

(2009) 06 KL CK 0143
In the High Court Of Kerala
Case No : WP (C) No. 592 of 2004 (U)

Rubfila International Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 30-06-2009

Acts Referred:

Constitution of India, 1950 — Article 14
Rubber Act, 1947 — Section 12(1), 12(2), 12(7), 25

Citation : (2011) 270 ELT 159 : (2009) 3 KLJ 443

Hon'ble Judges : C.K. Abdul Rehim, J

Bench : Single Bench

Advocate : Bechu Kurian Thomas, for the Appellant; Sajeesh K.B., John Varghese, P. Parameswaran Nair (A.S.), Joseph Kodianthara and Mathews K. Uthupachan, for the Respondent

Final Decision : Allowed

Judgement

C.K. Abdul Rehim, J.—The petitioner is a Public Limited Company engaged in manufacture of the heat resistant Latex Rubber Threads. Petitioner is an approved exporter of the said product. Petitioner is challenging validity of Ext. P1 notification in this writ petition. Ext. P1 is issued by the Union of India, fixing the rate of cess on the Rubber produced in India and procured for export production by the Export Oriented Units and procured for export production by the Export Oriented Units (EOUs), Units in the Special Economical Zone (SEZ) and Units in the Export Processing Zone (EPZs) at "zero paise" per Kg. According to the petitioner through Ext.P1 an exemption from payment of "Rubber Cess" is granted to certain industries based on the locality where such industries are set up, and such an exemption is granted in violation of Article 14 of the Constitution of India. Further, it is issued by the Central Government without there being any power derived under the Rubber Act, 1947. If the Units engaged in export of Rubber products, such as EOUs, Units situated at SEZs and EPZs are made eligible for such an exemption, there is no reason for denying such exemption to the petitioner, who is also doing export of Rubber products is the contention.

2. The first question for consideration is about the competence and jurisdiction of the Union Government to issue a notification like that of Ext.P1. As evident from Ext. P1, the notification is issued in exercise of power conferred on the Union Government by Sub-section (1) of Section 12 of the Rubber Act 1947 (hereinafter referred as the Act for short). For an easy reference Section 12(1) and (2) is extracted below:

12. Imposition of New Rubber Cess:

(1) With effect from such date as the Central Government may by notification in the Official Gazette, appoint, there shall be levied as a cess for the purpose of this Act, a duty of excise on all rubber produced in India at such rate, not exceeding two rupees per kilogram of rubber produced as the Central Government may fix.

(2) The duty of excise levied under Sub-section (1) shall be collected by the Board in accordance with rules made in this behalf either from the owner of the estate on which the rubber is produced or from the manufacturer by whom the such rubber is used.

Under Section 12(1) the Central Government is authorised, (1) to fix the appointed day from which the levy of cess is to be collected, and (2) to fix the rate at which the duty of excise (cess), not exceeding two rupees per kilogram of rubber produced, is to be collected. Beyond the above quoted two specific powers, Section 12(1) does not confer any power on the Central Government to give exemption to anybody or to any class of manufactures who are using rubber, or exporting Rubber products, from payment of such duty of excise (cess)

3. As per Section 12(7) of the Act, the duty of exercise so collected, reduced by cost of collection as determined by the Central Government, shall first be credited to the "Consolidated funds of India" and then be paid by the Central Government to the Board for being utilised for the purpose of the said Act, if Parliament by appropriation made by law in this behalf so provides. It is pointed out by Sri. Bechu Kurian Thomas, learned Counsel for the petitioner, that till 1960 the liability to pay excise duty u/s 12(1) was on the owner of the estate in which rubber is produced. But by an amendment to Section 12(2), the liability for payment was extended also to the manufacturer by whom such rubber is used. As per the amended provision the Rubber Board shall collect the duty either from the owner Of the estate on which rubber is produced or from the manufacturer by whom such rubber is used. It is specifically pointed out that the incidence of taxation as prescribed u/s 12(1) is on production of the rubber within the country. The wording of Section 12(1) is to the effect that the cess shall be levied as a duty of excise on all rubber produced in India. Merely because the liability has been extended also to manufacturers, apart from the owners of the estate, the nature of levy or the incidence of taxation is in no way affected, is the submission.

4. On an analysis of the above said provisions, it is clear that the incidence of

levy is on production of Rubber in the country and not on production of any value added product of the Rubber by any manufacturer. When the liability for payment of cess was also extended to the manufacturers through the amendment brought in the year 1960, its validity was challenged before the hon"ble Supreme Court on the grounds that the amendment is beyond the legislative competence of the Parliament because it is outside the ambit of Entry 84 of List I in the Seventh Schedule of the Constitution, and on the ground that it will confer uncontrolled and unrestricted discretion upon the Rubber Board to levy and collect cess either from the owners of the estates or from the manufactures, without specifying the circumstances under which it should be imposed on one or another. In *Jullunder Rubber Goods Manufacturers' Association Vs. The Union of India (UOI) and Another*, the hon"ble Supreme Court, discarding all the above contentions, held that the incidence of charging excise duty certainly falls on production and Sub-section (2) provides only a method of collection either from the producer of the Rubber or from the manufacturer who uses it. Further it is held that so long as the law provides the method of collection it can be provided with guidance by fixation of rate and it was noticed that under the Rules framed u/s 25 of the Act all guidelines and control can be introduced.

5. In a further decision of the hon"ble Supreme Court in *State of Kerala Vs. Madras Rubber Factory Ltd.*, it is observed that the levy of excise duty is not under Sub-section (2) but it is under Sub-section (1) of Section 12. It is the duty which is statutorily levied under Sub-section (1) on the rubber produced, is to be collected under Sub-section (2), in the manner provided by the Rules. By reason of Section 12(1) a cess at the rate prescribed is statutorily levied on the Rubber so produced and the liability to pay the said amount of cess gets attached to the rubber so produced. Therefore the incidence of duty is directly relatable to the production of rubber and the character of levy is not altered merely because the payment of duty is deferred till the purchases of the rubber by manufacturer.

6. Based on the settled legal position as above, Sri. Bechu Kurian Thomas submitted that the Rubber Cess is not an excise duty attached to the manufactures on their production, but it is the duty leviable on Rubber produced in the country. The duty of excise so collected being an amount credited to the "Consolidated fund of India", and being paid by the Central Government to the Rubber Board for utilization for the purposes of the Act, the exemption granted to a group of manufactures from payment of such duty is totally beyond the scheme of the Act, and it is totally lacking competence. It is contended that fixation of "Zero paise per Kg" as rate of cess in Ext.P1, is virtually an exemption granted from payment of cess to certain manufactures. It is evident from usage of such terms that the Central Government is aware about its inability to exempt any group of manufacturers. So the attempt is clear, that it is indirectly providing exemption to certain groups from payment of cess, which the Government cannot do directly. It is settled principle of law that the Government cannot do something which they could not do directly by any indirected means or method. Therefore the exemption granted through Ext.P1 is totally unsustainable, is the

contention.

7. In the counter affidavit of respondents, it is contended that Ext.P1 is intended at promotion of export of industrial rubber, which is hitherto been an import substitute, and it is intended to develop India as a regular exporter of this commodity. It is stated that the notification was issued as a equal to the Government's "Export and Import (EXIM) Policy" in order to boost export of rubber products and there is no discrimination in taking such a policy and it is not violative of Article 14 of the Constitution of India. It is contended that the benefit under the notification is allowed only to EOUs and units in EPZ and SEZ, which are 100% EQUs. The SEZs are deemed to be foreign territory for the purpose of trade operations, duties and tariffs as per Chapter VII of the new EXIM Policy. Thus these units are separate category and cannot be treated on par with other units engaged in manufacturing of rubber products for domestic consumption. The impugned notification is issued pursuant to economic policy of the Government to promote export of rubber products in the larger public interest and therefore the policy is not contrary to law or in any way mala fide or illegal. Hence it is not appropriate to the court to go into the wisdom of the advisability of the economic policy of the Government that there being any such power provided under statute, is the contention.

8. Even assuming that Ext.P1 is a sequel to the EXIM Policy adopted by the Central Government, the question arises whether such a policy can be brought in without there being corresponding amendment brought into the statute, through an executive order or even through a subordinate legislation. It is held by the hon'ble Supreme Court in *Delhi Development Authority, N.D. and Another Vs. Joint Action Committee, Allottee of SFS Flats and Others*, that;

An executive order turned upon a policy decision is not beyond the pale of judicial review. Whereas the Supreme Court may not interfere with the nitty-gritty of the policy, or substitute one by the other but it will not be correct that the court shall lay its judicial hands off when a plea is raised that the impugned decision is a policy decision. Interference therewith on the part of the Supreme Court would not be without jurisdiction as it is subject to judicial review.

Broadly a policy decision is subject to judicial review on the following grounds:

- (a) if it is unconstitutional;
- (b) If it is dehors the provisions of the Act and the regulations;
- (c) If the delegatee has acted beyond its power of delegation;
- (d) if the executive policy is contrary to the statutory or a larger policy.

In *P.J. Irani Vs. The State of Madras*, it is held by the hon'ble Supreme Court that a subordinate legislation can be challenged not only on the ground that it is contrary to the provisions of the Act or other statutes; but also if it is violative of the legislative object. The provisions of the subordinate legislation can also be

challenged if the reasons assigned therefore are not germane or otherwise mala fide. Further in *Bombay Dyeing and Mfg. Co. Ltd. Vs. Bombay Environmental Action Group and Others*, the hon'ble Supreme Court observed that a policy decision, as is well known, should not be lightly interfered with, but is difficult to accept the submission that the courts cannot exercise their power of judicial review at all. By reason of any legislation or by way of subordinate legislation, the State gives effect to its legislative policy. A subordinate legislation apart from being intra vires the Constitution, should not also be ultra vires the parent Act under which it has been made. A subordinate legislation, it is trite, must be reasonable and in consonance with the legislative policy as also give effect to the purport and object of the Act and in good faith.

9. In the instant case Ext. P1 is not even a subordinate legislation, but only an executive order, is the contention of the petitioner. Therefore as long as it is contrary to the provisions of the Act and as long as the Act does not provide power to the Government for such a notification, it is totally invalid.

10. Considering the rival contentions evaluated on the basis of the settled legal precedence cited above, the following conclusions can be arrived in this case. The fixation of "Zero paise per kilogram" as duty of excise leviable from certain class of manufacturers as Rubber cess will clearly amount to granting of exemption. It is evident that fixation of "Zero paise" is only an indirect method of granting exemption, which is Government knows that they could not do directly. The question whether the Central Government has got competence in issuing an order exempting certain class of manufacturers from payment of excise duty as Rubber cess, can be answered only on the negative. It is evident from Ext. P1 that the Government themselves admitted that they had issued such a notification only by virtue of power conferred u/s 12(1) of the Act. But it is clear and evident that Section 12(1) of the Act does not empower the Government from issuing any order granting exemption to any category of estate owners or manufactures from payment of the duty of excise. No other provisions in the Act empowers the Government from granting such an exemption. Therefore Ext.P1 is issued beyond the power and competence of the Government and hence it is not sustainable. Thirdly, whether the Government is right in issuing such a notification in promotion of the "Exim Policy" It is settled law that a policy decision cannot be permitted to contradict the provisions of the statute or its legislative object. Therefore the exemption granted through Ext.P1 which is in violation of the provisions of the Act and its legislative object, could not be held valid, even if it is issued as a policy decision taken by the Government.

In the result Ext.P1 is unsustainable and the writ petition is allowed quashing Ext. P1 notification.