
(1991) 07 BOM CK 0082

In the Bombay High Court

Case No : Appeals No"s. 1437, 1015, 1016 and 1003 of 1987 in Writ Petitions
No"s. 1639, 313, 314 and 312 of 1981

Patel Aluminium Pvt. Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 02-07-1991

Acts Referred:

Customs Act, 1962 — Section 12(2), 25, 25(1), 25(2)

Citation : (1991) 56 ELT 298

Hon'ble Judges : S.P. Bharucha, J;M.F. Saldhana, J

Bench : Division Bench

Advocate : Mr. A.J. Rana and Mr. T.G. Vora, instructed by M/s Kantilal Underkat and Co., Mr. N.G. Thakkar, Mr. V.L. Punjuani and Mr. D.R. Jhuria, Original Petitioners, for the Appellant; Mr. J.P. Devadhar, (Original Respondents), for the Respondent

Judgement

Bharucha, J.—These appeals involve similar facts and the same point of law. The learned Single Judge delivered a judgment in Writ Petition No. 1639 of 1989 and followed the judgment in the other three writ petitions. We can, therefore, dispose of all the four appeals by a common judgment.

2. The facts that we set out relate to the first appeal. The Appellants use aluminium ingots for the manufacture of aluminium extruded shapes and sections and other aluminium articles. The aluminium ingots are purchased by the Appellants from the local market and are also imported from abroad.

3. On 18th April 1980 a notification was issued by the Central Government u/s 25(1) of the Customs Act, 1962, whereby aluminium ingots were exempted, when imported into India, from the whole of the basic customs duty and additional duty leviable thereon. This notification was to remain in force upto 30th September 1980. On 29th August 1980 the Central Government issued another notification u/s 25(1) in relation to aluminium ingots whereby the same were exempted from such portion of the additional duty leviable thereon as was

in excess of 12.5 per cent ad valorem. On 9th September 1980 a third exemption notification was issued by the Central Government relating to aluminium ingots and thereby the same were exempted from the whole of the basic customs duty leviable thereon. The position, therefore, at that time was that importers of aluminium ingots has to pay no basic customs duty and only 12.5 per cent of the additional duty thereon.

4. On 2nd December 1980, a notification was issued under the provisions of Sections 25(2) of the Customs Act relating to 30,639 tons of aluminium ingots which were being imported by the Minerals and Metals Trading Corporation India (MMTC). The text of the notification is as follows :-

"Ad hoc exemption Order No. 948 F. No. 355/160/79 Cus. Government of India, Ministry of Finance, Deptt. of Revenue, New Delhi, the Deptt. of Revenue, New Delhi, the 2nd December 1980.

To, The Collector of Customs, Bombay, Calcutta, Madras.

Sub : Aluminium exemption from Countervailing duty of Customs.

Sir,

I am directed to say that in the light of the shortage of aluminium in the country, 30639 tons of aluminium ingots/wire rods is being imported by the Mineral and Metals Trading Corporation India (MMTC) to meet the shortage of the aluminium in the country. Since the c.i.f. price of imported aluminium is almost equal to the indigenous price taking into account the need for distributing it at reasonable price, it has been felt necessary to exempt aluminium from the whole of the countervailing duty of Customs (basic and auxiliary duties of customs are already exempt).

Having regard to the circumstances of exceptional nature as above and in exercise of the powers conferred by sub-section (2) of Sec. 25 of the Customs Act, 1962, (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts 30,639 tonnes of aluminium (13,684 tonnes of ingots and 16,955 tonnes of rods) falling within Chapter 76 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and imported by the Metals and Minerals Trading Corporation of India Ltd. from the whole of the additional duty leviable thereon u/s 3 of the said Customs Tariff Act subject to the condition that the import of the above shall be covered by an Import Trade Control Licence or a Customs clearance permit issued by the Chief Controller of Exports, New Delhi or the Chief Controller of Import, Export, New Delhi or by an Open General Licence of the Import Trade Control Policy in force at the time of importation of the goods.

The part-wise figures of the goods are as under :

Ingots Rods ----- ---- Bombay 6504 M.T. 9962 M.T. Calcutta 3000 M.T. Madras 7180 M.T. 3993 M.T.

Yours faithfully, Sd/- K. Kumar Under Secretary to the Govt. of India."

5. The appellants were proposing to buy 499.355 metric tonnes of aluminium ingots imported against a replenishment licence by M/s. Hitesh Metals, Bombay. These aluminium ingots were shipped to India under a bill of lading dated 22nd August 1980. The Appellants had also imported another 7.962 M.T. of aluminium ingots. Both the consignments were landed in Bombay in or about September 1980. Additional duty at the rate of 12.5 per cent and 10 per cent surcharge was levied thereon, in the aggregate sum of Rs. 9,95,679-99 Ps. The writ petition was filed by the Appellants for a declaration that the exemption notification dated 18th August 1980 continued to remain in force and effective upto 30th September 1980, for a declaration that the levy of additional duty at the rate of 13.75 per cent on the c.i.f. value of the aforementioned aluminium ingots was unreasonable, unconstitutional and without the authority of law, and for writ seeking the refund of the said amount of Rs. 9,95,679.99 Ps.

6. When the writ petitions were heard by the learned Judge, the plea that the exemption notification dated 18th April 1980 continued to remain in force upto 30th September 1980 was given up. What was pressed was the argument of hostile discrimination which was pleaded in the following words :-

"Both the Petitioners and the MMTC are importers of aluminium rods and ingots and both of them import the same from the open market abroad. The petitioners say that both the Petitioner company and the MMTC are importers of aluminium ingots and rods. They are both, therefore, similarly situated and any favourable treatment accorded to MMTC would be clearly discriminatory, without any just basis or classification and would be arbitrary and without the authority of law. It is also necessary to note that MMTC does not itself consume or use the aluminium ingots imported by it, but merely sells the same to actual users of the item. As MMTC does not pay any additional duty, it is able to sell the imported aluminium ingots at a price which is less than that which has to be paid by actual users who purchase aluminium otherwise than from MMTC or who import it directly. This results in a hostile discrimination being practiced against such users of aluminium as compared to those who buy the commodity from MMTC. It is submitted that there is no basis or justification at all for distinguishing between these two groups of actual users of aluminium and treating one very favourably as compared to the other. This also is in violation of the fundamental rights to equality guaranteed by Article 14 of the Constitution of India."

The learned Judge, having regard to the terms of the said notification u/s 25(2) and the judgment of the Delhi High court in the case of H. Jahangir Bhatusha Vs. Union of India (UOI) and Another, , negated the contention that the said notification u/s 25(2) or the classification made thereunder were unreasonable.

7. The judgment of the Delhi High Court in M. Jahangir Bhatusha's case was affirmed by the Supreme Court M. Jhangir Bhatusha and Others Vs. Union of India (UOI) and Others, . The Government of India had canalised the import of

edible oils under the Import Policy of 1978-79 so that the State Trading Corporation alone could import them. Some private importers who had entered into firm commitments with foreign suppliers to purchase edible oils filed writ petitions and were permitted to import the edible oils they had contracted for. Various notifications were issued granting exemption in respect of edible oils from Customs, additional and auxiliary duty. The result was that while the edible oils imported by the S.T.C. attracted basic customs duty at the rate of 5 per cent, the private importers aforementioned had to pay basic Customs duty at the rate of 125 per cent and auxiliary duty at the rate of 25 per cent. The writ petitions that the private importers filed complaining of the preferential treatment accorded to the S.T.C. as compared to them were dismissed by the Delhi High Court. There was no objection before the Supreme Court in the appeals to the canalisation in favour of the S.T.C. The objection was restricted to the alleged differential treatment. The Supreme Court observed that it was apparent that the power conferred on the Central Government u/s 25(2) was to be exercised by it in its subjective satisfaction. The Central Government had to be satisfied that it was necessary in the public interest to pass special exemption order. The exercise of the power was controlled by the requirement that the exemption order must contain a statement stating the circumstances of an exceptional nature under which the special exemption order had been considered necessary. The requirement was intended to ensure that the satisfaction of Central Government concerning the necessity of the order was not reached arbitrarily but flowed from material relevant to the object for which the power had been conferred. The circumstances recited in the exemption orders were the following :

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

The Supreme Court noted that the import of edible oils had been entrusted exclusively to the S.T.C. with effect from 2nd December 1978. Because the private importers had already prior to that date entered into contracts for the purchase of edible oils with foreign sellers they were permitted to make the imports to honour their commitments. In other words, they were allowed to work out their contracts without affecting the principle that as and from 2nd December 1978 the business of importing edible oils belonged exclusively to the S.T.C. The Supreme Court found that the reasons set forth in the exemption notifications (quoted above) constituted a reasonable basis for the same. It appeared from the material placed before it that international prices were fluctuating and although they might have shown a perceptible fall, there was the apprehension that because of the history of fluctuations there was a possibility of their rising in the future. The need to protect the domestic market was always present and, therefore, encouragement had to be given to the imports effected by the S.T.C. by reducing the rate of customs duty levied on such imports. This involved a long term perspective, since the exclusive monopoly to import these edible oils was

now entrusted to the S.T.C. What appeared to have dominated the policy of the Government in issuing the exemption notification was the consideration that the domestic prices of "vanaspati" should be maintained at reasonable levels. It could not be doubted that the entire edible oil market was an integrated one and that it was not reasonable to treat any one of the edible oils or "vanaspati" in isolation. It was a well accepted fact that "vanaspati" manufacturers constituted a powerful organised sector in the edible oil market and a high "vanaspati" price would encourage an unauthorised diversion of edible oils to "vanaspati" manufacturing units, resulting in a scarcity in the edible oil market giving rise to erratic prices and depriving consumers of access to edible oils. The need for preventing "vanaspati" prices ruling high was also to prevent people normally using "vanaspati" from switching over to edible oils, thus leading to an imbalance in the market. An overall view made it necessary to ensure that domestic prices of "vanaspati" remained at reasonable levels. The policy of the Central Government was to have sufficient suppliers of edible oil at hand in order to feed the market. It was, therefore considered desirable and in the public interest to reduce the rate of customs duty to five per cent on the imports made by the S.T.C. It was the Central Government which had to be satisfied, as the authority appointed by Parliament u/s 25(2), that it was necessary in the public interest to make the special order of exemption. It had set out the reasons which prompted it to pass the orders. The circumstances mentioned could not be said to be irrelevant or unreasonable. It was not for the Court to sit in judgment on the sufficiency of the reasons. It was true that the State donned the robes of a trader when it entered the field of commercial activity and, ordinarily, it could claim no favoured treatment, but there might be clear and good reason for making a departure. Viewed in the background of the reasons for granting a monopoly to the S.T.C., acting as an agent or nominee of the Central Government in importing the edible oils, it would be evident that policy considerations rendered it necessary to make consummation of that policy effective by imposing a concessional levy on the imports. No such concessions were called for in the case of the private importers who were merely working out contracts entered into by them with foreign sellers before 2nd December 1978.

8. Counsel for the Appellants submitted that Section 12(2) of the Customs Act treated the Government on a par with private importers in the matter of imposition or levy of duty. Section 25 permitted the grant of exemption in respect of goods in the public interest but it did not permit the grant of exemption in regard to any particular importer. In any case, the grant of exemption had to pass the test of Article 14 of the Constitution. In order to pass the test two conditions had to be fulfilled, namely, the grant of exemption had to be founded upon intelligible differentia and the differentia had to have a rational nexus to the object sought to be achieved. Though the first of the two conditions might be satisfied in the instant case, the instant case, the second was not satisfied. MMTC and the Appellants were in the same situation inasmuch as both could import the goods and sell the same in the open market. There was no

monopoly created by canalization or otherwise in favour of the MMTC. Besides, in the case of the Appellants in the first appeal, they were actual users of the goods. In the practical sense, when the same goods were available from the MMTC at a lower rate by reason of the exemption from duty granted to it, an intending purchaser would purchase from the MMTC and not from the private importer. In so far as the judgment in M. Jahangir Bhatusha's case was concerned, it was submitted that it was distinguishable because there a monopoly had been created through an order of canalisation in favour of the S.T.C. also, the private importers there were only those who had entered into firm commitments with foreign sellers prior to the order of canalization.

9. The reasons given in the said notification u/s 25(2) read as follows :

"I am directed to say that in the light of the shortage of aluminium in the country, 30639 tons of aluminium ingots/wire rods is being imported by the Minerals and Metals Trading Corporation India (MMTC) to meet the shortage of the aluminium in the country. Since the c.i.f. price of imported aluminium is almost equal to the indigenous price, taking into account the need for distributing it at reasonable price, it has been felt necessary to exempt aluminium from the whole of the countervailing duty of Customs (basic and auxiliary duties of customs were already exempt.)"

They would seem to suggest that what was felt necessary was to exempt aluminium from additional duty and not only the consignment of 30,639 metric tonnes of aluminium ingots which was being imported by MMTC.

No affidavit has been filed by the Respondents in reply to the petition. We have not before us any of the sort of material that was placed before the Supreme Court in M. Jahangir Bhatusha's case. There does, therefore, appear to be some substance in the contention that no good reason has been made out why private importers of aluminium ingots should be treated differently from the MMTC, but we need express no definite conclusion because, for the reasons we now set out, the appeals must fail.

10. We have no doubt that the benefit of a special exemption notification u/s 25(2) cannot be so widened as to be made available to all importers. In other words, the Court cannot convert a notification u/s 25(2) into a notification of general application u/s 25(1). The notification u/s 25(2) has to be issued by special order in each case upon the Central Government being satisfied that it is necessary in the public interest so to do and it is obligatory that the circumstances of an exceptional nature should be stated in the order.

11. Mr. Rana submitted that, in the circumstances, we should mould the relief, by which is meant that we should strike down the said notification u/s 25(2). To strike it down would adversely affect the MMTC. The MMTC is not a party to the appeals. We cannot pass an order which would adversely affect the MMTC without hearing it.

11. In the result, the appeals are dismissed. There shall be no order as to costs. In Appeal Nos. 1003 of 1987, 1015 of 1987 and 1016 of 1987 the Appellants have furnished bank guarantees and, pending the disposal of the appeals, there were orders restraining the Respondents from enforcing the same. Upon the application of Counsel, these interim orders shall remain in operation for period of four weeks from to-day.