

(1979) 11 DEL CK 0037
In the Delhi High Court
Case No : Civil Writ No. 1517 of 1979

H. Jahangir Bhatusha

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 14-11-1979

Acts Referred:

Citation : (1984) 15 ELT 106

Hon'ble Judges : V.S. Deshpande, C.J.; Harish Chandra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

V.S. Deshpande, C.J.—u/s 25 of the Customs Act, 1962 (the Act)-

"(1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification goods of any specified description from the whole or any part of duty of customs livable thereon.

(2) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from the payment of duty, under circumstances of an exceptional nature to be stated in such order, any goods on which duty is leviable."

In exercise of this power the Central Government passed the following order on 17th March, 1979 :

"Subject : Import of vegetable oils by State Trading Corporation- Exemption from duty thereof.

I am directed to say that in view of high international prices of vegetable oils and in order to keep the domestic prices of vanaspathi at reasonable levels, it has been felt that certain specified vegetable non-essential oils imported by S.T.C. would need to be exempted from part of the customs duty.

2. Having regard to the circumstances of exceptional nature as mentioned above and in exercise of the powers conferred by Sub-section (2) of Section 25 of the Customs Act, 1962 (52 of 1962) read with subsection (4) of clause 31 of the Finance Bill, 1979, which clause has by virtue of the declaration made in the said Bill under the provisional Collection of Taxes Act, 1931 (16 of 1931), the force of law, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts in all a total quantity of three lakh tonnes of soybean oil, sunflower oil, rapeseed oil, palm oil and palm olein falling within Chapter 15 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), and to be imported by M/s. State Trading Corporation of India Limited from,-

(a) that portion of the duty of customs livable thereon which is specified in the said First Schedule as is in excess of 5 percent ad valorem;

(b) the whole of the auxiliary duty of customs which is livable thereon under sub-clause (1) of clause 31 of the Finance Bill, 1979; and

(c) the whole of the additional duty livable thereon u/s 3 of the said Customs Tariff Act.

3. This exemption shall be in force up to and inclusive of the 30th day of June, 1979."

Similar orders were passed in respect of the stated quantities of six lakhs tonnes and five lakhs tonnes on 26th June and 31st October, 1979.

2. The petitioners had entered into contracts for purchase of some of the commodities mentioned in the above notification with foreign sellers prior to the 2nd December, 1979. Normally, these contracts would have become impossible of performance u/s 56 of the Contract Act which is based on the doctrine of frustration. The Import and Export Central Act, 1947, the Import Control Order issued there under as also the annual Import Policies are, however, supplemented by a Handbook of Imports & Exports procedure issued by the Chief Controller of Imports & Exports. It is provided in it that normally the Government would honour commitments made by Indian importers under firm contracts with foreign sellers entered into prior to the imposition of the ban. Import licenses would be issued for such imports contracted prior to the ban subject to certain conditions. The petitioners and other persons have secured import licenses under this provision or by successful writ petitioner under Article 226 of the Constitution. The result is that the purchases made by the petitioners prior to 2nd December, 1978 are imported by them after 2nd December, 1978 for the above reasons. There is thus an essential difference between the petitioners who have imported the commodities under contracts entered into prior to 2nd December, 1978 and the State Trading Corporation (STC) who is granted the monopoly of imports of these articles from 2-12-1978 and the onwards, inasmuch as the contracts of purchase by the S.T.C. would ordinarily be those which are entered into after 2-12-1978. We have had occasions to hear numerous writ petitions regarding the import of these articles and found that the

international prices of these articles have been rising from before 2nd December, 1978 and thereafter. It is likely, Therefore, that the purchases made by the petitioners from the foreign sellers may be at prices lower than the prices which would be paid by the S.T.C. to the foreign sellers after 2nd December, 1978.

3. It is against the above background that we have to understand the powers exercised by the Central Government from time to time u/s 25(1) and Section 25(2) of the Customs Act in regard to the customs duty payable on these commodities. The Customs Tariff Act, 1975, Schedule I, Section 1, Entry 15.07 imposed a duty on these commodities at 60% on the value of the goods to be imported. On 1st July, 1977, however, the Government ordered u/s 25(1) of the Customs Act, a total exemption of these commodities from the payment of customs duty on imports. Thus for some time these commodities were imported totally without payment of duty. The reason was obvious. For some time there has been a shortage of vanaspathi in the country and edible oils had to be imported from abroad to help manufacture of vanaspathi at a cheaper rate by reducing the level of prices of the edible oils inside the country. This policy of total exemption was modified on 1st March, 1979 when the Government ordered that the exemption from payment of customs duty on these articles shall be confined to the difference between the duty of 60% and the duty of 12 1/2%. All imports of these commodities were, Therefore, liable to the payment of duty at 12 1/2%,. Since the canalisation of the import of these commodities had already vested the monopoly of these imports in the S.T.C. from 2nd December, 1978, this modification in the exemption really concerned the imports to be made by the S.T.C. It was only incidental that the modification also affected stray persons like the petitioners, who adventitiously happened to import these commodities after the ban of 2nd December, 1978 because of the concession given to them by the Government honouring their pre-ban commitments. No complaint was made by any one against this notification.

4. Then came the impugned notifications of 17th March, 1979, 26th June, 1979 and 31st October, 1979, the first of which has been fully reproduced above. They reduced the duty payable by the S.T.C. from 12 1/2% to 5%. These notifications are silent about imports made by persons other than the S.T.C. The reason for the silence is also apparent. After the ban of 2nd December, 1978 almost the whole of the import of these commodities is by the S.T.C. which has been given the monopoly of it. The only exception is the imports made by the petitioners of goods bought by them prior to the ban and allowed to be imported by them on the ground that their contracts had been concluded prior to 2nd December, 1978.

5. The writ petitions have been filed to impugn the advantage given to the S.T.C. by these impugned notifications which reduced the duty payable by the S.T.C. to 5% ad valorem, while keeping the duty payable by the petitioners at 12 1/2 % ad valorem. At the time of the admission of the writ petitions reference was made to Section 12 of the Customs Act to show that no discrimination would be made in the imposition of customs duty between the goods belonging to the

Government and the goods belonging to others. An interim injunction was also secured directing the Customs authorities to allow the petitioners to clear their imported goods on payment of only 5% duty on furnishing bank guarantee for the remaining 7 1/2% duty and on agreeing to pay interest at 6% per annum on the amount of the unpaid duty if the writ petitions were to be eventually dismissed. At that stage and indeed till the date of the argument, the impugned notifications were never placed before us and our attention was never drawn to Section 25 and the difference between Sub-section (1) and Sub-section (2) thereof. When we became aware of them we decided to finally hear the writ petitions and dispose them of even though the respondents could not file the counter-affidavits. It was because of the interim relief that had been granted and that it became urgent to decide the writ petitions expeditiously.

6. The main attack by the writ petitioners on the impugned notifications is based on Article 14 of the Constitution. It is argued for them that the action of the Government in charging only 5% duty on goods imported by the S.T.C. while charging 12 1/2% duty on the goods imported by the petitioners in contrary to Article 14 of the Constitution and as such discriminatory against the petitioners.

7. The burden to prove discrimination is on the petitioners. To discharge this burden, they have first to prove that they and the S.T.C. are similarly situated in respect of the imports of these commodities and the liability to pay the customs duty. In our view they have not discharged the burden. The difference between them and the S.T.C. are apparent. The petitioners have purchased these goods at prices current prior to 2-12-1978. The S.T.C. has stepped into the field of import of these commodities only because of the canalisation on 2-12-1978. The purchases of these commodities abroad by the S.T.C. are, Therefore, likely to have been made after 2-12-1978 at the prices current after 2-12-1978. As stated above, the international prices of these commodities prior to 2-12-1978 were likely to be lower than the prices which obtained after 2-12-1978. The profit margin of the petitioners on the sale of the imported goods in India was thus likely to be higher than the profit margin of the S.T.C., if the S.T.C. was to pay the same rate of customs duty on the import of these goods, namely 12 1/2%. Normally, these commodities will be sold in the Indian market at one level of prices because of the economic laws of demand and supply. The level of prices would be comparatively high because both the S.T.C. and the petitioners would be paying 12 1/2% duty on these imports.

7A. According to the recital in the impugned notification, in view of high international prices of vegetable oils, the Government wanted to keep the domestic prices of vanaspathi at reasonable level in our country. Since the vanaspathi is manufactured from vegetable non-essential oils, the Government decided to reduce the duty on the import of these oils. Since the import prices of these oils was a component in the price at which vanaspathi would be sold in our country, the Government apparently thought that reduction of the duty on the import of these oils would make cheaper raw-material available for the

manufacture of vanaspathi and keep the vanaspathi price low.

It is to be noted that the impugned action was taken by the Government u/s 25(2) of the Act. In this context the following clarifications have to be made. Firstly, Section 25 does not at all mean that the Government is bound thereby to impose a uniform customs duty on the goods belonging to the Government as also to the goods imported by other persons. It was because the petitioner gave us this impression that these writ petitions were admitted and interim reliefs granted. It is now seen that the only object of Section 25 is to make it clear that there was no bar to the imposition of customs duty on goods belonging to the Government. This had to be made explicit so that the provisions of the Customs Act would be made applicable to goods imported by the Government. Otherwise, it could have been argued that no customs duty could be imposed on goods imported by the Government inasmuch as the customs duty is imposed by the Government and it could not be imposed on the goods belonging to the Government itself. The object of Section 25 was thus limited and did not go beyond this. Section 25 does not mean that the customs duty must be the same on the goods belonging to the Government as the goods belonging to the other persons.

8. This becomes clear when Section 25 is read dutifully Sub-section (1) of Section 25 gives the Government a general power of exemption of customs duty on the import of goods. Such exemption may be either partial or total. An order made u/s 25(1) pre-supposes that the entry imposing customs duty in the Schedule to the Customs Tariff Act, 1975 remains unchanged. The operation of the said entry is only modified by the notification issued u/s 25(1).

Section 25(2) differs from Section 25(1). An order u/s 25(2) can be made only under the following conditions :

- (1) The Central Government must be satisfied that it is necessary in the public interest so to do;
- (2) A special order has to be passed in each case;
- (3) The exemption from the payment of duty can be made only under circumstances of an exceptional nature; and
- (4) Such circumstances have to be stated in such an order.

It will be seen that conditions to be fulfilled before an action under subsection (2) of Section 25 is taken are quite rigorous. Firstly, the Government had the information regarding the prices at which goods were purchased by the S.T.C. abroad. On this information the Government could be satisfied that it was in public interest to grant partial exemption from payment of duty to the S.T.C. The Government could not be expected to know at what prices the goods had been purchased by the petitioners abroad, nor have the petitioners given this information either to the Government or to the Court. If the petitioners contend that the duty payable by the petitioners should have been reduced by the

Government to 5%, it was the duty of the petitioners to have placed before the Government the information as to the price which the petitioners had paid for the import of the goods abroad. The Government would have then been able to know if the petitioners and the S.T.C. were similarly situated. It is only then that the Government could be satisfied that public interest existed in the reduction of duty not only on the goods imported by the S.T.C., but also on the goods imported by the petitioners.

Secondly, the impugned orders are the special orders passed by the Government restricted to specific quantities of oil imported by the S.T.C. This is because the prices of these quantities would be known to the Government. An estimate could be made by the Government in respect of these quantities as to the effect the import of such quantities of oil would have on the price of the oil and, Therefore, of the vanaspathi in the Indian market. No such estimate could be made regarding the imports made by the petitioners. This is why general exemption was granted to all u/s 25(1), but a special exemption could be granted to the S.T.C. alone u/s 25(2).

Thirdly, the basis of the powers exercisable u/s 25(2) is the existence of circumstances of an exceptional nature. These circumstances are the necessity to maintain the vanaspathi prices at a reasonable level in the country. This object could be achieved by the Central Government in either of the two ways. The Government could either impose a control on the price of the imported oils and of the price of the vanaspathi or the Government could reduce the customs duty on the import of the oils, so that the costs of production of the vanaspathi would be reduced, thus producing the result of keeping the vanaspathi prices at a reasonable level. The Government has chosen the latter way of bringing about this result. Can the petitioners contend that they were similarly situated with the S.T.C. and the Government was thus bound to treat them equally in respect of the reduction of duty as was done with the S.T.C. ? As already stated, the petitioners have already failed to show that they had purchased the oils abroad on the same price at which the S.T.C. purchased it after 2-12-1978. Secondly, the petitioners have also failed to show that they would be willing to sell the oils imported by them in the Indian market at the same price as the S.T.C. would sell it. Unless this is done, the petitioners could not claim the benefit of the reduction of duty which was given to the S.T.C. For, that benefit was given with a specific object in view. The Government could ensure the sale of the oils imported by the S.T.C. at a particular price, but they had no control over the sale of the imported oils by the petitioners. Since the petitioners were not similarly situated with the S.T.C., they cannot invoke Article 14 of the Constitution in respect of their contention.

9. Ensuring of a reasonable price of vanaspathi by the reduction of duty on the import of oils by the S.T.C. can be viewed from another angle. The object of the impugned action was to ensure a reasonable price of vanaspathi. In other words, it was to control the price of vanaspathi not by fixing the sale price directly, but

by making available the raw-material for the making of vanaspathi at a cheaper price by reducing the import duty on the raw-material. The benefit of the reduction of the import duty was given only to the imports made by the S.T.C. for the simple reason that the monopoly of the imports from 2-12-1978 onwards vested in the S.T.C. The question is whether the Central Government was bound to take into account the imports made by the petitioners also. We have already stated above that the petitioners were not similarly situated with the S.T.C. Further, in bringing about a price level of the vanaspathi, the Government had to take into account the cost of the imported raw-material incurred by the S.T.C., which was by far the largest importer from 2-12-1978 onwards because of the monopoly enjoyed by it. The Government was not bound to consider the cost of the import of the oils by small importers like the petitioners. The decision of the Supreme Court in *Shree Meenakshi Mills Ltd. Vs. Union of India (UOI)*, , has shown that a price control measure adopted by the Government cannot be deemed to be an unreasonable restriction on the rights of the petitioners guaranteed by Article 19(1)(g) of the Constitution only because it either reduced the profit margin of the petitioners or even results in some loss to the petitioners. As observed by the Supreme Court in paragraph 82, "It is not shown here that the control price is so grossly inadequate that it not only results in huge losses but also is a threat to the supply position of yarn." In this case also the petitioners have not shown that the effect of the reduction of the price of oils which would be brought about by the reduction of the customs duty payable by the S.T.C. would result in the petitioner incurring huge losses or in a threat to put them out of business. Article 19(6)(ii) of the Constitution makes it constitutional for the Government to enable the S.T.C. which is a Corporation owned or controlled by the S.T.C. to carry one trade or business whether to the exclusion complete or partial of citizens or otherwise. This would show that the monopoly granted to the S.T.C. and the concession granted to it on the payment of import duty to the exclusion of the petitioners is conclusively deemed to be free from any objection so far as Article 19(6)(ii) is concerned. The import of Article 19(6)(ii) is also felt on the challenge based by the petitioners on Article 14.

10. That the classification between the Government or a Government Corporation like the S.T.C., on the one hand, and the petitioners and other private persons, on the other hand, is reasonable is settled by a series of decisions ending in the seven-Judge Bench decision in *Maganlal Chhaganlal (P) Ltd. Vs. Municipal Corporation of Greater Bombay and Others*, . The object of the classification has also a rational connection with the distinction made between the S.T.C. and the petitioners. While the S.T.C. is under the control of the Government the petitioners are not. This is why the benefit of the reduction of duty is given to the S.T.C. alone and not to the petitioners. Moreover, while the cost of the import by the S.T.C. is known to the Government, the cost of the imports by the petitioners is not so known to it. Lastly, the impact of the price of vanaspathi through lowering of the import duty on the imports by the S.T.C. is secured in accordance with the guidelines laid down by Sub-section (2) of Section 25 of the Act. For

these reasons the impugned orders are valid and they have not been shown to be contrary to Article 14 of the Constitution.

11. Mr. A.K. Sen, learned counsel in the connected cases, relied upon the decision of the Supreme Court in *State of Rajasthan Vs. Mukanchand and Others*, where the following observation occurs:

"The Jagirdar's capacity to pay debts had been reduced by the resumption of his lands and the object of the Act was to ameliorate his condition. The fact that the debts are owed to a government or local authority or other bodies mentioned in the impugned part of Section 2(e) has no rational relationship with the object sought to be achieved by the Act."

In our view, this decision has no application to the facts of the present case. The object in that case being a general reduction of the indebtedness of the Jagirdars, the impugned statute was contrary to Article 14 inasmuch as it had the effect of reducing the indebtedness of the Jagirdars only in respect of private creditors but not in respect of the public creditors and no reasonable classification could have been made between private and public creditors. In the present case the object is to keep the prices of vanaspathi at a reasonable level by making available vegetable oils at a reasonable level of prices. Since the general price level has to be reasonable the object could be achieved either by a direct price control as stated above or alternative means of enabling major holder of vegetable oils to keep the said price low, In fixing the price level, the Government was justified in taking into account only the major holder of the vegetable oil, namely, the S.T.C., and it was not expected to take into account the minor holders of the oil, namely, the petitioners. If the price was reasonable in relation to the major holder of the oil, then it would be deemed to be reasonable in respect of other holders of the oil, also.

12. In the result, the petitions are dismissed and the petitioners are directed to pay the customs duty on the goods imported by the petitioners calculated at 12 1/2% on the value of the goods. As the goods were cleared on payment of duty of 5% only under our interim orders, the petitioners are directed to pay to the appropriate authorities the balance of the duty calculated at 7 1/2% duty along with interest on the amount at six per cent per annum from the date of clearance of the goods till the date of payment as already stipulated in the interim orders. The costs of the writ petitions be borne by the parties.