
(1993) 04 OHC CK 0013
In the Orissa High Court
Case No : O.J.C. No. 3470 of 1987

Indian Charge Chrome Ltd.	Vs	APPELLANT
Union of India (UOI)		RESPONDENT

Date of Decision : 28-04-1993

Acts Referred:

Constitution (Forty-Second Amendment) Act, 1976 — Section 58(2)
Constitution of India, 1950 — Article 14, 19, 226(3), 265, 301
Customs Act, 1962 — Section 12(1), 155, 25, 25(1)
Project Import (Registration of Contract) Regulations, 1965 — Regulation 3(2), 4

Citation : (1993) 44 ECC 65 : (1994) 72 ELT 538

Hon'ble Judges : G.B. Patnaik, J;B.N. Dash, J

Bench : Division Bench

Advocate : P. Ch. Misra, B.K. Mohanty and S.S. Das, for the Appellant; A.B. Mishra, Senior Standing Counsel (Central), for the Respondent

Final Decision : Allowed

Judgement

G.B. Patnaik, J.—Petitioner No. 1 is a Public Limited Company and petitioner No. 2 is a shareholder of the company. They have filed this writ application to declare the amendment made on 1st of May, 1986, to the Notification No. 133/85-Customs, as well as the Notification No. 67/87-Cus-toms, dated 1-3-1987 to be constitutionally invalid being discriminatory in nature and have further prayed to quash the order of the Assistant Collector of Customs, Paradeep, dated 17th of August, 1987, annexed as Annexure-3, by which order the said Assistant Collector has cancelled the registration of the project contract/85-86. Under the Notification No. 133/85-Customs, dated 19th of April, 1985, which has been issued by the Central Government in exercise of power conferred under Sub-section (1) of the Section 25 of the Customs Act, an Explanation has been added and under the explanation the expression "Powered Projects" shall mean,

" ... such projects whose output of end-product is power, but shall not include captive power plants set up by units engaged in activities other than power generation."

Under Notification No. 67/87-Customs, dated 1-3-1987, goods specified in column (2) of the Table falling under Heading No. 98.01 of the First Schedule to the Customs Tariff Act, 1975, when imported into India have been exempted and though power projects (including gas turbine power 35 per cent ad valorem projects) of capacity 50 Mega Watts and below are described in the Schedule, but an Explanation has been added to the effect that expression "Power Projects" shall mean,

" ... such projects whose output or end-product is power, but shall not include captive power plants set up by projects engaged in activities other than power generation."

These two Notifications have been annexed as Annexures 1 and 2 respectively to the writ application.

2. Petitioner's case in a nutshell is that petitioner No. 1 manufactures high carbon ferro-chrome/charge chrome as a 100 per cent Export-oriented unit. In accordance with the policy of the Union Government and as the normal supply of power in the State of Orissa practically crippled the industry, a Letter of Intent was granted in favour of petitioner No. 1 to set up a captive power plant for generation of power. It entered into two separate contracts dated 28-9-1984 with Gotaverken Energy System and Asea Stal. Under the Customs Tariff Act, 1975, the Central Government has enacted the Project Import (Registration of Contract) Regulations, 1965 (hereinafter referred to as the "Regulations"). Under the aforesaid Regulations, an improper claiming assessment of articles falling under any of the sub-headings of Heading No. 84.66 on their importation has to apply to the proper officer of the Customs at the Port where the goods are to be imported, for registration of the contract, as provided in Regulation 3(2) of the Regulations. Under Regulation 4, the Proper Officer will have to examine the application and be satisfied and will then register the contract by entering the particulars thereof in a book kept for the purpose and assign a number in token of registration and communicate the number to the importer. The said Regulations have been annexed as Annexure-4 to the writ application. Sub-heading No. 84.66 of Section XVI of Chapter 84 deals with item of properties. Clause (d) thereof provides :

"Auxiliary equipment, as well as all components (whether finished or not) or raw materials for the manufacture of the aforesaid items and their components required for the initial setting up of a unit for the substantial expansion of an existing unit, of a Specified :

- (1) Industrial Plant;
- (2) Irrigation Project;
- (3) Power Project;
- (4) Mining Project;

(5) Project for the exploration for oil or other minerals, and

(6) such other projects as the Central Government may, having regard to the economic development of the country, notify in the Official Gazette in this behalf:

Provided ... "

Thus, auxiliary equipment as well as all components or raw materials for the manufacture of the power project without any restriction or limitation come within the ambit of the sub-heading No. 84.66. In accordance with the Regulations, the petitioner No. 1 applied to the Assistant Collector of Customs, Visakhapatnam, who is the Proper Officer for registration of the contract in relation to the petitioner's project to import auxiliary implements for establishment of the 100 per cent export-oriented high carbon ferro chrome/charge-chrome Unit along with the necessary documents. On 28th of January, 1986, petitioner No. 1 applied for registration of the contracts, with Asea Stal and Gotaverken Energy System under the Project Import (Registration of Contract) Regulations, 1965, and for assessment as power project import for 100 per cent export-oriented unit under Tariff Item No. 84.66 of the First Schedule to the Customs Tariff Act, 1975, read with Notification No. 71/85-Cus., dated 17th of March, 1985. All the necessary documents and materials were forwarded by petitioner No. 1 to the Proper Officer. The Government of India by Notification No. 71 dated 17-3-1985 in exercise of powers conferred u/s 25 of the Customs Act exempted goods falling under the Heading 84.66 of the First Schedule to the Customs Tariff Act, 1975, of power projects irrespective of ownership and end-use, whereas industrial plants or projects other than power projects were subjected to 20 per cent ad valorem duty. In view of the aforesaid exemption notification, the Assistant Collector of Customs, Paradeep (opp. party No. 2) by his letter dated 7-2-1986 registered the contract between petitioner No. 1 and Gotaverken Energy System AB, Sweden, as a 100 per cent export-oriented unit power-project and the port of importation in respect of the contract was to be Paradeep. The said order has been annexed as Annexure 7. But the petitioner's application dated 28-1-1986 in respect of the contract with Asea Stal was kept pending and no order had been passed thereon. Petitioner No. 1, therefore, issued reminders to opposite party No. 2 on 31st of March, 1986, and 25th of July, 1986, for registration of the said contract with Asea Stal as shipments were likely to be received. The Central Government by Notification No. 220/86, dated 3-4-1986 in exercise of its power u/s 155 of the Customs Act superseded the Project Import (Registration of Contract) Regulations, 1965, and brought into force a fresh set of Project Import Regulations in relation to goods falling under Heading No. 98.01 which was equivalent to the Heading No. 84.66. On 1-5-1986 the Central Government amended its earlier Notification dated 19th of April, 1985, by inserting an Explanation to give a meaning to the expression "power project" as per Annexure-1. Opposite Party No. 2 finally by his letter dated 17th of August, 1987, rejected the petitioner's application dated 28th of January, 1986, in respect of contract with Asea Stal and by the same letter also cancelled

the earlier registration that had been granted in respect of the petitioner's contract with Gotaverken Energy System. The sole ground on which the petitioner's application to register the contract with Asea Stal has been rejected is that the captive power plant for 100 per cent export-oriented unit is a part of the export-oriented unit project and not an independent project in itself and, therefore, the captive power project is not a power project at all. The further ground of rejection is that M/s. Indian Charge-Chrome Limited is engaged in activities other than power generation and the end-product is "charge-chrome", and not "power" and, therefore, the said captive power plant is not entitled to the benefit of exemption. Petitioners, therefore have approached this Court for quashing of the order of opposite party No. 2 under Annexure-3 as well as the two Notifications issued by the Government of India under Annexures 1 and 2 respectively.

3. Mr. Mohanty appearing for the petitioners contends that the Central Government in exercise of its power u/s 25 of the Customs Act having granted the exemption from levy of duty in respect of all power projects including gas turbine power projects when imported into India as it falls under Heading No. 84.66 of the First Schedule to the Customs Tariff Act, 1975, by the notification dated 17-3-1985, annexed as Annexure-11, the subsequent notifications under Annexures 1 and 2 with the addition of an Explanation to explain the expression "power projects" to mean "such projects whose output or end-product is power but shall not include captive power plants set up by units engaged in activities other than power generation" are arbitrary, irrational and have no reasonable nexus with the object to be achieved and, therefore, the said explanation is illegal, invalid and inoperative and must be struck down. So far as the letter of the Assistant Collector or Customs dated 17-8-1987, annexed as Annexure-3, is concerned, Mr. Mohanty contends that the same is vitiated as the reasons for refusing the application for registration are bad in law and further there is no power under the Regulations to cancel a registration already granted.

4. The opposite parties have filed a counter-affidavit being sworn to by the Assistant Collector, Central Excise & Customs (Law). The stand of the opposite parties is that power having been conferred upon the Central Government to grant exemption on being satisfied that it is necessary in public interest so to do, it has the power to modify an exemption notification either wholly or partially. Such exemption being within the exclusive discretion of the Central Government, the same is immune from being challenged as an unreasonable restriction under Article 19(g) of the Constitution. That apart, the exemption notification really intended to exempt those projects which generate power and supply the same to the consumers, but it was not intended to confer any benefit to the industrialists who have set up captive power plants for running their own factories whose end-product is something else than power and, therefore, though the original notification did not contain any such explanation and brought within itself all the power projects, but by amendment an explanation was added restricting the exemption only in respect of those power projects which generate power and

distribute power to others and, therefore, it is a reasonable classification having a reasonable nexus with the object of exemption and the same cannot be said to be arbitrary or discriminatory.

So far as the letter of the Assistant Collector under Annexure-3 is concerned, the stand taken in the counter-affidavit is that since the petitioner's contracts with the two firms in relation to setting up of a captive power plant do not come within the purview of the amended notifications, and the customs authorities have on an erroneous impression granted registration, the said registration had been cancelled and the petitioner's application dated 28th of January, 1986, has not been allowed and there is no illegality in the same.

5. In view of the rival stand of the parties, the following questions really emerge for our consideration :-

(i) "Power Projects" when imported into India having been exempted from levy of Customs Duty under the Customs Tariff Act, 1975, in view of the Notification of the Government dated 17-3-1985 issued u/s 25(1) of the Customs Act, whether the subsequent notifications explaining the expression "power projects" to mean only "such projects whose output or end-product is power but shall not include captive power-plants set up by units engaged in activities other than power generation" can be said to be hit by Article 14 of the Constitution, on the ground that for such differentiation there is no nexus between the classification made and the object sought to be achieved?

(ii) u/s 25(1) of the Customs Act, power has been conferred upon the Central Government to exempt goods of any specified description from the whole or any part of the duty of customs leviable thereon and thus, whether it is permissible for the Central Government in exercise of such power to issue a notification indicating that "power projects" will not include "captive power plants" set up by units engaged in activities other than power generation?

(iii) Whether the discretionary power of the Central Government in the matter of exemption u/s 25 of the Customs Act can at all be interfered with by the Court and, if so, under what circumstances?

(iv) Whether the letter of the Assistant Collector under Annexure-3 rejecting the petitioner's application for registration can be said to have been based on germane consideration and whether the same is liable to be struck down? and

(v) Whether the registration once granted under the Regulations can at all be cancelled without any power for cancellation in the Regulations?

6. Before embarking upon an enquiry into the questions posed, it would be appropriate to extract a few notifications of the Government which would be relevant for our consideration. The Government of India Notification No. 71/85-Customs, dated 17-3-1985 allowing exemption in respect of goods falling under the Heading No. 84.66 of the First Schedule to the Customs Tariff Act, 1975, is extracted hereinbelow in extenso :-

* * * * * The said notification was superseded by the Notification No. 132/85-Cus., dated 19-4-1985 which is extracted hereinbelow in extenso :-

* * * * * On the same date, the Government of India issued another Notification No. 133/85-Cus., in relation to the power projects falling under Heading No. 84.66 which is extracted hereinbelow :-

* * * * * By Notification No. 306/86-Cus., dated 1-5-1986, the earlier notification dated 19th of April, 1985, was amended and an Explanation was added. The said notification is extracted hereinbelow in extenso :-

* * * * * Finally, after change of tariff heading, the Notification No. 67/87-Cus., dated 1-3-1987 was issued which is extracted hereinbelow in extenso :

* * * * * 7. Generation and distribution of electricity was listed in the first category of industries in Schedule "A" to the Industrial Policy Resolution of 1956 and State undertook the exclusive responsibility for the future development of such industry. Notwithstanding the aforesaid responsibility of generating and distribution of power by the State, enshrined in the Industrial Policy Resolution of the Government of India, the position of power became acute day by day. In the State of Orissa, acute shortage of power led to lack of production in several power-intensive industries which required power as a basic requirement for the manufacture of the product. The power generation system of the State could not supply necessary quantity of power to such industries and indulged in power-cuts to those industries. When Government realised that it would not be in a position to supply power to these power-intensive industries, particularly when the industry is a 100 per cent export-oriented one, it granted permission to install captive power plants so that they could generate power to be used for their own industries, but so far as the excess power is concerned, certain terms and conditions were imposed. We are not concerned with those terms and conditions in the present case. Admittedly the petitioners' unit manufacturing charge-chrome is a 100 per cent export-oriented unit and being faced with acute shortage of power from the power distributing agencies of the State, it undertook to set up its own captive power plant so that the production and manufacture of the charge-chrome will not come to a halt for want of power. Bearing in mind these admitted facts, we will now have to consider the questions posed by us which arise on the contentions advanced by the parties.

8. Coming to the first question posed by us, Sub-section (1) of Section 25 of the Customs Act gives the Central Government a general power of exemption of customs duty on the import of goods. Such exemption may be either partial or total. While exercising power u/s 25(1), the Central Government must be satisfied that it is necessary in the public interest to exempt "power projects" when imported into India from levy of customs duty. Having exempted "power projects" from levy of customs duty in exercise of power of exemption u/s 25(1) of the Customs Act, the question that boils down for consideration is whether there is any reasonable nexus for excluding "captive power plants" set up by

projects engaged in activities other than power generation from the purview of such exemption notification? According to Mr. Mohanty, the learned counsel for the petitioners, the captive power plants set up by different 100 per cent export-oriented industries also generate power and their output and product is also "power". Since power projects are exempted from levy of duty under the Customs Tariff Act, there cannot be any justification to exclude those power projects set up by other projects who not only generate power but also manufacture some other materials. As for instance, petitioner No. 1 manufactures charge-chrome which is a 100 per cent export-oriented industry. It has set up a power project which generates power. Therefore there is no rhyme or reason to exclude the power project of the petitioner from the purview of exemption notification. In support of this contention, reliance has been placed on the decision of the Supreme Court in the case of *Motor General Traders and Anr. v. State of Andhra Pradesh and Ors.*, AIR 1984 Supreme Court 121, wherein their Lordships indicated that though classification is permissible within the ambit of Article 14 of the Constitution, but such classification must satisfy two tests, namely (i) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) the differentia must have a rational relation to the object sought to be achieved by the statute in question. Thus, while classification may be founded on different bases, what is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. The case in hand classifies "power projects" into two groups, namely (i) projects generating power alone and (ii) projects generating power as well as engaged in manufacturing some other products. The Union Government has not placed any material to indicate the nexus for such classification and the object sought to be achieved by such classification.

In course of arguments, learned Standing Counsel for the Union Government places reliance on three decisions which on examination we find have absolutely no application. The first one is the case of *Khyerbari Tea Co. Ltd. and Another Vs. The State of Assam*, and paragraph 19 of the said judgment was pressed into service by the learned Standing Counsel. But the said case deals with the question with regard to the legislative competence under Entry 56 of List II and the effect of a validating taxing statute operating retrospectively and how far it transgresses Articles 304(b) and 265 of the Constitution. We find it difficult to comprehend how this decision is of any assistance in answering the point in issue. The only relevance so far as the said decision is concerned is the observation made by their Lordships in Paragraph 45 to the effect that the power conferred on the Court to strike down a taxing statute if it contravenes the provisions of Articles 14, 19 or 301 of the Constitution has to be exercised with circumspection, bearing in mind that the power of the State to levy taxes for the purpose of governance and for carrying out its welfare activities is a necessary attribute of sovereignty and in that sense it is a power of paramount character. But their Lordships also observed in the self same paragraph that if the

impugned Act imposes unreasonable restrictions on the fundamental rights of a citizen and confers unbridled power on the appropriate authorities or introduces unconstitutional discrimination which in consequence amounts to a colourable exercise of a legislative power, then such a taxing statute can properly be regarded as a purely confiscatory and the power of the Court can be legitimately invoked and exercised. In our considered opinion, therefore, the aforesaid decision of the Supreme Court does not assist the Revenue in any manner to save the impugned notifications by establishing any nexus with the object sought to be achieved for exclusion of the category of power projects from the purview of the exemption notification.

The next decision on which the learned Standing Counsel places reliance is the Full Bench decision of the Gujarat High Court in the case of Ahmedabad Cotton Mfg. Co. Ltd., etc. v. Union of India and Ors. AIR 1977 Gau 113. In the said case their Lordships were examining the question as to whether the writ petitions should abate u/s 58(2) of the Constitution (Forty Second) Amendment Act in view of Article 226(3) of the Constitution and, therefore, the decision is absolutely not on the point in issue.

One other case on which learned Standing Counsel places reliance is the decision of the Supreme Court in the case of Sukhnandan Singh, etc. Vs. Jamiat Singh and Others, where the question for consideration was whether a Civil Court will have jurisdiction to examine the correctness of a decision or order of an authority under the Sea Customs Act. We are at a loss to find as to in what way the aforesaid decision is of any assistance to the Revenue.

9. As stated earlier, when supply of power became acute and power-intensive industries became sick for non-supply of power and the Government permitted those industries to set up captive power plants for generation of power, the Government of India exempted "power projects" from levy of customs duty when imported into India for the obvious reason that the cost of generation of power would otherwise enormously increase. That being the object and not an iota of material having been placed before us to indicate the object or purpose for excluding the power projects which though generate power are yet not entitled to the exemption in question, we have no hesitation to come to the conclusion that it has perpetrated hostile discrimination and the same cannot be sustained. In our considered opinion, the two notifications under Annexures 1 and 2 adding Explanation and excluding "Captive power plants set up by units engaged in activities other than power generation" are grossly discriminatory in nature, without any reasonable nexus with the object sought to be achieved and we accordingly quash those two notifications. The first contention of Mr. Mohanty, the learned counsel for the petitioners, therefore, is sustained.

10. Coming to the second question posed by us, u/s 12(1) of the Customs Act, duties of customs have to be levied at such rates as may be specified under the Customs Tariff Act, 1975 on goods imported into or exported from India. u/s 25(1) of the Act, the Central Government has the power to issue a notification

exempting certain goods from levy of customs duty when imported into India if it is satisfied that it is necessary in the public interest so to do. Having been satisfied about the existence of public interest, it exempted power projects from levy of customs duty when imported into India. There is no further material on record as to why those power projects would be excluded from the purview of the notification where the units are engaged in activities other than power generation. If generation of power which prima facie is entitled to exemption, then these captive power plants which also generate power cannot be excluded from the purview of the notification of exemption.

Though the Union Government has filed a return but excepting reiterating that the Government has power to issue notification u/s 25 of the Customs Act has not indicated any justifiable object for taking out these captive power plants from the purview of the exemption notification. In course of arguments, the learned Senior Standing Counsel for the Central Government urges that a power project and a captive power plant generating power cannot be equated and, therefore, there cannot be any discrimination at all. We are unable to appreciate this contention. The captive power plant is also a power project generating power, but the owner of the said plant has some other business like manufacturing of charge-chrome as in the present case. But that cannot be a ground for excluding the power generation unit from the purview of exemption notification, particularly when the Union Government has not placed an iota of material to establish any nexus for such exclusion and the object that is sought to be achieved thereby. In the aforesaid premises, our answer to the second question is that the Central Government is not entitled to issue a notification u/s 25(1) of the Customs Act excluding captive power plants even though they generate power from the purview of the exemption notification by adding the Explanation in question.

11. So far as the third question is concerned, it is no doubt true that the Central Government has been conferred discretionary power to exempt goods of any specified description from levy of customs duty if the Government is satisfied that it is necessary in the public interest so to do. The satisfaction of the Central Government with regard to the existence of public interest may not be subject to judicial review. But if the impugned notification contravenes any of the constitutional provisions, there cannot be any manner of doubt that the Court would be justified in striking down the same. Article 14 is not merely a provision, but confers a right of equality and, therefore, its violation could be challenged under Article 226 of the Constitution. Article 14 protects all persons from discrimination by the legislative as well as by the executive organ of the State. An executive action violating the principle of equality before law or equal protection of law is open to challenge under Article 14 as has been held by the Supreme Court in the case of *Satwant Singh Sawhney v. V.D. Ramarathnam*, Assistant Passport Officer, New Delhi and Ors., AIR 1967 Supreme Court 1836. An executive action which results in denial of equal protection of law or equality before law can be judicially reviewed and can be struck down on the ground of

discrimination. The wisdom of a legislative policy may not be open to judicial review, but when the wisdom takes the concrete form of law, the same must stand the test of being in tune with the fundamental rights. (See *A.L. Kalra Vs. Project and Equipment Corporation of India Ltd.*, . The purpose of equal protection clause is to secure every person within the State against arbitrary discrimination, whether occasioned by the express terms of the statute or by their improper application through duly constituted agents. When the statute is not itself discriminatory and the charge of violation of equal protection is only against the official who is entrusted with the duty of carrying it into operation, the equal protection clause would be availed of. The equal protection clause can be invoked not merely when discrimination appears on the express terms of the statute itself, but also when it is the result of improper or prejudicial execution of the law. Even in matters of bounty, charity, subsidy or privileges, the State or any public authority cannot act arbitrarily and their actions must conform to the constitutional mandate enshrined under Article 14 of the Constitution. In this view of the matter, discrimination practised by an executive or administrative officer in carrying out the provisions of an Act which are themselves fair is within the prohibition of Article 14 of the Constitution. A notification issued u/s 25(1) of the Customs Act granting or withdrawing an exemption from duty is in the nature of a piece of subordinate legislation and consequently, its validity can be tested by the Court by applying the standards applicable to an administrative action. This is concluded by the decision of the Supreme Court in the case of *Indian Express Newspapers (Bombay) Private Ltd. and Ors. etc. v. Union of India and Ors.* AIR 1986 SC 515. In the aforesaid premises, we have no hesitation to hold that the notification of the Central Government in exercise of its discretionary power u/s 25 of the Customs Act can be scrutinized and can be struck down by the Court if the said notification is found to be violative of Article 14 or discriminatory in any manner.

12. Coming to the question of the order of the Assistant Collector under Annexure-3, the ground on which the Customs authorities have rejected the application for registration in that captive power plant for 100 per cent export-oriented unit is not an independent project and is a part of the 100 per cent export-oriented unit project and, therefore, the said power project is not entitled to the benefit in question. The captive power plant is an independent plant set up by the manufacturer of charge-chrome for generating power. There is no rhyme and reason to consider the captive power plant to be a part and parcel of the charge-chrome plant. That apart, the purpose of exempting power projects from levy of customs duty when goods are imported into the country is that the cost of generation of power will be less. That object cannot be different when power alone is produced by a person and when power is produced as well as other goods are manufactured. So long as the project generates power, it is difficult to see any rational nexus for excluding the project from the purview of exemption and, therefore, the ground on which the application for registration of the contract has been rejected under Annexure-3 cannot be sustained and the same

must be quashed.

13. The only other question that survives for our consideration is whether the registration once granted under the Regulations could at all be cancelled without any power for cancellation under the Regulations. As it transpires, the registration in respect of one contract had been granted under the provisions of the Project Import (Registration of Contract) Regulations, 1965. Registration having been granted under the provisions of the Regulations, unless the Regulations provide for cancellation and grounds for cancellation, the authority has no power to cancel the same. Learned Standing Counsel appearing for the Union Government in course of hearing has contended that if registration had been granted erroneously, it could be cancelled. We are unable to appreciate this contention. In the absence of any power for cancellation of registration under the Regulations, the impugned order under Annexure-3 cancelling the registration is bad in law and, therefore, the same must be quashed.

14. In the net result therefore, Annexures 1,2 and 3 are hereby quashed and the appropriate authorities are directed to consider the question of petitioner No. 1's application for registration of the contract with Asea Stal. The writ application is allowed. There will, however, be no order as to costs.

B.N. Dash, Member (J)

15. I agree.