carried with it to make a rule or bye-law with retrospective operation, it may become an instrument of oppression. In these circumstances, it has been rightly held that the provision conferring such a power must be strictly construed and unless a statute expressly confers a powers to make a rule or bye-law retrospectively, it must be held that it has not conferred any such power. It is said that such a strict construction may prevent a rule making authority from making a rule in an emergency, though the occasion demands or justifies a rule with retrospective effect. The simple answer to this alleged difficulty is that if the Legislature contemplates or visualizes such emergencies, calling for the making of such rules or bye-laws with retrospective effect, it should expressly confer such power. It is also said that the Government can be relied upon to make such rules only on appropriate occasions. This Court cannot recognize implied powers pregnant with potentialities for mischief on such assumptions. That apart, the scope or ambit of a rule cannot be made to depend upon the status of a functionary entrusted with a rule making power. In public interest the least the court can do is to construe provisions conferring such a power strictly and to confine its scope to that clearly expressed therein...."

15. A reference was made to judgment of the Supreme Court in *Income Tax*

Officer, Alleppey Vs. M.C. Ponnose and Others, where in para 5 while referring to the minority view of Subba Rao, J., it was observed as under:

"5. Now it is open to a sovereign Legislature to enact laws which have retrospective operation. Even when the Parliament enacts retrospective laws such laws are, in the words of Willes, J., in *Phillips v. Eyre*, 40. Law J Rep (NS) QB at p. 37, "no doubt prima facie of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the, character of past transactions carried on upon the faith of the then existing law." The Courts will not, Therefore, ascribe retrospectively to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the Legislature. The Parliament can delegate its legislative power within the recognised limits. Where any rule or regulation is made by any person or authority to whom such powers have been delegated by the Legislature it may or may not be possible to make the same so as to give retrospective operation. It will depend on the language employed in the statutory provision which may in express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect. But where no such language is to be found it has been held by the Courts that the persons or authority-exercising subordinate legislative functions cannot make a rule, regulation or bye-law which can operate with retrospective effect; (see *Subba Rao, J. in Dr. Indramani Pyarelal Gupta Vs. W.R. Nathu and Others*, , the majority not having expressed any different opinion on the point; *Modi Food Products Ltd. Vs. Commr. of Sales Tax, U.P.*, ; *India Sugar Refineries Ltd. v. State of Mysore*, AIR (1960) Mysore 326 and *General S. Shivdev Singh and Anr. v. The State of Punjab and Ors.* 1959 PLR 514."

16. Learned Senior Counsel sought to contend that a distinction has to be made between the principles of promissory estoppel and legitimate expectation and those of vested right. In view of the stand of the respondents relying upon the decision of the Division Bench of this Court in CWP No. 4713/1995 with connected matters titled "All India Garments Non-Quota Manufacturers Exporters Association and Ors. v. Union of India and Ors." decided on 13.05.1996, a distinction was sought to be drawn in respect of the observations made there under. One of the three pleas raised on behalf of the petitioners while dealing with the change of the Garment Policy was creation of a vested right in the petitioners as is apparent from page 15 of the said judgment. This plea was dealt with by reference to judgment of the Supreme Court in *S.B. International Ltd.*'s case (supra). The plea was rejected on the ground that the petitioners do not have a vested right to get the quota. The distinction, thus, sought to be carved out by learned Senior Counsel was that the quota had not been issued in the said case, while in the present case, the quota had been issued and the terms and conditions of that quota was sought to be changed.

17. It was also pointed out that this judgment of the Division Bench was

delivered on 13.5.1996 while the Supreme Court dealt with the same Policy arising from a judgment of the Madras High Court on 9.5.1996, which could not be brought to notice of the Division Bench. This judgment is P.T.R. Exports (Madras) Pvt. Ltd. and others Vs. Union of India and others, where it was observed in paras 4 and 5 as under:

"4. An applicant has no vested right to have export or import licenses in terms of the policies in force at the date of his making application. For obvious reasons, granting of licenses depends upon the policy prevailing on the date of the grant of the license or permit. The authority concerned may be in a better position to have the overall picture of diverse factors to grant permit or refuse to grant permission to import or export goods. The decision, Therefore, would be taken from diverse economic perspectives which the executive is in a better informed position unless, as we have stated earlier, the refusal is mala fide or is an abuse of the power in which event it is for the applicant to plead and prove to the satisfaction of the court that the refusal was vitiated by the above factors.

5. It would, Therefore, be clear that grant of license depends upon the policy prevailing as on the date of the grant of the license. The Court, Therefore, would not bind the Government with a policy which was existing on the date of application as per previous policy. A prior decision would not bind the Government for all times to come. When the Government is satisfied that change in the policy was necessary in the public interest, it would be entitled to revise the policy and lay down new policy. The court, Therefore, would prefer to allow free play to the Government to evolve fiscal policy in the public interest and to act upon the same. Equally, the Government is left free to determine priorities in the matters of allocations or allotments or utilisation of its finances in the public interest. It is equally entitled, Therefore, to issue or withdraw or modify the export or import policy in accordance with the scheme evolved. We, Therefore, hold that the petitioners have no vested or accrued right for the issuance of permits on the MEE or NQE, nor is the Government bound by its previous policy, it would be open to the Government to evolve the new schemes and the petitioners would get their legitimate expectations accomplished in accordance with either of the two schemes subject to their satisfying the conditions required in the scheme. The High Court, Therefore, was right in its conclusion that the Government is not barred by the promises or legitimate expectations from evolving new policy in the impugned notification."

18. Learned Senior Counsel submitted that if after the grant of license, changes can be permitted, it could even go to the extent of cancelling the license. This cannot be permitted as a vested right had accrued on the grant of license (quota) and it was not a mere case of promissory estoppel.

19. A further judgment referred to by learned Senior Counsel again on the basis of the stand of the respondents having relied upon the same was in the case of M.K. Jain and Anr. v. Union of India and Anr. 2002 VII AD (DELHI) 513. The judgment of learned Single Judge of this Court and the facts were similar to the

extent that there was a ban in transfer in respect of certain items imposed during currency of the quota. In fact, it was not even disputed by learned Senior Counsel that the facts are apposite, but the contention was that the plea of vested right was neither claimed nor argued. A reference in this behalf was placed on para 8 of the judgment to show that the impugned notice was challenged on the ground of not being in public interest, contrary to principles of promissory estoppel, legitimate expectation and the rule of audi alteram partem. It was further assailed on the ground of lack of authority of law and was alleged to be a mala fide exercise of the power. Learned Senior Counsel, thus, contended that even if facts are identical, the judgment can be a precedent only for the ratio and since the plea of vested right was neither raised nor answered in M.K. Jain's case (supra), the petitioners cannot be thrown out in the present proceedings merely by reference to the said judgment.

20. In order to substantiate the said plea, learned Senior Counsel referred to the minority view in judgment of the Supreme Court in Dalbir Singh and Others Vs. State of Punjab, . It was stated that though this was the minority view, which dissented from the majority judgment, there was no dispute on the particular proposition to the effect that a judgment cannot be a binding precedent on an issue even if there are similar facts since the proposition of law was not raised, It was observed in para 22 as under:

"22. With greatest respect, the majority decision in Rajendra Prasad case (supra) does not lay down any legal principle of general applicability. A decision on a question of sentence depending upon the facts and circumstances of a particular case, can never be regarded as a binding precedent, much less "law declared" within the meaning of Article 141 of the Constitution so as to bind all courts within the territory of India. According to the well-settled theory of precedents every decision contains three basic ingredients--

(i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct or perceptible facts;

(ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and

(iii) judgment based on the combined effect of (i) and (ii) above.

For the purposes of the parties themselves and their privies, ingredient (iii) is the material element in the decision for it determines finally their rights and liabilities in relation to the subject-matter of the action. It is the judgment that estops the parties from reopening the dispute. However, for the purpose of the doctrine of precedents, ingredient (ii) is the vital element in the decision. This indeed is the ratio decidendi It is not everything said by a Judge when giving judgment that constitutes a precedent. The only thing in a judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyze a decision and isolate from it the ratio decidedly In the leading case of Qualcast (Wolverhampton) Ltd. v. Havnes, LR 1959 AC 743 : (1953) All ER 38

applied to the legal problems raised by the facts as found, upon which the decision is based. The other two elements in the decision are not precedents. The judgment is not binding (except directly on the parties themselves), nor are the findings of facts. This means that even where the direct facts of an earlier case appear to be identical to those of the case before the court, the Judge is not bound to draw the same inference as drawn in the earlier case."

21. To the same effect, reliance was placed on judgment of the Constitution Bench of the Supreme Court in *S.P. Gupta Vs. President of India and Others*, where it was observed that it is elementary that what is binding on the court in a subsequent case is not the conclusion arrived at in a previous decision but the ratio of that decision, for it is the ration which binds as a precedent and not the conclusion.

22. Learned Senior Counsel in the end referred to the Policy dated 12.11.1999 itself where para 4 deals with the system of allotment under different categories. The said para 4 is as under:

"4. Systems of Allotment--

(i) Quantities for export in each allotment year shall be allocated under the following systems at rates indicated against each of them:

System	of	Allotment	Percentage	of	Annual	Level
(a) Past Performance Entitlement (PPE) System 70% (out of which HVE) (5%)						
(b) New Investor's Entitlement (NIB) System 15%						
(c) Non Quota Entitlement (NQE) System 5%						
(d) First Come First Served (FCFS) Entitlement System 10% _____ 100 Total						

(ii) Quantities that become available from time to time on account of surrenders, flexibilities or otherwise shall also be allocated under the First Come First Served (FCFS) System.

(iii) The Ministry of Textiles reserves the right to allocate entitlements in variation with the above, in case it is considered so desirable, in view of changes in the demand pattern and/or other relevant considerations. The Ministry may also reserve quantities for knitwear, woollen products, children's wear or any other Country/Category. Such reserved quantities will operate in the FCFS System for the products for which they have been reserved, up to 30 September and unallocated balance from the reserved quantities as on 1 October will be made available for applications in the FCFS System, without any reservations for such Countries/Categories."

23. Both learned Additional Solicitors General appearing for respondent No. 1,

UOI and learned Counsel for respondent No. 2, AEPC opposed the petition. Learned ASG contended that the matter is outside the scope of judicial challenge being a pure policy matter and in public interest in view of the reasons set out for the change. Learned ASG referred to the Policy itself where in para 5, PPE system has been dealt with. The quantities earmarked for allotment in this system are to be made available on 1st January and applications are to be invited by the Quota Administering Authority during the previous year. The allotment, utilization and transferability of this quota is as under:

"Allotment, Utilisation and Transferability

(v) The allotment will be in two parts, each consisting of 50% of the allotment. The first part will be valid from the date of allotment till the 31st of May and second part will be valid till the 30th of September.

(vi) In the case of allotment valid till the 31st of May, transfers may be allowed till the last date, but the original quota holder or the transferee shall get the certification/endorsement of shipment in respect of the entitlement by the 31st of May. Such certification/ endorsement shall be valid for shipment up to the 20th of June of the quota year. Unutilised quotas (non-certified or non-shipped) shall lapse.

(vii) In case of allotment valid till the 30th of September, transfers may be allowed till 20th September. The original quota holder or transferee may get an extension thereof till the 31st of December on payment of BG/EMD at the rates given below, subject to the condition that the extension sought is for a specific buyer. One time change of buyer can be allowed by DG, AEPC without changing other conditions applicable."

24. Learned ASG, thus, submitted that this quota is in two portions and in respect of the second portion, transfer was permitted till 20th September. An extension could be granted till 31st December on payment of BG/EMD subject to the condition that extension is sought for the specific buyer. One-time change of buyer could, however, be allowed. The lapsed portion of this quota of both the parts would go to FCFS quota. Learned ASG submitted that the object was to see that the quota was fully utilized and did not remain unutilized by reason of any speculative transfer of the quota.

25. The Export and Import Policy itself was referred to for its various provisions to contend that there could not be any vested right in favor of the petitioners. It was submitted that the license was not a right and in this behalf, clause 4.7 of the said Policy was referred to, which is as under:

"4.7 No person may claim a license as a right and the Director General of Foreign Trade or the licensing authority shall have the power to refuse to grant or renew a license in accordance with the provisions of the Act and the Rules made there under,"

The foresaid Clause 4.7 was also further sought to be read along with para 1.3

which gave right to the Central Government to make any amendment to the Policy and is as under:

"1.3 The Central Government reserves the right in public interest to make any amendments to this Policy in exercise of the powers conferred by section 5 of the Act, Such amendment shall be made by means of a Notification published in the Gazette of India."

Para 4.11 dealt with the specification of procedure by the Director General of Foreign Trade (DGFT) and in case of any doubt about the interpretation of the said Policy, the same was to be referred to the DGFT.

26. Learned ASG also referred to para 4 of the Garment Policy dated 12.11.1999 extracted above which dealt with the systems of allotment and the right reserved by the Ministry to allocate entitlements in variation of the above. The reserved quantities could operate in FCFS system and the basis had to be the base year, which was defined in para 3 of the said policy and reads as under:

"3. Base Year

The phrase "Base Year" for an allotment year, wherever appearing in this notification, shall mean the calendar year preceding the year immediately before that allotment year. For example, for the allotment year 2000, the base year shall be 1998."

27. Learned ASG submitted that public interest is the paramount consideration and this is apparent from the last para 20 of the Garment Policy, which is as under:

"20. Right of the Government to make Amendment--

Government reserves the right to make amendments to and of the foregoing provisions in the public interest, without giving prior notice."

28. It was submitted that representation of the trade had been suitably dealt with and 10 days" restriction has been removed as communicated by respondent No. 2 to its members in terms of the circular dated 27.8.2004.

29. Learned ASG referred to the counter affidavit for the stand of UOI and the reasons for taking the decision in question. It was submitted that the quota regime was to be completely abolished by 1st January, 2005 and the object was the optimum export revenue by efficient administration of the quota system. The legal backing for distribution of the quota is derived from Section 5 of the said Act and respondent No. 2, AEPC is designated as the Quota Administering Authority. There is a limited flexibility of the transfer of quotas under PPE/NQE system till 20th September, but the same is not available for the other quotas. In view of the end of the quota regime, the flexibility of carry forward from the year 2005 is not available. Not only this, EU and US have taken a stand that the administered annual quota limits on basis of date of export and not date of entry and, thus, shipment exported in 2004 and entering US/EU in 2005 would still be

subject to 2004 quota limits and would, thus, have to be set off against the quota of 2004, The result of this is stated to be that unlike the preceding years, year-end shipments would not get charged to the next year's quota levels and in view of the restricted availability, the Government had genuine concern for administering the quota. The object of the change was to nullify the artificial scarcity and consequent high premium, which eroded the margins of exporters. The higher the quota premium, the higher is the cost price for the exporter, which he has to recover from the buyer and this aspect has to be considered where the importers have a choice to import from competing countries including India. This high premium was, thus, stated to result in non-competitive rates, which may result in the importers shifting towards buyers from other countries.

30. The Government was stated to be predisposed to opening quantities far in excess of the annual levels and, thus, additional quantities were released on 12.7.2004 under FCFS system. It was noticed that the utilization of certain traditionally fast moving categories was much lower in comparison to the last year's utilization despite the fact that the quantities had been opened in excess of annual quota limits. There was, thus, all round demand for opening more quantities under FCFS system. The Government is stated to have been faced with the situation where the genuine exporters were unable to meet their committed obligations for want of quotas and, on the other hand, there were grim prospects of gross under-utilization of the precious quotas. It was in respect of the aforesaid scenario that the Government had exercised the power conferred under para 20 of the Garment Policy to correct the anomaly and control the unwanted quota manipulations. The transfer of PPE/ NQE quota in the specified categories was banned so as to avoid embargo situation. The aforesaid material was, thus, referred to to substantiate the plea of public interest.

31. The subsequent representations particularly from small exporters who had booked export orders depending on buying of quota from the market resulted in dilution of the restriction to facilitate execution of such orders. Such exporters were, thus, permitted to apply to respondent No. 2 for allowing them to obtain quota by transfer subject to the following conditions:

- "a. The transfer certificate may be issued only against the confirmed orders from specific and reputed buyers with predetermined date of shipment.
- b. The exporters should be ready to export the goods within 10 days.
- c. The exporters have to give the EMD/BG as per the rates prescribed in the FCFS System for ensuring export performance.
- d. If the export is not made within the validity of transfer certificate, 50% EMD/BG may be forfeited."

The aforesaid was further relaxed in terms of the circular dated 27.8.2004 removing the restriction (b) for readiness to export the goods within 10 days.

32. The aspect, which was emphasized on behalf of the respondents, was that

the plea of vested right was really an after thought in view of the fact that no ground mentioned such a plea. In fact, in rebuttal to this plea, the only ground which learned Senior Counsel for the petitioner was able to point out was Ground K, which is as under:

"K. That the change in policy midstream after the quota were allotted to the petitioner is a retrospective amendment which is not perceivable (though it should be permissible) in law."

Learned Senior Counsel on this aspect, thus, submitted that though the plea of vested right had not been stated in so many words, Ground K implied the same thing.

33. On the plea of vested right, learned ASG referred to judgment of the Supreme Court in *BALCO Employees Union (Regd.) Vs. Union of India and Others*, , where in para 92, it was observed as under:

"92. In a democracy, it is the prerogative of each elected Government to follow its own policy. Often a change in Government may result in the shift in focus or change in economic policies. Any such change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or mala fide, a decision bringing about change cannot per se interfered with by the Court."

34. In nutshell, the plea of learned ASG is that there is a right to amend the Policy in public interest, especially in terms of para 20 of the Garment Policy and the change of economic policy is permissible, especially in view of the observations in *Balco Employees' Union's* case (supra) and there is no specific plea of vested right in the writ petition.

35. Learned counsel for respondent No. 2, AEPC adopted the same submissions and by referring to the counter affidavit submitted that no one can have a Fundamental Right or a vested right or interest after allocation of entitlement. It was, thus, submitted that it was open to the Government to vary the terms of the Policy if it is in public interest and the amendment had been brought in to curb cornering of quota which resulted in rising of the premium and ultimately affecting the earning of foreign exchange. This aspect had to be considered with the fact that the validity of quota under the two systems of PPE and NQE could be extended up to 31st December on payment of EMD/BG and complying with other requirements which were not really disputed.

36. In rebuttal, learned Senior Counsel for the petitioners disputed the three main submissions on the ground that para 20 of the Garment Policy could not affect quotas already allocated and if this was permitted, it would amount to a retrospective change and would be illegal under the said Act as no retrospective amendment was permitted under the said Act. The Policy at best being a subordinate legislation could not alter such a right. The judgment of the Supreme Court in *Balco Employees' Union's* case (supra) was sought to be distinguished

by reference to the fact that para 92 talked about vested interest an not vested right, which was distinct and that the plea of vested right was, in fact, taken in Ground K.

37. In the end, it was submitted that the cat was out of the bag as the respondents really relied upon the factum of the further release of FCFS quota on 12.8.2004 to avoid embargo situation in case of violation of multi-lateral agreement, which position had arisen on account of the release of such quota after the writ petition had been filed.

38. I have considered the submissions advanced by learned Counsel for the parties.

39. A reading of the counter affidavits of the respondents and submissions made in that behalf clearly shows that the matter in issue is a well-considered decision by the Government of India and there is no mala fide or other factors responsible for taking the decision. The mere fact that FCFS quota was released on 12.8.2004 after filing of the writ petition will not imply that the same is the sole motive of taking the decision whereby certain bi-lateral agreements with different countries have to be fulfilled.

40. It has to be appreciated that the quota regime is coming to an end towards the end of the year. The object of the Government naturally should be to see to the maximum utilization of the quota. If quota lapses, there is loss of foreign exchange earnings.

41. The original Garment Policy of 12.11.1999 itself shows that there are different categories of quotas, which are to be allocated for which respondent No. 2, AEPC is the Quota Administering Authority. In so far as NQE quota is concerned, the guidelines for PPE quota are to apply mutes mutandi in terms of para 7(vi) of the said Garment Policy. The allotment, utilisation and transferability of PPE quota are dealt with in paras 5(v) to 5(xi). The allotment is split into two parts of 50 per cent each. The first allotment is valid up to 31st May and the second till 30th September. The quota in question is the one which is valid till 30th September and only transfers were allowed till 20th September, which could be extended till 31st December subject to the condition of production of BG / EMD and the extension being sought for a specific buyer. Thus, these stipulations are contained in the original Policy itself, which were never challenged.

42. The communication dated 5.7.2004 records that the actual utilisation of quota in most traditionally fast moving categories had been low, though quantities had been allocated far in excess of annual quota limits imposed by the restraining countries. A suspicion, thus, arose that speculation and hoarding of quotas was taking place creating artificial scarcity in respect of certain categories. This was likely to result in some genuine exporters not being able to fulfill their export commitments because of non-availability of quota and, thus, there would be under-utilization of quotas. It was in these circumstances that the

power was exercised in para 20 of the Garment Policy, which clearly gave the right to the Government to make amendment in public interest. The discussion shows that it is in public interest as it is to prevent such hoarding and in order to ensure proper utilization of quota. The ultimate object was to facilitate genuine exporters and check premium in quotas.

43. A representation had been received from the trade regarding release of quantities of FCFS quota which was simultaneously acceded to and this is recorded in the letter dated 6.7.2004 of respondent No. 2. Thus, though there was happiness on the issue of opening the quantity, there was grievance in respect of stopping of transfer. There was part review in terms of the letter dated 14.7.2004 to the extent of protecting small and genuine exporters and such exporters were asked to apply to respondent No. 2 for allowing them purchase of quota. Transfer was, thus, directed to be permitted but only against confirmed orders for specific and reputed buyers with pre-determined date of shipment and the exporter should be ready to export goods within 10 days. The exporter has to also give EMD / BG as per the rates prescribed in FCFS system. The further reconsideration which has arisen is post filing of the writ petition vide communication dated 27.8.2004. The condition of export of goods within 10 days was, thus, done away with and to that extent, the grievance of the petitioners and the trade stands redressed.

44. Learned Senior Counsel for the petitioners, however, sought to contend that even this relaxation did not solve all the problems and the very right of the respondents to provide for such restriction cannot be sustained. This plea is based on the sole defense of a vested right.

45. Learned Senior Counsel has referred to the fact that the said Act does not permit retrospective change in the Policy being in the nature of a subordinate legislation and in this behalf has referred to judgments in Dr. Indramani Pyarelal Gupta's case (supra) and The Income Tax Officer, Alleppy's case (supra).

46. In my considered view, there is really no doubt about the proposition that retrospective changes in legislation can only be if the enactment itself provides for it. In respect of subordinate legislation in the form of the Export and Import Policy, this would come into play only if say an export was made and thereafter the terms and conditions of the same were sought to be changed. That is not the position in the present case. The question, thus, arise whether the mere issuance of quota itself would imply that once the same is issued, there cannot be a change in the Policy affecting the quota.

47. In my considered view, the petitioners cannot claim any such vested right on the issuance of quota and the judgment in S.B. International Ltd.'s case (supra) is not of assistance to the petitioners since that matter dealt with the issue of changes with reference to validity of the date of application or the date of license. In case of a quota, there is a possibility of both itself utilisation and non-utilisation. In case of non-utilisation, the quota lapses. If the grant of quota and

thereafter on its transfer or otherwise had resulted in further action of utilisation of the same, could such a vested right said to have accrued.

48. There is no doubt that in AH India Garments Non-Quota Manufacturers Exporters Association's case (supra), the claim of vested right was rejected, but that quota had not been allocated. The same issue had come up in P.T.R. Exports (Madras) Pvt. Ltd. 's case (supra) and the Supreme Court observed that a prior decision would not bind the Government for all times to come when the Government is satisfied that change in the policy was necessary in public interest and it would be entitled to revise the policy and lay down new policy. The Supreme Court, thus, observed that it would prefer to allow free play to the Government in such matters of allocation or allotment or utilisation. These observations were made in the very context of these different quotas of garment and, thus, in my considered view, this issue is no more rest Integra.

49. There can again be no doubt about the proposition that a judgment is binding on the principles of law laid down by it. Mere similarity of facts, without the legal proposition being considered, would really not be a precedent as observed in Dalbir Singh's case (supra). However, the judgment in M.K. Jain's case (supra) cannot be totally ignored. The matter in issue was identical. The right to make change in the policy by restricting such transfers of quota was upheld. To that extent, the ratio is settled and is a precedent. The reasons for the restriction therein also was the same attempt at speculation in the market, which was sought to be curtailed. The only issue is that while dealing with this aspect, the plea of vested right was not specifically raised. Thus, the question would be whether the plea of vested right raised by the petitioners could be entertained and could give rise to a different conclusion. As observed above, I do not find any creation of vested right in this behalf.

50. The relevance of the judgment in Balco Employees' Union's case (supra) cannot be ignored which emphasises the free play to the Government on matters of economic policy even if it adversely affected some vested interests.

51. It is material to note that the Garment Policy itself envisages changes in terms of para 20 of the Policy on grounds of public interest. It is this public interest which has resulted in the restriction on transfers. The right of the Government to restrict transfer is, thus, an integral part of the grant of quota. What is relevant is also the review of the decision partially by the respondents on representations of the trade where substantially the grievances of the trade have been remedied. The difficulties expressed by the trade in implementation of such restriction were, thus, taken care of. Transfer is, thus, permitted but subject to certain terms and conditions. Even these terms and conditions have been further watered down in terms of the circular dated 27.8.2004.

52. There is also substance in the contention of the respondents that what was sought to be argued was clearly not the theme of the writ petition. There is at best an oblique reference in Ground K to the aspect of retrospective amendment

in the Policy made after allotment of quota. The substance and direction of the writ petition is, in fact, not what was argued though, strictly speaking, it cannot be said that the plea of vested right was totally absent, though not stated in those terms. There is also absence of any material particulars of what are the quotas purchased by petitioner No. 1 and how the restriction on transfer is going to affect its performance. There is, thus, absence of any material particulars and the challenge is general in nature.

53. In view of the aforesaid position, I am of the considered view that no such vested rights are said to have been created in favor of the petitioners by issuance of the quota and the respondents were well within their rights to amend the Policy to put a restriction in certain categories of PPE / NQE quota for transfer which transfer was subsequently permitted but subject to observance of certain terms and conditions.

54. Dismissed leaving the parties to bear their own costs.