

(2016) 02 GUJ CK 0039
In the Gujarat High Court

Case No : Special Civil Application Nos. 13882 to 13884 of 2015

Ketan Pottery Works and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 04-02-2016

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11-AC, Section 5A
Constitution of India, 1950 — Article 14, Article 15, Article 31(2)

Citation : (2016) 334 ELT 206 : (2016) 2 GLR 1755

Hon'ble Judges : Akil Abdul Hamid Kureshi and Mohinder Pal, JJ.

Bench : Division Bench

Advocate : Paresh M. Dave and Paritosh Gupta, Advocates, for the Appellant;

Final Decision : Allowed

Judgement

Akil Abdul Hamid Kureshi, J.—1. Petitioners have challenged a portion of Notification No. 8 of 2003 dated 01.03.2003 (hereinafter to be referred as "the said notification"). The petitioners have also prayed for a declaration that they would be entitled to full exemption limit of Rs. 150 lakhs in a financial year under the said notification without including in such limit the value of clearances made by the petitioners for export of goods to Nepal. The petitioners have challenged Order-in-Original as at Annexure-I and the Appellate Order as at Annexure-J to the petition on the basis of such declaration.

2. Brief facts may be noted from Special Civil Application No. 13882 of 2015 as under:

"The petitioners are small scale industrial units and are engaged in the manufacture of ceramic and pottery items. The Government of India issued the said notification on 01.03.2003 granting exemption to first clearances of specified goods up to the value of Rs. 150 lakhs and full exemption to captive consumption for manufacturers having clearances not exceeding Rs. 4 crores in the preceding financial year. Under such notification, the Government of India exempted

clearances specified in column (2) of the Table contained therein for home consumption of excisable goods of the description specified in the annexure appended to the notification from so much of the aggregate of the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985, and the special duty of excise specified thereon in the Second Schedule to the said Central Excise Tariff Act, 1985 as is in excess of the amount calculated at the rate specified in the corresponding entry in Column (3) of the said Table. Relevant portion of this notification reads as under:

"....In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944) (hereinafter referred to as the Central Excise Act) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 8/2002-Central Excise, dated the 1st March, 2002, published in the Gazette of India vide number G.S.R.129(E), dated the 1st March, 2002, the Central Government, being satisfied that it is necessary in the public interest to do so, hereby exempts clearances, specified in column (2) of the Table below (hereinafter referred to as the said Table) for home consumption of excisable goods of the description specified in the Annexure appended to this notification (hereinafter referred to as the specified goods), from so much of the aggregate of, -

(i) the duty of excise specified thereon in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as the First Schedule); and

(ii) the special duty of excise specified thereon in the Second Schedule to the said Central Excise Tariff Act, 1985 (hereinafter referred to as the Second Schedule),

as is in excess of the amount calculated at the rate specified in the corresponding entry in column (3) of the said Table:

Provided that nothing contained in this notification shall apply to a manufacturer who has availed the exemption under notification No. 39/2001-Central Excise , dated the 31st July, 2001, published in the Gazette of India vide number G.S.R.565(E), dated the 31st July, 2001, in the same financial year:

Provided further that exemption contained in this notification shall not apply to goods which are chargeable to nil rate of duty or are exempt from the whole of the duty of excise leviable thereon.

TABLE

.....

"(3) For the purposes of determining the first clearances up to an aggregate value not exceeding one hundred and fifty lakh rupees made on or after the 1st day of April in any financial year, mentioned against serial No. 1 of the said Table, the following clearances shall not be taken into account, namely, -

(a) clearances, which are exempt from the whole of the excise duty leviable

thereon (other than an exemption based on quantity or value of clearances) under any other notification or on which no excise duty is payable for any other reason;

(b) clearances bearing the brand name or trade name of another person, which are ineligible for the grant of this exemption in terms of paragraph 4;

(c) clearances of the specified goods which are used as inputs for further manufacture of any specified goods within the factory of production of the specified goods..... "

.....

"Explanation,- For the purposes of this notification,

.....

"(G) "Clearances for home consumption", wherever referred to in this notification, shall include clearances for export to Bhutan and Nepal..... "

In terms of the said notification, thus, an SSI Unit will be exempt from payment of excise duty upto clearances of Rs. 150 lakhs, subject to the conditions mentioned therein. As per para 3 of the said notification, for the purpose of determining the first clearances upto the said value of Rs. 150 lakhs, the clearances which are exempt from the whole of excise duty leviable thereon under any other notification or on which no excise duty is payable for any other reason, would not be taken into account. This would thus cover all exports made by a manufacturer. However, the explanation at the end of this notification in clause (G) provided that clearances for home consumption wherever referred to in this notification shall include clearances for export to Bhutan and Nepal. By implication, thus, the exclusion of clearances for export provided in para 3 of the said notification would not apply in case of the clearances for export to either Bhutan or Nepal.

3. This exclusion had a history, namely, special bilateral trade relations between India and Nepal flowing from various treaties. In particular, our attention was drawn to the Indo-Nepal Treaty of October 2009 in which it was agreed by the two countries that the Government of India would allow the Government of Nepal payment of the excise and other duties collected by the Government of India on goods produced in India and exported to Nepal, subject to certain conditions. Relevant portion of the Treaty reads as under:

"III. With Reference to Article III

1. The Government of India will allow the Government of Nepal payment of the excise and other duties collected by the Government of India on goods produced in India and exported to Nepal provided that:

(I) Such payment shall not exceed the import duties and like charges levied by the Government of Nepal on similar goods imported from any other country, and

(ii) the Government of Nepal shall not collect from the importer of the said Indian goods so much of the import duty and like charges as is equal to the payment allowed by the Government of India..."

4. Thus, on exports made to Nepal by an Indian manufacturer, the Government of India would collect excise duty and pass on the same to the Government of Nepal, subject to the conditions noted in the said Treaty. It was precisely for this reason that in the multiple notifications issued by the Government of India for providing modalities for working out the provisions of Rules 18 and 19 of the Central Excise Rules, 2002, there was always exclusion in cases of exports made to Nepal and Bhutan. As is well known, Rule 18 of the Central Excise Rules, 2002 pertains to rebate of duty when goods are exported. It is open for the Central Government to grant rebate of duty paid on such excisable goods or duty paid on materials used in such goods. Rebate would be granted subject to the limits as may be notified. Likewise, Rule 19 of the Central Excise Rules, 2002 pertains to exports without payment of duty and envisages exports on furnishing bonds.

5. The Government of India had issued notification No. 19/2004 dated 06.09.2004 laying down the procedure for rebate of duty on export of goods which would cover exports to all countries except Nepal and Bhutan. The notification provided rebate of excise duty paid on exported goods subject to the conditions and limits contained therein. However, the notification would apply to goods exported to any country other than Nepal and Bhutan. Likewise, the Government of India had also issued notification No. 42/2001 dated 26.6.2000 under Rule 19 laying down the procedure for export of goods on furnishing bonds. The preamble of this notification itself provides that in exercise of powers conferred by sub-rule (3) of Rule 19 of the Central Excise Rules, 2001, the Central Board of Excise and Customs hereby notifies the conditions and procedures for export of "all excisable goods, except to Nepal and Bhutan without payment of duty".

6. Several similar such notifications issued by the Government of India either under Rule 18 or 19 of the Central Excise Rules have been produced on record. It is not necessary to refer to all of them. The crux of the matter is that corresponding to the Government's policy flowing from the Indo-Nepal Treaty noted above, passing on excise duty payable on goods manufactured for export to the Government of Nepal on such exports, no duty rebate or exemption from payment of excise duty was granted.

7. This situation, however, underwent a major change when such bilateral treaty no longer prevailed. This can be seen from the clarification issued by the Government of India under Circular dated 13.01.2012 in which it is stated as under:

"...Pursuant to Revised Treaty of Trade between Government of India and Government of Nepal, exports to Nepal have been put at par with exports to other countries (except Bhutan). In this regard, six Notification Nos. 24/2011-

Central Excise (N.T.), 27/2011-Central Excise (N.T.), 27/2011-Central Excise (N.T.), 28/2011-Central Excise (N.T.) and 29/2011-Central Excise (N.T.) all dated 6.12.2011 have been issued to amend earlier Notification Nos. 19/2004-Central Excise (N.T.) dated 6.9/2004, 42/2001-Central Excise (N.T.) dated 26.6.2001, 43/2001-C.E.(N.T.) dated 26.6.2001, 44/2001-Central Excise (N.T.) dated 26.6.2001 and 45/2001-Central Excise (N.T.) dated 26.6.2001 respectively. Notification No. 25/2011 -Central Excise (N.T.) dated 5.12.2011 has rescinded the earlier Notification No. 20/2004-Central Excise (N.T.) dated 6.9.2004. These amendments abolish the existing DRP for exports to Nepal and puts export to Nepal at par with exports to other countries (except Bhutan). All these notifications have been made effective from 1st March, 2012...."

Date: 04.02.2016

8. It can thus be seen that, in view of the revised treaty of trade between the Government of India and the Government of Nepal, now exports to Nepal would be on par with exports to other countries. It was because of this reason that several notifications issued by the Government of India under Rule 18 or 19 of the said Rules came to be suitably amended. Reference is already made to these notifications in the above noted clarification. The petitioners have produced few of these notifications at Annexure-E (Colly.). For example, Notification No. 24/2011 dated 05.12.2011 reads as under:

"Rebate of duty on export of goods to all countries other than Bhutan w.e.f. 1.3.2012 - Amendment to Notification No. 19-2004-C.E.(N.T.) -In exercise of the powers conferred by rule 18 of the Central Excise Rules, 2002, the Central Government hereby makes the following further amendment in the Ministry of Finance, Department of Revenue, notification number 19/2004-Central Excise (N.T.) dated the 6th September, 2004, namely:--

2. In the said notification, in the opening paragraph, for the words "other than Nepal and Bhutan", the words "other than Bhutan" shall be substituted.

3. This notification shall come into force on 1st March, 2012."

9. As per this notification, therefore, in the earlier notification No. 19 of 2004 issued under Rule 18 of the Rules, there would be an amendment by which the expression "other than Nepal and Bhutan" would be substituted by "other than Bhutan". Thus, exclusion of Nepal would be deleted and would survive only with respect to exports to Bhutan. In other words, for the purpose of granting rebate under Rule 18, exports made to Nepal would be treated on par with exports to other countries and rebate as provided in notification No. 19 of 2004 would now be available with effect from 01.03.2012. Yet another notification No. 26 of 2011 came to be issued making similar changes in the earlier notification No. 42 of 2001 concerning the exports made on furnishing bond.

10. Case of the petitioners is that, by virtue of revised treaty between the Government of India and the Government of Nepal, exports to Nepal would now

no longer be treated different from exports to any other country. It was for this reason that earlier notifications issued under Rule 18 or 19 of the said Rules came to be suitably amended and any export to Nepal would now qualify for rebate or would be permissible on furnishing bond. In view of such circumstances, according to the petitioners, even the SSI exemption notification No. 8 of 2003 should have been amended. The term "clearances for home consumption" which will include clearances for export to Nepal and Bhutan ought to have been changed deleting reference to exports to Nepal. Purely due to oversight, the Government of India did not amend such notification. In this context, the petitioners drew our attention to the minutes of the Tariff Conference held on 28/29.9.2015 which was attended by Commissioners of Central Excise and Customs across the country in which, in the context of the requirement of amending said SSI notification No. 8 of 2003, it was discussed and resolved as under:

"B.17 Visakhapatnam Zone - Scope of Exemption - Manufacture under Central Excise - Clearances to Nepal with reference to Exemption Notification No. 8/2003-CE :

Issue: In terms of SSI notification No. 8/2003-C.E. dated 1.3.2003, computation of clearances for home consumption, wherever referred in the notification, shall include clearances for export to Bhutan and Nepal. However, with effect from 1.3.2012, export clearances to Nepal have been made at par with all other countries. Further, C.B.E. & C. vide Circular No. 961/04/2012-CX dated 26.3.2012 (2015 (278) ELT (T7)), has clarified that, in respect of Nepal, even if the export proceeds are received under Indian rupees, the clearances are still eligible for rebate or refund as the case may be. In such a case, it is not known why the export clearances to Nepal are still being considered as home clearances with reference to the limit of exemption available to an SSI under the notification referred. The condition in the notification is restricting the benefit to the Small Scale Manufacturers to the extent of clearances made to Nepal. Clarification is needed in view of the change in the treatment given to Exports to Nepal w.e.f. 1.3.2012.

Discussion & Decision

The conference agreed that it was a valid suggestion and there was a need to amend notification No. 8/2003-C.E. dated 1.3.2003 to bring parity in the exports to Nepal under various notifications. The conference recommended that Board may examine the same. However, it was also agreed that till the necessary amendments in SSI exemption are made, the present dispensation of treating exports to Nepal as domestic consumption shall continue to apply."

11. Thus, even high level Customs officials recognized the need for amendment of SSI notification No. 8/2003 so that the mischief of including exports to Nepal within the exemption limit of Rs. 1.50 crore after changes in bilateral treaties can be remedied. Instead of making suitable changes in the said notification, the

Government of India persisted with the original format and would, post 1.3.2012 also, include in the exemption limit of an SSI unit exports made to Nepal. The petitioners had excluded such exports from their limit for claiming exemption. The department, therefore, issued a show cause notice dated 25.3.2014 calling upon the petitioners why unpaid duty be not recovered with interest and penalty. Assistant Commissioner of Central Excise passed Order-in-Original dated 30.6.2014 and confirmed the central excise duty liability of Rs. 4.81 lakhs and imposed matching penalty under section 11-AC of the Central Excise Act. The petitioners' appeal failed before the Commissioner. In this background, the petitioners have prayed for striking down the words "and Nepal" in para 5 (G) of SSI notification No. 8/2003 and also prayed for setting aside the Order-in-Original as well as the Appellate Order,

12. Learned counsel for the petitioners submitted that the entire policy of including exports made to Nepal within the limit of home consumption provided in SSI exemption notification No. 8/2003 underwent a major change when, due to change in the bilateral treaty, exports to Nepal, which were till now considered local clearances, would now be treated on par with exports to any other country. It was because of this change, that the Government of India had amended notifications issued under Rules 18 and 19 of the said Rules and included exports to Nepal for rebate under Rule 18 and for exports on furnishing bond as per Rule 19. Even the conference of Commissioners of Customs and Central Excise recognized the need to amend the notification and so recommended. Despite this, the Government of India simply did not act on such recommendations.

13. Counsel submitted that, in the present form the SSI notification No. 8/2003 has been rendered discriminatory and arbitrary insofar as it continues to treat the exports made to Nepal as home consumption. He submitted that this condition would be discriminatory to the SSI units vis-à-vis non-SSI units. He further submitted that other SSI units making exports to the countries other than Nepal would have an advantage over the units like the petitioners whose exports are mainly to Nepal.

14. Learned counsel Mr. R.J. Oza relied on the affidavit-in-reply and contended that granting of exemption is a matter of discretion of the Government of India. Exemption is granted in exercise of the powers of delegated legislation. All exports to Nepal are treated similarly. Notification, therefore, cannot be said to be discriminatory.

15. The facts are not seriously in dispute. Till 01.03.2012, in view of the bilateral trade treaty between the Government of India and the Government of Nepal, on all goods exported to Nepal the Government of India would recover excise duty and the same would be surrendered to the Government of Nepal. All exports to Nepal were therefore treated on par with home consumption. However, this regime was dismantled. Exports made to Nepal are now treated on par with exports to any other country. No rebate of excise duty was permitted on such exports, and the facility of export on furnishing bond was available. It was

precisely because of this reason that several notifications issued by the Government of India under Rules 18 and 19 of the said Rules which till now excluded exports to Nepal were suitably amended.

16. Logically, therefore, even the SSI notification No. 8/2003 should have been amended. This was also recognized during the conference of Commissioners where this issue came up for consideration and suitable recommendations were made. Despite such clear facts, the Government of India did not act and rescind reference to the exports to Nepal in the SSI notification No. 8/2003, particularly in Explanation Clause (G) where clearances for home consumption would include clearances for export to Nepal also. In absence of such amendment, the SSI units exporting goods to Nepal would have to include value of such exports within the exemption limit, though exports to Nepal now stand on the same footing as export to any other country. Continued reference of export to Nepal on the said notification is thus wholly arbitrary. The SSI Notification 8/2003 provides exemption to SSI units from payment of excise duty subject to the mandatory ceiling. Value of exports to Nepal, would be includable for computing such limit though no excise duty is payable on such clearances.

17. Quite apart from total oversight or inaction on the part of the Government of India in not making such corresponding changes, we find that the same is also discriminatory. In this context, we recognize that the exemption in question is issued by the Government of India in exercise of the powers of delegated legislation. Being in the nature of legislative functions, there are limited grounds on which validity thereof can be questioned in a Court of law. However, it is well-settled that such legislation is not immune from challenge to its constitutionality. In *Vasu Dev Singh v. Union of India* reported in , (2006) 12 SCC 753, the Supreme Court observed that, while considering the validity of delegated legislation, the scope of judicial review is limited. The scope and effect has to be considered having regard to the nature and object thereof. A reference was made to a decision of the Supreme Court in the case of *P.J. Irani v. State of Madras* reported in , AIR 1961 SC 1731 in which it was held that the delegated legislation would be amenable to judicial review on three grounds, namely, (1) if it was discriminatory, (2) if it was made on grounds which are not germane or relevant to the policy and purpose of the Act and (3) if it was made on grounds which are mala fide.

18. In *Union of India v. N.S. Rathnam and Sons* reported in , (2015) 10 SCC 681, the Supreme Court held that, benefit of exemption is to be extended to all similarly situated persons and the Government cannot create sub-classification excluding one sub-category, even when both sub-categories are of the same genus. It was further observed that, judicial review of a notification is permissible in order to undertake the scrutiny as to whether the notification results in invidious discrimination between two persons though they belong to the same class. The Supreme Court, while still recognizing the wide discretion conferred on the legislature in tax and economic matters, held that, exemption

notification is not immune to challenge on the ground of discrimination under Article 14 of the Constitution. It was further observed, as under:--

"12. The judgment of this Court in *Kasinka Trading's* case, no doubt, lays down the principle that there is wide discretion available to the Government in the matter of granting, curtailing, withholding, modifying or repealing the exemptions granted by earlier Notifications. It is also correct that the Government is not bound to grant exemption to anyone to which it so desires. When the duty is payable under the provisions of the Act, grant of exemption from payment of the said duty to particular class of persons or products etc. is entirely within the discretion of the Government. This discretion rests on various factors which are to be considered by the Government as these are policy decisions. In the present case, however, the issue is not of granting or not granting the exemption. When the exemption is granted to a particular class of persons, then the benefit thereof is to be extended to all similarly situated person. The Notification has to apply to the entire class and the Government cannot create sub-classification thereby excluding one sub-category, even when both the sub-categories are of same genus. If that is done, it would be considered as violating the equality clause enshrined in Article 14 of the Constitution. Therefore, judicial review of such Notifications is permissible in order to undertake the scrutiny as to whether the Notification results in invidious discrimination between two persons though they belong to the same class. In *Aashirwad Films v. Union of India and Others*, this aspect has been articulated in the following manner:

9. The State undoubtedly enjoys greater latitude in the matter of a taxing statute. It may impose a tax on a class of people, whereas it may not do so in respect of the other class.

10. A taxing statute, however, as is well known, is not beyond the pale of challenge under Article 14 of the Constitution of India.

11. In *Chhotabhai Jethabhai Patel & Co. v. Union of India*, , AIR 1962 SC 1006 it was stated: (AIR p. 1021, para 37)

"37. But it does not follow that every other article of Part III is inapplicable to tax laws. Leaving aside Article 31(2) that the provisions of a tax law within legislative competence could be impugned as offending Article 14 is exemplified by such decisions of this Court as *Suraj Mall Mohta & Co. v. A.V. Vishvanatha Sastri* (, AIR 1954 SC 545 : (1955) 1 SCR 448) and *Meenakshi Mills Ltd. v. A.V. Visvanatha Sastri* (, AIR 1955 SC 13 : (1955) 1 SCR 787). In *K.T. Moopil Nair v. State of Kerala* (, AIR 1961 SC 552) the Kerala Land Tax Act was struck down as unconstitutional as violating the freedom guaranteed by Article 14. It also goes without saying that if the imposition of the tax was discriminatory as contrary to Article 15, the levy would be invalid."

12. A taxing statute, however, enjoys a greater latitude. An inference in regard to contravention of Article 14 would, however, ordinarily be drawn if it seeks to

impose on the same class of persons or occupations similarly situated or an instance of taxation which leads to inequality. The taxing event under the Andhra Pradesh State Entertainment Tax Act is on the entertainment of a person. Rate of entertainment tax is determined on the basis of the amount collected from the visitor of a cinema theatre in terms of the entry fee charged from a viewer by the owner thereof.

13. It is, thus, beyond any pale of doubt that the justiciability of particular Notification can be tested on the touchstone of Article 14 of the Constitution. Article 14, which is treated as basic feature of the Constitution, ensures equality before the law or equal protection of laws. Equal protection means the right to equal treatment in similar circumstances, both in the privileges conferred and in the liabilities imposed. Therefore, if the two persons or two sets of persons are similarly situated/placed, they have to be treated equally. At the same time, the principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position. It would mean that the State has the power to classify persons for legitimate purposes. The legislature is competent to exercise its discretion and make classification. Thus, every classification is in some degree likely to produce some inequality but mere production of inequality is not enough. Article 14 would be treated as violated only when equal protection is denied even when the two persons belong to same class/category. Therefore, the person challenging the act of the State as violative of Article 14 has to show that there is no reasonable basis for the differentiation between the two classes created by the State. Article 14 prohibits class legislation and not reasonable classification."

19. Reverting back to the facts of the case, we may recall, in view of change in the bilateral trade relations between the Government of India and the Government of Nepal, exports to Nepal are now placed at par with exports to other countries. If that be so, reference to clearances for export to Nepal in Explanation clause (G) to SSI notification No. 8/2003 has been rendered wholly redundant. If such reference continues even after 01.03.2012, the situation that would arise is that, for all purposes, export to Nepal would be treated on par with export to any other country. For the purpose of SSI exemption under said notification No. 8/2003, however, it would continue to be treated as clearances for home consumption. This will be plainly discriminatory vis-?-vis other SSI units who might be having exports to countries other than Nepal as compared to the SSI units like the petitioners whose substantial exports may be to Nepal. Under such circumstances, the former set of SSI units would claim total exclusion of all clearances made by them to all countries while computing exemption limit under notification No. 8/2003, whereas the later would be subjected to inclusion of value of exports made to Nepal for computation of such limit. Since with effect from 01.03.2012 exports to Nepal are put at par with exports to other countries, the petitioners and other SSI units making exports to the countries other than Nepal form a homogeneous class. Both sets of

manufacturers are SSI units. Both export their goods to various countries. There cannot be further sub-classification of SSI units exporting to Nepal and those SSI units exporting to the countries other than Nepal since after 01.03.2012 the distinction has been obliterated. This distinction which was prevalent till 01.03.2012 lost its relevance on account of change of the Government of India policy. Continued reference of exports to Nepal in SSI exemption notification No. 7/2003 would render, to that extent, such notification discriminatory and, therefore, violative of Article 14 of the Constitution.

20. Under the circumstances, the portion "and Nepal" appearing in Explanation Clause (G) to SSI Notification No. 8 of 2003 is declared unconstitutional with effect from 01.03.2012.

21. Resultantly, the Order-in-Original as well as the Appellate Order impugned in the petitions are rendered invalid. Petitions are allowed and disposed of accordingly.