(1995) 01 GAU CK 0025

In the Gauhati High Court

Case No : Civil Rule No''s. 2441 and 3117 of 1994

India Carbon Ltd. APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 25-01-1995

Acts Referred:
Constitution of India, 1950 — Article 14, 16

Citation : (1995) 1 GLR 298

Hon'ble Judges : H.K. Sema, J

Bench : Single Bench

Advocate : P.K. Goswami, A.K. Saraf, S. Mitra and K.K. Gupta, for the Appellant; K.N. Choudhury and K.P. Sarma, Central Govt. Standing Counsel, for the Respondent

Judgement

H.K. Sema, J.—These two Civil Rules are connected, and as such they are being disposed by this common judgment.

2. This case has a chequered history. To appreciate the present controversy, the facts strictly for the purpose of the disposal of the case may be recited.

3. Petitioner No. 1 is a Company, registered under the Companies Act, under the name and style of India Carbon Ltd. and carrying on the business of Manufacture, purchase and sale of Petroleum Coke. Petitioner No. 2 is a share holder of the Petitioner No. 1 Company. The Petitioner?s Company was established in the year 1962 mainly for the purpose of production of Claimed Petroleum Coke (herein after Code of Civil Procedure). To foster the industrial growth and development in the country, from time to time the Central Government introduced scheme offering incentive subsidies to various industries. One such Scheme was introduced by the Government of India to grant Transport subsidy in selected areas by notification dated 23rd July, 1971 to be effective from 15th July, 1971. The scheme was made applicable to all industrial units located in the selected are as both in the public and private sectors barring plantations, refineries and power generating units. The scheme was made

applicable for a period of 5 (five) years but it was subsequently extended by notifications dated 25th February, 1991 and was extended for another period of five years w.e.f. 1.4.90 till 31st March 1995. The scheme was also made applicable to the industries set upon or after 15.7.1971 only. However, by an amendment dated 25.9.86, the scheme was also made applicable to all industrial units which were set up on or after 1.1.1960. The Petitioner?s company which was established in 1962 became entitled to the subsidy w.e.f. 1st September, 1986 the date on which the amendment dated 25.9.86 came into force. After the 1986 amendment of the scheme, the Central Government as well as the State Government considered the claims of the Petitioner?s company for granting transport subsidy of the CPC w.e.f. 1st September, 1986. The Petitioner?s company also received the transport subsidy a sum of Rs. 37.19.993/- for the period of 30th September, 1986 and 30th June, 1987 and a further sum of Rs. 80,87,930/- for the period from 1.7.87 to 31.12.88.

4. However, The Government of India, Ministry of Industry, vide circular dated 30.3.88 issued a clarification that the CPC is a product of refineries, the scheme for transport subsidy is relevant to the movements of raw materials and finished products and the refineries are excluded from the scheme. By the aforesaid circular, it was further clarified that the transport subsidy will not be available on CPC which is a product of the refineries, On being represented by the Government of Assam and the Petitioners by its letter dated 21.6.88 and 5.7.88 respectively, the Government of India on consideration of various aspects of the matter, by its circular dated 8th February, 1989 withdraw the circular dated 30.3.88. It was stated in the letter dated 8th February, 1989 that on the representation received from the Government of Assam, the matter was again re-considered by the Ministry and it was decided to allow transport subsidy to industrial units producing CPC in the notified areas.

5. By a letter dated 18th August, 1989, the circular issued on 8th February, 1989 has been cancelled. By another letter dated 18th August, 1989, the Director of Industries, Government of Assam was requested to recover a sum of Rs. 37,19,993/- reimbursed to the Petitioner?s company as transport subsidy is not admissible on the Code of Civil Procedure. Thereafter, the Petitioner?s company on 11th September, 1989 received a letter dated 7th September, 1989 issued by the Addl. Director of Industries and requested Petitioner?s company to refund the sum of Rs. 37,19,993/-into the Central Government account and Rs. 80,89,930/- in the State Government account received by the Petitioner?s company as transport subsidy on Code of Civil Procedure. The aforesaid impugned letters dated 18th August 1989 of the Central Government and the letter dated 7th September, 1989 of the Addl. Director of Industries, Government of Assam was the subject matter in Civil Rule 1825/89. The learned Single Judge of this Court allowed the petition by its judgment dated 15.2.93 inter alia in terms of the following order in paragraph 6 of its judgment:

On the facts and in the circumstances of the case the doctrine of legitimate

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expectation was attracted. That being the position, the principles of natural justice was to be complied with before making the decision to refuse the Petitioner company to enjoy the subsidy, and also before directing the Petitioner company to refund subsidy.

6. This Court further held in para 8 of its judgment as under:

For the foregoing reasons, the letter dated 18.8.89 cancelling the communication dated 8.2.89 under which the Petitioner company was permitted to enjoy transport subsidy and letter dated 7/8.9.89 by which the Petitioner company was asked to refund the subsidy granted are quashed with a direction to the Central ''''Government to give an opportunity to the Petitioner company of being heard before making any decision in this regard. (emphasis supplied)

7. Pursuant to the aforesaid directions by this Court, in Civil Rule No. 1825/89, the representative of the Petitioner?s company appeared before Joint Secretary, Ministry of Industry on 13.7.93 and explained the position and placed its case. In other words, the representative of the Petitioner?s company was heard on 13.7.93 pursuant to the direction of this Court.

8. In the instant writ proceeding, the Petitioners have assailed the impugned order dated 15.7.94 (Annexure-XXVII) passed by the Under Secretary to the Government of India, Ministry of Industry and order dated 29/30th July, 1994 (Annexure-XXVIII) passed by the Director of Industries, Government of Assam, pursuant to an order dated 15.7.94 passed by the Government of India.

9. It is contended by Mr. P.K. Goswami, learned Counsel for the Petitioners that the impugned order dated 15.7.94 is illegal, arbitrary and not tenable in law inasmuch as no reason whatsoever has been assigned. It is further contended by Mr. Goswami that there was no materials in the facts of the case to support such decisions. Next, it is contended by Mr. Goswami that the Respondents having made categorical and unequivocal terms promises to the Petitioner company for granting of transport subsidy, the Respondents are estopped from resiling from such promises on the principle of the doctrine of the promissory estoppel.

10. Counter on behalf of the Respondents have been filed. The case of the Respondents is taken in pat a 16 of the counter. It is averred in para 16 of the counter that in terms of para 6(XVII) of the scheme, that Union of India is fully empowered to approve or otherwise any claims of transports subsidy.

11. Before I advert to the other points, to appreciate the present controversy, we may have a quick look at the purpose, the aims and the applicability of the scheme. A bare perusal of the scheme it was intended to promote the growth of industry located in certain selected areas because of the hilly and remoteness they are not easily accessible. The scheme was made applicable in both the public and private sectors irrespective of their size, located in the State of Jammu & Kashmir, Assam, Meghalaya, Nagaland and the Union territories of Tripura, Manipur and NEFA (now States). A perusal of para 3 of the scheme,

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three conditions must be fulfilled for getting transport subsidy:

(a) That it must be an industrial unit.

(b) It must be located in the selected areas, and

(e) that it must not be plantation, refineries and power generating units.

12. Petitioner Company is an industrial unit is not disputed by the Respondents, It is also not disputed that it is located in the selected areas. It is also not disputed that the Petitioner?s industrial unit is not plantantion, refineries and power generating units. In this connection, reference may be made to paragraph 38 of the writ petition in which the Petitioner has made specific averment that the Petitioner company at Noonmati, is not a refinery and therefore, CPC which the Petitioner company produces is also not a refinery product. The Respondent did not deny this statement in paragraph 19 of their counter. The transport subsidy scheme 1971 (as amended) is applicable to all industrial units barring plantations, refineries and power generating units in both public and private sectors, (sic) in selected areas. Once the industrial units fulfilled the aforesaid conditions, it is immaterial as to what items and or commodities they produces. Under the scheme, transports subsidy is granted to industrial units and not in respect of a particular item or commodities they produces. Therefore, it is quite erroneous to deny an eligible Industrial unit a transport subsidy on the ground that it produces a particular commodities.

13. Reverting to the facts of the case, admittedly the order impugned, was; passed after hearing the representative of the Petitioner?s company on 13.7.83 pursuant to the direction of this Court. At this stage, it may be pertinent to refer to the impugned order quoted in extenso:

Udyog Bhavan, New Delhi Dated : the 15th July, 1994

TO

The Director of Industries.

Government of Assam,

GUWAHATI.

Sub : Transport Subsidy re-imbursed in respect of M/s. India Carbon Ltd,, Guwahati-Recovery regarding.

Sir,

I am directed to refer to this Department''s letter No. 16/23/88-DBA-II, dated the 18th Aug. 1989 on the subject mentioned above and to say that consequent to the directions of the Gauhati High Court in regard to the writ petition filed by M/S India Carbon Ltd., the question of applicability of the transport subsidy to the Calcined Petroleum Coke (Code of Civil Procedure) was again reviewed and the Government of Indian is still of the view that the transport subsidy on this

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item is not admissible as conveyed already. You are, therefore, again requested to expedite recovery of the money (Rs. 37,19,993) disbursed to M/s. India Carbon Ltd. for transportation of CPC and credit the same to the Central Government''s Account under intimation to this Ministry.

Yours faithfully, Sd/- (C.R. BISWAS) Under Secretary to the Govt, of India.

14. A bare perusal of the impugned order, it clearly appears that no reason Whatsoever has been assigned in refusing the Petitioner?s company the transport subsidy. On the other hand, the impugned order referred to earlier decision conveyed to the parties which has already been quashed by this Court by a judgment dated 15.2.93, passed in Civil Rule No. 1825/89. It will be pertinent to point out that the impugned order dated 15th July, 1994 as revealed from the order itself was passed pursuant to the direction of this Court in Civil Rule No. 1825/89.

15. As already quoted the operative portion of the judgment, this Court while allowing the petition directed the Central Government to give an opportunity to the Petitioner?s company of being heard before making any decision in this regard pursuant to this direction, the representative of the Petitioner?s company was heard on 13.7.93. Direction of opportunity of being heard is implicit in it that such hearing must necessarily be followed by a reasoned order. Hearing of the Petitioner is not an empty formalities, it must be followed by a reasoned order taking into accounts of all consideration and the surrounding facts and circumstance on the basis of which submission had been made before the authority and the reasons for rejecting or acceptance of the submissions and findings thereon. This has not been done in the present case.

16. It is more disturbing that such cryptic order has been passed is a case of grave civil consequences by no other than the highest executive authority representing the Union of India. More so, the order has been passed pursuant to the direction of this Court and alter giving an opportunity of being heard to the Petitioner.

17. By now it is well settled principle of law that any order having penal consequences lacks reason is arbitrary. When an act is arbitrary it is implicit in it that it is unequal as well and is violative of Article 14 of the Constitution.

18. In E.P. Royappa Vs. State of Tamil Nadu and Another, the Apex Court had held in para 85 of its judgment as under:

Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for Stale action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible consideration, it

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would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise; of power and arbitrariness are different lethal radiations emanating from the same vice; in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16.

19. It is contended by Mr. K.N. Choudhury, learned Central standing counsel that in terms of para 6 (XVII) of the scheme, the Union of India is fully empowered to approve or otherwise any claim for transport subsidy. Mr. Choudhury further contended that the power of financial grant is absolutely discretionary and the Petitioner cannot claim such financial grant as a matter of right. Whether or not such financial grant can be extended is the discretionary power of the Central. At this stage, it will be pertinent to refer to the provision of para 6 (XVII) of the scheme.

20. Para 6 (XVII) of me schem runs:

Notwithstanding the provisions of the scheme Government of India and/or the Government of the State/Union Territory concerned have full discretion to refuse to entertain or reject any claims for transport subsidy.

It is true that the Government of India had a discretion to refuse to entertain of reject any claim for transport subsidy. I am however, unable to accept the contention of Mr. Choudhury in the facts and circumstances of this case, firstly because the Petitioner company was selected and in fact granted a subsidy a sum of Rs. 37,19,993/- between 30.9.86 and 30.6.87 and further sum of Rs. 80,89,930/- for the period from 1.7.87, to 21.12.88. It is not the case of the Respondent that the Petitioner?s company does not come within the purview of the scheme 1971 as amended. In fact, as already pointed out that the Petitioner?s company fulfilled the condition precedent and they have been paid the subsidy and in normal circumstances they should be continued getting subsidy grants. When Government of India release the transport subsidy for the period aforesaid, it is presumed that they released the subsidy amount after the application of mind.

21. Further by letter dated 8.2.89, the Government of India on consideration of the various representations received from the Government of Assam and from Petitioner company reconsidered the matter and decided to allow transport subsidy to industrial units producing CPC in the notified areas covered under the transport subsidy scheme. In the letter aforesaid, it was categorically stated that it has been ascertained that CPC can be manufactured either in refinery or by an industrial unit which is not a refinery and therefore, the government of India has decided to allow the transport subsidy to industrial units producing CPC in the notified areas. It is presumed that vide letter dated 8.189 allowing the Petitioner company to enjoy transport subsidy has been decided after the application of mind and having considered the entire aspects of the matter. Therefore, it is not the case of the Respondent that the Petitioner company is not an industrial unit and they are not entitled to get transport subsidy. Now therefore, it is not

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permissible for the Respondents to turn back and say that they have full discretionary power to refuse to entertain or reject any claim for transport subsidy. Such a situation if allowed to happen, it will be repetition of Tiger and Lamb'' story in Aessop''s fable. It is always open to the Respondent Government to change policy or review the policy, but such changes must specify good and compelling reasons but not in exercise of arbitrary discretionary power. In the instant case, the duty cast upon the Respondent is heavy, because of the fact that the Petitioner company has been granted transport subsidy under the scheme and to take away such right to enjoy the transport subsidy the Respondent Government must make out compelling good reasons.

22. Secondly, the impugned order was passed pursuant to the direction of this Court and not in exercise of discretionary power under para 6(XVII) of the scheme, When there is specific direction from the Court and the order is passed pursuant to such direction, it is not permissible for the Respondents to choose the forum to suit its sweet will and say that they have exercised the discretionary power under Para 6(XVII) of the scheme. In the facts and circumstances of this case, the discretionary power under the scheme was not available to the Respondents.

23, Even assuming that such discretionary power is available to the Respondents, the Respondent Government cannot use that discretionary power arbitrarily and to suit its sweet will. By now it is well settled principle of law that there is no unfettered discretionary power in public law.

24. In Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries, the Apex Court had held that there is no unfettered discretion in public law. A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is ''fairplay in action''. The Apex Court further held that:

Even though the highest tenderer can claim no right to have his tender accepted, there being a power while inviting tenders to reject all the tenders, yet the power to reject all the tenders cannot be exercised arbitrarily and must depend for its validity on me existence of cogent reasons for such action.

25. In Khudiram Das Petitioner v. The State of West Bengal and Ors. Respondents, the Apex Court held in para 10 of its judgment as under:

10. There is also one other ground on which the subjective satisfaction reached by an authority can successfully be challenged and it is of late becoming increasingly important. The genesis of this ground is to be found in the famous words of Lord Halsbury in Sharpes v. Wakefield 1891 AC 173 at p. 179:

...when it is said that something is to be done within the discretion of the authorities...that something is to be done according to the rules of reason and justice, not according to private opinion...according to law and not humour, It is to be, not arbitrary, vague, fanciful, but legal and regular.

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26. The Apex Court further held in para 11 of its judgment as under:

11. This discussion is sufficient to show that there is nothing like unfettered discretion immune from judicial reviewability. The truth is that in a Government under law, there can be no such thing as unreviewable discretion. "Law has reached its finest moments," said Justice Douglas,

"When it has freed man from the unlimited discretion some ruler some...official, some bureaucrat...Absolute discretion is a ruthless master. It is more destructive of freedom than any of man''s other inventions." United States v. Wunderlich, (1951) 342 US 98.

And this is much more so in a case where personal liberty is involved. That is why the Courts have devised various methods of judicial control so that power in the hands of an individual officer or authority is not misused or abused or exercised arbitrarily or without any justifiable grounds.

27. In Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, the Apex Court had held in para 20 of its judgment as under:

20. The rule inhibiting arbitrary action by Government which we have discussed above must apply equally where such corporation is dealing with the public, whether by way of giving jobs or entering into contracts or otherwise, and it cannot act arbitrarily and enter into relationship with any person it likes at its sweet will, but its action must be in conformity with some principle which meets the test of reason and relevance.

28. In Rohtas Industries Vs. S.D. Agarwal and Others, the Apex Court had held in para 37 of its judgment as under:

37. In Roncarelli v. Duplessis (1959) SCR (Can LR) 121 while dealing with the discretionary power of the Quebec Liquor Commission to cancel a liquor licence this is what Rand J. observed:

A decision to deny or cancel such a privilege lies within the "discretion" of the Commission; but that means that decision is to be based upon a weighing of considerations pertinent to the object of the administration.

In public regulation of this sort there is no such thing as absolute and untrammelled "discretion" that is that action can be taken on any ground or for any reason administrator; no legislative Act can, contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions.

Discretion" necessarily implies good faith in discharging public duly; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines of objects is just as ''objectionable as fraud or corruption. Could an Applicant be refused a permit because he had been born in

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another province, or because of the colour of his hair. The ordinary language of the legislature cannot be so distorted". In particular we would like to emphasize the observation that "there is always a perspective within which a statute is intended to operate".

29. In S.G. Jaisinghani Vs. Union of India (UOI) and Others, the Apex Court had held in para 14 of its judgment as under:

14. In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law.

30. From the above principle laid down by the Apex Court in a Catena of decision, it is sufficient that there is no unfettered discretionay power, in public law and that exercise of discretionary power must be based on justifiable grounds. From the impugned order quoted above, it is quite clear that no reason has been assigned for arriving at such conclusion and as is presently advised there was no materials before the Respondents on the basis of which such conclusion can be arrived at. The result is that the impugned orders are illegal, arbitrary and liable to be quashed.

31. Mr. Choudhury submits that the policy decision involving financial burden the Court cannot compell the Government to accord sanction. In this connection, he referred to a decision of the Apex Court rendered in Union of India and Ors.... Appellants v. Tejram Parashramiji Bombhate and Ors.... Respondents (1991) 3 SCC 11, where the Apex Court had held that in the policy matter involving financial burden, no Court can compell the Government to accord sanction. This is nobody''s case. The facts of this case is therefore, of no help to the Respondents case.

32. Mr. Choudhury also has drawn my attention to the decision of the Apex II Court rendered in Union of India and others Vs. Hindustan Development Corpn. and others, wherein the Apex Court had held that, the doctrine of legitimate expectation gives the Applicant sufficient locus standi is to be confined mostly to right of a fair hearing before a decision which results in negativing a promise or withdrawing an undertaking is taken. In the instant case, the legitimate expectation has been decided by this Court in Civil Rule No. 1825/89.

33. In view of the aforestated reasons, the impugned order dated 15.7.94, (Annexure-XXVII) and the impugned order dated 29.7.94, (Annexure-XXVIII) being arbitrary and violative of Articles 14 and 16 of the Constitution are hereby quashed. Petitions are allowed. In Civil Rule No. 2441/94, the impugned order

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dated 14.9.93 and impugned order dated 12.1.94, (Annexures XIII and XIV, respectively shall not be applicable in so far with regard to the case of the Petitioners.

In the facts and circumstances of these cases, parties are asked to bear their own costs.

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