

(2003) 10 KAR CK 0062

In the Karnataka High Court

Case No : Writ Petition No's. 2741-2742 of 2003

Jindal Vijayanagar Steel Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 21-10-2003

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19 (1) (g)
Customs Act, 1962 — Section 25, 25 (1)

Citation : (2003) ECR 1022 : (2004) 163 ELT 424 : (2004) ILR (Kar) 117 :
(2004) 1 KCCR 81 SN

Hon'ble Judges : R. Gururajan, J

Bench : Single Bench

Advocate : Atul Setalvad, for Bhuvan and Co, for the Appellant; A.S. Bopanna, for the Respondent

Final Decision : Allowed

Judgement

R. Gururajan, J.—Petitioners are challenging Annexure-A a notification dated 1-3-2001 as unconstitutional in terms of Articles 14 and 19 of the Constitution of India. They are also seeking for a writ of certiorari to quash the order dtd. 6-1-2003 issued by the Deputy Secretary, Department of Revenue. They are also seeking for refund of Rs. 13,07,07,730/- together with interest in terms of Annexure-K.

2. Brief facts of the case are as under :-

The first petitioner is a company engaged in the business of manufacture of Hot Rolled Coils and Plates. Second petitioner is the General Manager and shareholder of the Company. Respondents 1 and 2 are the Union of India and Department of Revenue. Respondents 3 and 4 are the Customs Officials. Respondents issued a notification dtd. 26-4-2001 in terms of Sub-section (1) of Section 25 of the Customs Act, 1962 which amended the notification dtd. 1-3-2001 by inserting Sl. No. 64-A in the matter of customs duty payable on Metallurgical Coke when imported by manufacturers of pig iron or steel. This

notification seeks to exclude from the ambit of the notification manufacturers of pig iron or steel using Corex Furnace and the exclusion in terms of the notification according to the petitioner is arbitrary and not based on any intelligible differentia and is discriminatory and is in violation of Articles 14 and 19(1)(g) of the Constitution of India.

2.1 Petitioner-company has set up an integrated steel plant of capacity 1.57 MTP at Toranagallu in Bellary District. It is not disputed that the petitioners adopted the Corex - Basic Oxygen Furnace - Continuous Casting Process - Hot Strip Mills Route. Apart from this, the petitioners have also set up a Pellet Plant of Capacity 3 MTPA in the premises for manufacturing iron oxide pellets which is an essential input for pig iron making in the Corex Furnace, Petitioners are adopting a state-of-the-art technology for iron making i.e., Corex Furnace which is imported. Such a plant has been set up for the first time in India keeping in view the imports and benefits for production of pig iron. It has several advantages like, it is possible to use non-cooking coal, energy efficient, better and faster control over melt quality, environment friendly, lower cost of production etc., Department of Metallurgy, Institute of Science, Bangalore, has opined that blast Furnace and Corex Furnace involve the same processes. A certificate issued by the Department of Metallurgy, Institute of Science, Bangalore, is at Annexure-B. Petitioner made a representation to the Indian Institute of Science for their comments on the similarity of the two processes. The Institute by its letter dated 21-1-2003 further certified that the technology fall in the same class. Annexure-B1 is the certificate. Mecon Ltd., a Government of India enterprise also has issued a certificate opining that there is no basic difference between Corex Furnace and the blast furnace technology. Annexure-C is the certificate. Petitioner again made a representation to Mecon Ltd., for their comments on the similarity of the two process. Mecon Ltd., clarified that both the technologies fall in the same class. Annexure-C1 is the said clarification dtd. 23-2-2003. Metallurgical Coke is an essential input used in the manufacture of pig iron or steel which in turn is used in the manufacture of Hot Rolled Coils and Plates. Metallurgical Coke is regularly imported by the Company and at present the company has pending orders for import of about 60,000 MT, Respondent No. 1 issued a notification Annexure-A in relation to the basic customs duty payable on the import of Metcoke into India whereby the Company was compelled to pay the basic customs duty at 15% ad valorem on the said goods under Heading 27.04 of CTA in respect of consignments cleared between the period 26-4-2001 to 28-2-2002 and it was denied the benefit of the notification. Petitioner made several representation to the concerned authorities, requesting them to consider making recommendations to the Ministry of Finance for extending of the benefit of the concessional rate of customs duty under the said notification. Petitioners state that while announcing the changes vide Circular bearing No. B-9/4/2001-TRU, dtd. 25-4-2001 the Government of India stated that some of the changes made by the said notification provided for exemption on an end-use basis. Petitioner as filed Annexure-E, a circular along with extract of the speech of the

Hon''ble Union Finance Minister made on 25-4-2001 wherein the Hon''ble Minister has stated that the customs duty on Metcoke is proposed to be reduced to 5% on actual user basis to steel plants to help improve their viability. According to petitioner, the actual user, steel plant, includes blast furnace as well as Corex Furnace. Notification dtd. 19-5-2000 was issued by the first respondent for Anti-dumping duty was sought to be levied on the goods imported from China. The notification however, granted exemption only to manufacturers of pig iron or steel using blast furnace. Petitioner is challenging the discrimination in the matter of exemption. The matter is now pending in Supreme Court. The Government of India amended the notification on 19-5-2000 and exempted Metcoke from Anti-dumping duty if imported by manufacturers of pig iron or steel using blast furnace. Writ petition was filed in this Court. This Court granted interim reliefs to the petitioners permitting the company to clear the said goods on the payment of admitted duty and on the payment of 50% of disputed duty in cash and furnishing a Bank Guarantee for the remaining amount. The goods were imported in terms of the interim orders of this Court. Annexure-K is the interim order. Respondents thereafter issued a notification dated 1-3-2002 whereby the basic Customs Duty payable by the petitioner was restricted to 5% ad valorem instead of existing 15% ad valorem thus bringing uniformity in the basic customs duty to all manufacturers of pig iron or steel including the petitioner. Petitioner imported eleven consignments between 26-4-2001 and 1-3-2002 of metcoke. Petitioner paid the additional amount of customs duty in terms of the interim order of this Court. This Court thereafter remanded the matter by its final order and asked the petitioner to make representation to consider the plea of the petitioner and this Court further directed the respondents to find out as to whether the petitioners'' technology is same or similar to that of manufacture of pig iron and steel using blast furnace. Order of this Court is filed at Annexure-L. Thereafter a detailed representation was filed in terms of Annexure-N. The same has been rejected in terms of the endorsement dtd. 6-1-2003 Annexure-P. Petitioner aggrieved by Annexure-P is before me in this petition.

3. Notice was issued and respondents have entered appearance. The Customs Department justify their action. They deny the averments made by the petitioner. They say that the Central Government by way of conscious policy decision made a reasonable distinction based on an explicit criterion, between the different manufacturers of pig iron or steel using different technologies for the purpose of exemption. There is no discrimination in the notification. They justify their notification. They also say that the certificates are not disputed. They say that there cannot be any opinion on tax policy. They also say that in terms of the orders of this Court, the matter was considered and they further say that blast furnace technology and corex technology are not similar. The first and second respondent did not file any separate objection statement. They have filed a memo on 4-9-2003 and in the memo it is stated that the objection statement filed by the third respondent is with the co-ordination of the first and second respondents and as such the first and second respondents also adapt the

objection statement filed by the third respondent. The matter is heard at great length.

4. Sri Atul Setalvad, learned Senior Counsel took me through the pleadings to contend that a discriminatory treatment is meted out to the petitioner. He would say that grant of 15% concessional rate to manufacturers of steel using blast furnace is arbitrary and discriminatory. Learned Counsel invited my attention to the certificates to contend that the Corex Technology and Blast Furnace Technology are one and the same. The older technology is the blast furnace technology and the modern technology is the Corex Technology. There is no difference between the two and that therefore benefits cannot be denied to the petitioner. Learned Counsel refers to the writ petition to contend that the respondents contrary to the direction of this Court have chosen to reject the representation thereby injustice has been done to his client. Learned Counsel says that the subsequent notification provides for a benefit in favour of the petitioner. In conclusion learned Counsel strongly contends that this Court has to interfere in the given set of circumstances. He also attacks the endorsement on the basis of the material already available on record in the light of the two certificates issued by the Central Government. Learned Counsel relies on several judgments in support of his contention. Per contra, learned Counsel for the respondent argues that no case is made out by the petitioner. He says that a deliberate policy decision was taken to exclude Corex Technology and that cannot be questioned by the petitioner. There is no violation of Articles 14 and 19 of the Constitution of India. He explains the certificate to contend that Corex Technology differs from Blast Furnace Technology. He refers to the judgment of the Supreme Court to contend that the petition requires to be rejected.

4. After hearing the learned Counsel at great length, let me see as to whether a case is made out by the petitioner or not. Admitted facts reveal of Corex Technology being followed by the petitioner. Petitioner on an earlier occasion challenged the notification Annexure-A in WP No. 35478/2001. This Court by a detailed order allowed the petition particularly with a direction to the petitioner to file an appropriate representation with all material particulars including Annexure-B and C and the subsequent notification to the first respondent and the first respondent was to consider as to whether the petitioner's technology is same or similar to the that of Blast Furnace Technology. This Court further directed the respondent not to enforce the bank guarantee. After remand, the matter was considered by the respondents and they have rejected the representation of the petitioner in terms of the endorsement dtd. 6-1-2003.

6. It is to be noticed at this stage that Section 25 is a provision providing for grant of exemption in the matter of customs duty in the public interest. It is further seen that Sl. No. 64(A) was introduced in terms of a notification dtd. 26-4-2001. It provides for 5% duty insofar as Metcoke when imported by manufacturers of pig iron or steel using Blast Furnace Technology. Admittedly petitioner has imported metcoke and is engaged in the manufacture of pig iron or

steel using Corex Technology. It is also necessary at this stage, to notice the comments in the matter of corex technology of the Department of Metallurgy, Indian Institute of Science and the same reads as under;

- "1. Both the processes produce liquid metal of similar composition from iron.
2. Both processes require a minimum amount of coke for smooth operation.
3. Both the processes can use coal
4. The phenomena taken place in both the processes are also identical.

So although outwardly two processes look different and the name of the two processes are different but these two processes are equivalent and similar,"

(underlining is mine).

6.1 Annexure-B is again a certificate issued by the Department of Metallurgy after remand by this Court. They refer to various factors and ultimately say that in spite of all these apparent differences, both old and new blast furnaces are basically the same. They further say as under;

"Two process are considered similar, if the type of reactor, phenomena taking place in the processes, basic ingredients and nature of raw materials and final products are same. These similarity exist between both corex and blast furnace.

So Technically speaking, both blast furnace and Corex processes are similar."

6.2 The petitioner had also approached Mecon Ltd., a Government of India Enterprises in the matter of similarity between Corex Technology and Blast Furnace Technology. They had given their opinion as under;

"We like to clarify that COREX technology as an alternate route for production of pig iron, the conventional one being the blast furnace technology. The basic difference between the two is that in case of corex the plant has been designed into 2 vessels, namely the reduction shaft furnace and the metter gassifier. The reduction shaft furnace performs the activities of the upper part of the blast furnace and the metter gassifier of the gas furnace. Corex is a trade mark of VA1, Austria; otherwise there is no other basic differences of this technology from that of the blast furnace except that good amount of oxygen is used in Corex and hot air blast in blast furnace."

6.3 After remand, they have again considered the matter and ultimately opined as under;

"Corex is an alternative route to blast furnace iron making producing the same product based on similar principles. Initially the Corex process was known as KR process, which was developed by Korf Engineering of Germany. A pilot plant of 8 tph (200 tpd) was put up jointly by Korf Engineering and Voest Alpine at Kehl, Germany known as KR Pilot Plant. Initially technology sale rights were divided between Korf Engineering and Voest Alpine. In due course, the complete

technology rights were purchased by Voest Alpine who changed the name of the process to Corex process and registered its Trade Mark to avoid confusion between KR process and Corex Process."

6.4 After remand, petitioner submitted a representation on 22-11-2002. They have given a very detailed representation annexing the letters of Department of Metallurgy and Mecon Ltd. While considering the same, respondents have stated in the endorsement that the Ministry is of the view that Blast Furnace Technology and Corex Technology are neither the same nor similar to each other despite their being some basic similarity in the process of manufacture. They admit of some similarity in their endorsement. While issuing this endorsement, it is rather unfortunate that despite a direction by this Court while remanding in the earlier writ petitions to consider the certificates Annexure-B and C issued by the Department of Metallurgy and Mecon Ltd., there is absolutely no reference to the same in the endorsement. No other better expert material are also obtained to differ from these two certificates. The differences as noticed by the Ministry of Finance and Company Affairs are as under.

Corex Technology

Blast Furnace Technology

1.

Pure oxygen is used for reduction.

1.

Hot is used for reduction.

2.

Double Chamber Vessel method.

2.

Single Chamber method.

3.

Gases released during the process can be tapped or controlled and utilized.

3.

Gases released during the process cannot be tapped or utilised.

4.

Gas generated during the process is of high calorific value and the same can be utilised in generation of power as fuel.

4.

Gas generated during the process is of less calorific value and cannot be utilised

for generation of power.

5.

Ordinary coke of any quality can be used for manufacture of Pig Iron. Also the quantity of coke required is less when compared to Blast Furnace.

5.

High grade Metallurgical Coke only can be used in case of Blast Furnace method. Huge quantity of Coke is required.

6.

Release of hazardous Chemicals is minimum.

6.

Release of chemicals is more.

7.

Stoppage and restart very easy.

7.

Stoppage and restart is time consuming and wastage is more.

5.6 A mere reading of the difference between the two would show that Corex Technology is nothing but a modern technology. This Court can take judicial notice that the technological development has taken over in all spheres including blast furnace technology and in the case on hand, a combined reading of the difference would show that Corex Technology is a better technological improvement over the Blast Furnace Technology providing for better result, better yield, better control etc. Therefore, even the so called differences would not go to show that the Corex Technology is something alien (foreign) compared to Blast Furnace Technology. In fact the respondents do admit that there are certain similarities in the process of manufacture in terms of the certificates and the two certificates issued by the Department of Metallurgy and Mecon Ltd., support the petitioner. No other expert opinion is taken overruling or diluting the experts opinion available on record. In these circumstances, the contention of the respondents that these two technologies are different warranting a different treatment cannot be accepted. They also refer to the trade mark for rejecting the case of the petitioners. That cannot be a ground to deny benefits to the petitioners. Instead of providing better terms for better purpose, respondents have chosen to deny the benefits. In these circumstances, learned Senior Counsel for the petitioners is right in his submission that the Government has committed a serious error in denying the benefits to the petitioner by creating a mini classification in their approach.

5.7 In fact the object of issuing notification in terms of Annexure-E would show

that the changes made by Notification No. 44/2001-Customs provide for exemption on end-use basis. The end-use is steel manufacturing. Along with Annexure-E the speech of the Minister has been produced. It is stated therein that the Customs exemption has been granted to steel plant to help improve their viability. Viability is the object of exemption and that viability does not in any way differ in the matter of Corex Technology. The object of the notification of viability to help steel industry drives me to the conclusion that a case is made out by the petitioner and the petitioner is treated in a discriminatory manner by the respondents in the matter of exemption.

5.8 The subsequent notification of 2003 issued by the respondent also provides for exemption to manufacturers of iron and steel using metcoke whether by Blast Furnace Technology or Corex Technology. Equal treatment is given subsequently. Only for a limited impugned period an amendment has been issued thereby providing for a concessional duty only for blast furnace technology by the respondent. Therefore in the light of my earlier finding that there exists similarities, an inference has to be drawn against the Central Government in the matter of custom duty reduction.

6. Petitioners' strong case is one of Article 14 an equal treatment clause. Article 14 provides that State shall not deny to any person equality before law. There are any number of cases on Article 14. The Supreme Court in the case of 79 SC 1628 ruled at 1637 ruled as under;

"It must, therefore be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largess the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

7. The Supreme Court in the case of 96 SC 1 has ruled in Para 10 as under;

"10. On hearing counsel, we are of the view that no dispute seems to have been raised in the High Court regarding the grant in aid made available to recognised private professional colleges other than law. Now was any material placed before the court on this score. The conclusion of the High Court to the effect that no extending the grants in aid to non-Government law colleges and at the same time extending such benefit to non-Government Colleges with faculties viz., arts, science, commerce, engineering and medicine (other professional non-Government colleges is patently discriminatory and based on material and sustainable. The State has not discharged the burden of proof cast on it to sustain the differential treatment meted out to one of the Government

recognised professional colleges (private law colleges). It is patent that like have been treated unlikes; without proper justification or reason and the private law colleges have been singled out for hostile discriminatory treatment. The disparity in the service conditions in not affording the benefit of pension-cum-gratuity scheme to the non-teaching staff in non-government law colleges and at the same time affording the same benefit to non-teaching staff of colleges with faculties of Arts, Science, Commerce, Engineering and Medicine with effect from 1-10-1982 is also discriminatory."

8. In the case on hand, petitioner has proved on facts, in the light of the certificate and the material on record that discrimination is meted out in the matter of exemption. The Government has failed to discharge its burden of proof to sustain the differential treatment meted out to the petitioner in this case. There is absolutely no material on record to exclude the petitioners from the beneficial notification. In fact the Central Government notwithstanding an opportunity has not chosen to file any affidavit. On the other hand, it has chosen to adopt the affidavit filed by the Deputy Commissioner. Therefore, the statement of objections filed by the Deputy Commissioner can as well be taken as the objections of the Central Government. It is stated therein that the Government has taken a conscious policy decision to grant concessional duty to manufacturers of pig iron and steel using blast furnace technology. It is not stated as to why a similar corex technology is omitted while granting concession. No acceptable reasons are forthcoming in the affidavit. In these circumstances, in terms of the judgment of the Supreme Court, reported in State of Maharashtra Vs. Manubhai Pragaji Vashi and others, , burden is not discharged by the Union of India. The affidavit is also silent as to whether the policy would help the object of viability or not. The consideration of object is more important in these cases. It is also not clear as to why this mini classification is made in the given set of circumstances in the light of Article 14 of the Constitution. The Government has committed a serious error on the facts of this case in denying the concession to the petitioners. Petitioner strongly relies on the speech of the Minister with regard to grant of exemption. Object pointed out by the Hon"ble Minister is one of viability. The Supreme Court in K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, has noticed that the speech of the Minister can be considered for the purpose of proper ascertainment of the intention of the Government in reduction of customs duty. In fact in the case on hand, the respondents do not deny the object is one of viable character and that its object is not to deny for the corex technology. The notification discriminates against the petitioner in the matter of duty and I am of the view that the impugned endorsement suffers from several angles in terms of the law declared by the Apex Court as per my earlier findings.

9. After coming to this conclusion, let me see as to what relief is to be granted to the petitioner.

9.1 Learned Counsel for the respondent relies on a judgment of the Supreme

Court in Jain Exports Pvt. Ltd. and Another Vs. Union of India (UOI) and Others, . In the said case, the Supreme Court has stated in Para 11 that in the light of the coining to a conclusion that the exemption is arbitrary and violative of Article 14, it may strike the exemption down but it cannot widen its scope so as to cover those if finds have been discriminated against. Learned Counsel for the respondent says that in the light of this ruling no relief could be given by widening the scope in the case on hand. In the light of this submission, I have carefully gone through the said judgment. A reading of the said judgment would show that the Court was considering with regard to entitlement of exemption granted to a contesting third respondent in that case. The Court noticed the various facts and thereafter the Court ruled that the petitioner in that case is not entitled for the reasons mentioned in Paras 8 to 9 and 10 to 11. The sentences read from Para 11 has to be understood in the context of the said case. Moreover, the Supreme Court in Para 11 has given its finding after noticing the judgment in the case of State of Madhya Pradesh Vs. Mohan Singh, . In that case the High Court granted the benefit to those who did not belong to SC and ST. The ruling is to be understood in the given set of circumstances and it could not be a uniform rule as sought to be argued by the respondent. Hence, the judgment as referred to by the learned Counsel would not apply to the facts of this case.

9.2 Learned Counsel for the petitioner has placed some judgment with regard to relief/discrimination in the matter of exemption.

The Supreme Court in Choksi Tube Company Ltd. Vs. Union of India (UOI) and Others, in the second judgment has ruled as under;

"7. It is not the case of the respondents that the import made by the said mills was in any way different front that made by the petitioners. There is no indication as to why the petitioners have been treated differently from the mills. Where power u/s 25(2) is exercised to grant a special exemption from payment of duty, under circumstances of an exceptional nature stated in such order, we would have expected the respondents to state on affidavit what it was that moved them in the public interest to grant such exemption and what was the exceptional nature of the circumstances attached to the imports made by the said mills. Having regard to the combined stand of the respondents not to state their case on paper we must assume that there was neither any public interest nor any exceptional matter involved and that others placed in circumstances similar to that in which said mills were placed must have the same benefit as was advanced to the said mills. Accordingly, we must direct the respondents to grant to the petitioner the same benefit that was granted to the said mills by the letter dated 19th March, 1977 written by M. Jayaraman, Under Secretary to the Government of India, Department of Revenue and Banking to the Collector of Customs, Bombay on 19th March, 1977 on the subject of "Exemption from payment of customs duty import of 735,787 MT of Hot Rolled Stainless Steel Strips by Ahmedabad Advance Mills Ltd., Bombay."

The Supreme Court in the said case has directed the respondents to grant the

same benefit to the petitioners that was granted to the oil mills in that case.

10. Hence, it is unnecessary for me to strike down the said notification. Instead I would prefer to extend the notification to the petitioner so that the discrimination is wiped out in terms of this order. In fact the Supreme Court in Choksi Tube Company Ltd. Vs. Union of India (UOI) and Others, has done the same thing. Taking note of the judgment of the Supreme Court in Choksi Tube Company Ltd. Vs. Union of India (UOI) and Others, , I deem it proper to direct the respondents to extend the benefit of the impugned notification to the manufacturers of pig iron and steel using corex technology (petitioner).

11. Having given this direction let me see as to whether petitioner can be directly granted the refund of certain amounts made over by the petitioners. Petitioners on an earlier occasion had moved this Court and at that time certain directions had been given that the Bank Guarantee submitted by the petitioner is to be kept in force till a decision is taken by the respondents. Thereafter they have taken decision while challenging the said decision in this petition, petitioner sought for interim stay and that was rejected by a learned Judge of this Court and this Court ruled that in the event of the petitioner succeeding in the matter, the respondents are to refund the amounts with interest stipulated under the Act within two months from the date of the order. Now the Bank Guarantee is enforced. In these circumstances, and in the light of this order, I deem it proper to direct the petitioner to file an appropriate application seeking for refund of the amount due in terms of the order of this Court along with facts and figures and the respondents are to dispose of the said application in accordance with law within four weeks from the date of filing of the application. Time for filing the application is four weeks from the date of receipt of a copy of this order.

12. Writ petitions are allowed in the above manner. Parties are to bear their respective costs.