

(2011) 08 MAD CK 0478

In the Madras High Court

Case No : Writ Petition No. 18188 of 2011

Vinay Auto Copier Machine and Others

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 08-08-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Customs Tariff Act, 1975 — Section 111, 151A

Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008
— Rule 13, 14, 17

Motor Vehicles Act, 1988 — Section 43A

Citation : (2011) 08 MAD CK 0478

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : Arvind P. Datar, SC and N. Viswanathan, for the Appellant; K. Ravi Anantha Padmanaban, for Customs and Central Excise, for the Respondent

Final Decision : Dismissed

Judgement

K. Chandru, J.—Excepting W.P. Nos. 18435 and 18436 of 2011, the other writ petitions were heard on 05.08.2011 and the matter was directed to be posted for orders on 08.08.2011. On the day when the matters were listed under the caption for orders, W.P. Nos. 18435 and 18436 of 2011 came up for admission. Mr. N.Viswanathan, learned Counsel agreed that these two matters were also covered by whatever the orders that are to be pronounced in the earlier writ petitions. Hence all the matters were clubbed together and a common order is passed.

2. The Petitioners in all these writ petitions are importers trading in Secondhand Digital Multifunction Printing and Copying Machines and secondhand Photocopier Machines and it accessories, parts and consumables. They are also having Code Numbers allotted under the Importer and Exporter Code issued by the respective offices of the Zonal Joint Director General of Foreign Trade. They had also imported from various overseas suppliers in U.S.A., Finland, Germany, Italy and

Sweden. The machines were sought to be imported through Chennai Customs. It was stated that the Customs Officers with the assistance of the approved Chartered Engineer were directed to examine the goods. Though applications were submitted long back for the purpose of engaging Chartered Engineers in the prescribed format as directed by the third Respondent Commissioner of Customs, (Seaport-Exports), Customs House, Chennai, No. action was initiated. The officers working under the third Respondent prior to the issuance of the impugned order and the consequent note instruction did not permit the clearance of the subject goods in the normal course, but invariably subjected the goods to first check causing 100% examination with the assistance of the locally approved Chartered Engineer under the pretext that the goods are being procured from the dealer and not from the manufacturer. Hence the value declared cannot be accepted. Therefore, they were getting the value enhanced and assessed duty under the specific sub heading No. 8443 31 00 of the Customs Tariff Act, 1975. Such action was resorted to by omitting to respect the ratio given by the Supreme Court as well as the circular No. 4/2008, dated 12.2.2008 issued by the Central Board of Excise and Customs, New Delhi.

3. It was stated that apart from enhancing the value for the purpose of assessment, the authorities had insisted on the Petitioners and other importers to produce licence for their imports claiming that the machine is similar to a photocopier and therefore, would be covered by the restrictions imposed under paragraph 2.17 of the Foreign Trade Policy published in terms of the Foreign Trade (Development and Regulation) Act, 1992. The action of the Respondents in insisting upon the production of licence under the Foreign Trade Policy is contrary to the policy. Therefore, they had moved this Court by way of writ petitions. This Court in a batch of writ petitions had directed the department to release the goods on payment of the duties of customs on the enhanced value as determined by the Chartered Engineer and upon deposit of 25% of the enhanced value with liberty to the Customs to proceed in accordance with law by following the decision of the division bench of this Court. It was stated that the clearance of the subject goods were being permitted by the other ports such as Kolkata, Cochin either accepting 25% deposit or by imposing appropriate fine and penalty. Further Customs, Excise and Service Tax Appellate Tribunal (CESTAT) at Banalore had passed a final order Nos. 405 to 416 of 2011, dated 28.6.2011 holding that the action of the Customs authorities in confiscating the goods u/s 111(d) of the Customs Act for non production of licence under paragraph 2.17 of the policy is contrary to law and accordingly set aside such confiscation.

4. It was claimed that pursuant to the order passed by the CESTAT, the issues raised by the Customs Authorities have been finally settled in favour of the importers and that the customs are No. more justified in seeking any cash deposit towards the release of the subject goods. But, however with the wrong motive to stop the import of the subject goods through the port of Chennai, under the oral instructions of the higher authorities, the authorities during May, 2011 had insisted on the approved Chartered Engineer to show how further

enhance the appraisalment of the value of the goods believing that such enhancement would stand as a deterrent against the import of such goods. They also came to know that warnings were issued to such Chartered Engineers that any failure to cooperate with the department will lead to delist from the approved list, thereby rendering them jobless. It is around this time, the new Commissioner had assumed the office of the third Respondent and had issued the Standing Order No. 13/2011, dated 14.6.2011 relating to the valuation of the second hand goods in general followed by note instruction, dated 14.6.2011 to all concerned specifically relating to the import of the old and used photocopiers and multifunction machines alone prescribing various modalities and cumbersome procedure. If these procedures are followed, the clearance of goods out of customs will become next impossible.

5. It was stated that only the Central Board of Excise and Customs alone are competent to issue instructions with a view to maintain uniformity in assessment u/s 151-A of the Customs Act. Therefore, the Standing Ordrs and the note instructions issued by the third Respondent are without jurisdiction. The direction issued by the third Respondent is contrary to various instructions issued by the Ministry providing for the early clearance of goods out of the Port and that it is unreasonable and there was a strong motive. It is nothing but an harassment. The note instructions issued are unique and unparalleled and has never been made in the history of Customs in any other Ports in India. That the requirement that there should be an approved Chartered Engineer is an irrelevant consideration. The Chartered Engineer is also approved by the Ministry of Commerce and is an expert in the field. Further stipulation that examination of goods should be videographed and photographed in close quarters and the unedited DVD should be provided for the purpose of assessment, adjudication and the audit, exposes the arbitrariness and highhandedness of the third Respondent. Such requirements only undermines the trustworthiness and competence of the officers of the CustoMs. It is their assertion that examination of goods by the Chartered Engineer has never been called into question.

6. It was stated that further direction to the Chartered Engineers to liaise with the original manufacturers of the subject goods to ascertain its value, year of manufacture and the residual life of goods before they furnish their reports would not serve any purpose. Further, if the other Ports in India are not having any restrictions in this regard, it is not clear as to why the Chennai Port must adopt a different yardstick. It was also stated that the note asserting that if the machine is not functional, it should be treated as e-waste further exposes the intimidator tactics besides exposing his ignorance. No. importers will bring e-waste by paying an huge costs incurring the additional cost in packing, transporting and remitting duties on the enhanced value besides incurring demurrage, detention and legal charges. Though the Joint Commissioner of Customs in a few cases held that the old used photocopiers and multifunction machines consisting of mostly electromechanical parts as e-waste, the CESTAT, Chennai Bench had vacated the orders of the Joint Commissioner and held that the secondhand old

and used computers cannot be hazardous waste or e-waste.

7. It was further stated that the CESTAT, Bangalore having decided the issue in favour of the importers, the Respondents cannot start a different procedure so as to bypass the orders passed by various courts. The Respondents without any orders of the court and obtaining report from the Tamil Nadu Pollution Control Board to hold the goods as hazardous waste, it is nothing but an exercise to get over the orders of this Court. There was No. necessity to issue such a standing order. The Standing Order was issued on their own without any source of power. Therefore, it was prayed that this Court must set aside the Standing Order No. 13 of 2011, dated 14.6.2011 and the consequent instruction in Note No. 4 dated 14.6.2011 issued by the third Respondent.

8. Heard the arguments of Mr. Arvind P. Datar, learned Senior Counsel leading Mr. N.Viswanathan, counsel appearing for Petitioners and Mr. K.Ravi Anantha Padmanaban, learned Standing Counsel for Respondents Excise Department.

9. Mr. Arvind P. Datar, learned Senior Counsel once again re-emphasised the same contentions. He also referred to a departmental clarification issued by the Central Board of Excise and Customs that the department cannot pre-determine the issue which is a matter of evidence. The department must be allowed to establish the same before the adjudicating authority. Even the Central Board of Excise and Customs" circular cannot impose limitations which are not provided in the notification and it cannot whittle down the notification. For this purpose, he placed reliance upon a judgment of the Supreme Court in TATA Teleservices Ltd. v. Commissioner of Customs reported in 2006 (194) E.L.T. 11(SC) : (2006) 1 SCC 746 and relied upon the following passage found in paragraph 10, which is as follows:

10. We are of the view that the reasoning of the Bombay Bench of the Tribunal as well as that of the Andhra Pradesh High Court must be affirmed and the decision of the Delhi Tribunal set aside insofar as it relates to the eligibility of LSP 340 to the benefit of the exemption notification. The Andhra Pradesh High Court was correct in coming to the conclusion that the Board had, in the impugned circular, predetermined the issue of common parlance that was a matter of evidence and should have been left to the Department to establish before the adjudicating authorities. The Bombay Bench was also correct in its conclusion that the circular sought to impose a limitation on the exemption notification which the exemption notification itself did not provide. It was not open to the Board to whittle down the exemption notification in such a manner. The exemption notification merely reproduced the language of Entry 8525 20 17 and since the exemption notification merely reproduced the tariff entry, the limitation sought to be imposed by the Board would tantamount also to reading the limitation into the classification itself. Since the issue would be ultimately a question of evidence, the onus was on the Department to prove by appropriate evidence that the goods were classifiable under Entry 8525 20 19 being the residuary entry. This the Department could have done by negating the claim of

the importers that the goods were classifiable under Tariff Entry 8525 20 17 and by establishing that the imported goods could not reasonably be classified under any other head. In this particular case the onus had not been discharged by the Revenue. The only evidence on record was the opinion sought for by the Ministry of Finance itself and given by the Department of Telecommunications to the effect that the model LSP 340 was in fact covered by the phrase "cellular telephone". Since there is No. dispute that the technology used in LSP 340 and the handheld mobile phone is the same, there is No. warrant to limit either the tariff entry or the exemption notification to handheld cellular phones. Neither the range nor the size would make any difference.

10. The learned Senior Counsel also referred to a judgment of the Supreme Court in Union of India (UOI) and Others Vs. Inter Continental (India), for contending that the department by issuing the circular subsequent to the notification cannot add a new condition to the notification, thereby restricting the scope of exemption notification or whittling it down. In doing so, the Supreme Court quoted with approval the judgment of TATA Teleservices Ltd."s case (cited supra). The following passage found in paragraph 6 of the judgment may be usefully extracted below:

6. We entirely agree with the view taken by the High Court that the department could not, by issuing a circular subsequent to the notification, add a new condition to the notification thereby restricting the scope of the exemption notification or whittle it down.

11. The learned Senior Counsel contended that the attempt by the third Respondent is a clever way of circumventing the earlier order and only in the Port of Chennai, the importers are subjected to such an illegal treatment.

12. Per contra, Mr. K.Ravi Anantha Padmanaban, learned Counsel for the Respondents submitted that the Central Board of Excise and Customs had issued a circular, dated 4.7.2011 regarding import of hazardous waste if allowed to dump into this Country in a big way, will be a serious threat to environment. Therefore, there is a need to adhere to the Hazardous Waste (Management, Handling and Transboundary) Rules, 2008. He referred to the following paragraphs found in the said circular which is as follows:

2. As the field formations are aware, the import and export of hazardous wastes is regulated by the Hazardous Waste (Management, Handling and Transboundary) Rules, 2008. Chapter IV of these Rules deals with import and export of hazardous wastes and Rule 13 thereof states that import of such wastes shall be allowed only for recycling, or recovery or reuse and not for disposal. Further, Rule 14 thereof provides that import and export of hazardous wastes specified in Schedule III shall be regulated in accordance with the conditions specified therein. A perusal of the said Schedule III shows that entries at A1180 and B1110 are relevant for electrical and electronic assemblies.

3. In this regard, the administrative Ministry viz. Ministry of Environment and

Forests has been consulted and they have confirmed that items at A1180 of the said Schedule III relating to waste electrical and electronic assemblies or scrap containing components such as accumulators and other batteries etc. require Prior informed Consent. It is also confirmed that items at B1110 of the said Schedule III can be imported with permission from Ministry of Environment and Forests. This entry includes electrical and electronic assemblies (including printed circuit board electronic components and wires) destined for direct re-use and not for recycling or final disposal. The Ministry of Environment and Forest has also confirmed that imports of second hand computers would require the permission of that Ministry.

4. In view of the above, the Board desires that the field formations should carefully and strictly implement the provisions of Hazardous Waste (Management, Handling and Transboundary) Rules, 2008. In particular, it should be noted that all imported goods falling within the purview of entry B 1110 of Part B of Schedule III of the said Rules, indicating second hand computers, would require the permission of the Ministry of Environment and Forests for import into India. It merits mention that the field formations should also refer to Rule 17 of the said Rules that treats contravening imports as illegal traffic requiring the importer to re-export the wastes at his cost within 90 days from the date of arrival. We must ensure that India does not become a destination for dumping junk electronic products.

5. These instructions may be brought the notice of all concerned by way of issuance of a suitable Public Notice/Standing Order.

6. Difficulties, if any, in implementation of these instructions may be immediately brought to the notice of the Board.

13. He also submitted that an order dated 27.7.2011 was issued by the third Respondent in respect of quality of inspection conducted by the Chartered Engineers M/S. SGS India Pvt. Ltd. in Order in Original No. 16901/2011. Pursuant to the enquiry it was found that M/S. SGS India Pvt. Ltd. have committed violations of provisions of public notice dated 1.9.2008 and they are not fit to continue as Chartered Engineers within the jurisdiction of Chennai Customs Zone. It was found that the company was hiring freelance Chartered Engineers and that those freelancers were not qualified for conducting inspections on secondhand machineries (Capital Goods imported through Chennai Port). In fact, they were not even aware whether the machines are e-waste or not ? These Chartered Engineers were delisted from the list of the approved Chartered Engineers. Therefore, he submitted that it is not as if the third Respondent lack in power in streamlining the procedure for enlisting the Chartered Engineers and also making inspections most scientific and having documentation done in a manner which cannot be questioned in future. Hence it was submitted that there is No. case for interfering with the impugned Standing Order and the consequent note instructions.

14. In the light of the rival contentions, it has to be seen whether the impugned orders call for any interference?

15. It must be noted that the Standing Order No. 13/2011 only regulates the procedure for engaging the assistance of the Chartered Engineer and the duties to be performed by the said Chartered Engineer. Note No. 4, dated 14.6.2011 gives guidelines for the Chartered Engineer to assess the goods which are to be imported. In paragraph No. 2 of Note No. 4 it was stated as follows:

2(ii)The importers are claiming that old and second hand photocopier/multifunction machines are in good working condition with sufficient residual value to meet the Policy requirements. In order to ensure that their claims are correct, the Chartered Engineer has to compulsorily test each and every machine and each and every function whenever a multifunction machine is imported. So, firstly the CE has to list out all the functions of each multifunction machine and test each of these machines and certify that each of these functions are working. In case of non-functioning of these machines, the same should also be certified by the Chartered Engineer as these machines may have to be categorized as e-waste and have to be handled as per the Hazardous Waste Rules as they have to be treated as hazardous waste.

The residual life of each of these machines have to be certified by the Chartered Engineer. This depends on the year of manufacture, usage, wear & tear and the general condition of the machine. It also depends on the fact that each machine at the time of manufacture is rated for certain period of healthy functioning by the original manufacturer. Therefore, the proper officer has to ensure that the Chartered Engineer shall take down all the details available with each machine and contact the original manufacturer and in consultation with them give the residual life in a scientific way.

16. The impugned Standing Orders are not public documents and they are issued with a view to the subordinate officers to utilize the assistance of the Chartered Engineers. The communication was never addressed to the Petitioners who are third parties to the impugned order. The impugned orders need not be orders issued in terms of Section 151-A of the Customs Act. Section 151-A of the Customs Act reads as follows:

151-A. Instructions to officers of customs. -The Board may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of goods or with respect to the levy of duty thereon, issue such orders, instructions and directions to officers of customs as it may deem fit and such officers of customs and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board:

Provided that No. such order, instructions or directions shall be issued-

(a) so as to require any such officer of customs to make a particular assessment or to dispose of a particular case in a particular manner; or

(b) so as to interfere with the discretion of the Commissioner of Customs (Appeals) in the exercise of his appellate functions.]

17. It is not any ones case that the Standing Orders take cover from Section 151-A. Notwithstanding the provisions of the Act, Rules and statutory notification, in order to have the office to function on day today basis, they must be guided by appropriate guidelines. The third Respondent being the authority in his Zone is entitled to lay down certain guidelines so that none of his subordinate act arbitrarily. In fact, they will be benefited by the issuance of such guidelines as it removes any arbitrariness in their obligation. Therefore, the Petitioners have No. locus standi to question the inter-office communication over which they have No. control nor they have locus standi to challenge the same. Unless and until an order is passed by the statutory authority by which they were legally injured, they cannot challenge these circulars.

18. Since the Petitioners heavily relied upon the recent order of the CESTAT, Bangalore, it is necessary to look into the order to see whether any observations made in Final Order Nos. 405 to 416 of 2011 would in any way impeach upon the present Standing Order. On the contrary, the following passage found in the said order will go against the Petitioners company. In paragraph No. 6.3, it was stated as follows:

6.3. The lower authorities have directed the Appellants to get the goods examined by the Chartered Engineer which was done by appointing M/S. SGS India Pvt. Ltd. for doing the job....

19. In paragraphs 6.6 and 6.7 of the order, it was stated as follows:

6.6. It is also seen from the factual matrix, that the Chartered Engineer who were appointed, have also clearly indicated that the imported goods in question are digital multifunctional print and copier machines as per the inspection report reproduced in para 6.3. of this order; if that be so we find that the sdaid machines cannot be called as photocopier machines as photocopier machines per se, have been specifically identifiable as photocopier machines in the explanatory notes to HSN, which we have referred as there were No. other corresponding notes in Customs Tariff to come to a conclusion....

6.7...It is not in dispute in this case that the imported goods are combination of printers, copying machines and/or facsimile machines. Hence, the "digital multifunction print & copier machines" cannot be termed as photocopiers to attract the bar of para 2.17 of the FTP.

20. It is in that view of the matter, the confiscation and the consequent penalties were set aside. But the passages reproduced above will show that the assistance of the Chartered Engineer were sought for and their report was mainly relied upon to arrive at a conclusion and that too it is with reference to classification and not for valuation. But even the Chartered Engineers" report referred to therein, i.e. M/S. SGS India Pvt. Ltd. themselves have been blacklisted by the

third Respondent. They were delisted from the approved list of Chartered Engineers for their poor quality of work in engaging unqualified and uninformed Chartered Engineers for such sensitive work. The order of the CESTAT does not show that there cannot be any assistance by the Chartered Engineer. The impugned circular only regulates the engagement of Chartered Engineers and also mandated the procedures that should be followed.

21. In the present case, the concern expressed by the third Respondent is not relating to classification, but more on the valuation and environmental concern. The Petitioners themselves have produced a copy of the report sent by the District Environmental Engineer, TNPCB addressed to the Member Secretary, TNPCB, dated 6.7.2011. In that report, he had stated that there are 12 importers i.e., 7 from Mirzapur, Uttar Pradesh, 1 from Allahabad, Uttar Pradesh and 4 from New Delhi, importing these machineries. In his report in paragraphs 5 to 7, he had stated as follows:

5. By exporting these machines after using the machine to the extent possible, the exporting countries tend to avoid scrapping of obsolete machinery in the pretext that the machinery is in working condition. Such export relieves the exporting country the botheration of managing post consumer electronic and plastic scrap and indirectly results in scrapping of machinery in the Country of import. The Importing Country is also indirectly thrust with the responsibility to deal with such post consumer electronic scrap.

6. Most of these multifunctional machines contained printer cartridges and they were found to be packed with black tonner residues.

7. It is felt that import of such Second Hand Multifunctional Print and Copying Machines should not be allowed as it results in scrapping of such machinery in India and such scrapping will result in generation of e-Scrap and plastic wastes which will have to be managed or disposed in India.

22. He also observed that the hazardous wastes can be imported only with a permission of the Ministry of Environment and Forests, Government of India.

Therefore, he submitted that the TNPCB should take up the issue with the Government of India. In fact, the High Court of Kerala in its order dated 1.12.2010 in W.P.(C) No. 34102 of 2010 in a case relating to Shivam International, Sikar v. Commissioner of Customs, Cochin and Additional Director, Directorate of Revenue Intelligence, Cochin, had observed as follows:

...having regard to the fact that there is large scale import of e-waste into India, it cannot be stated that the action of the Department that insisting that each item should be connected to a power source to find out, whether it is in a working condition or not is arbitrary or without jurisdiction. The Hon"ble Kerala High Court further observed that the Department cannot be blamed for taking steps to ensure that the goods imported are not e-waste. Accordingly, the Court ordered for release of only such of those machines, which are found to be

working after connecting them to a power source and the Petitioner paying the Customs duty and other charges.

23. When the matter was taken on appeal, a division bench of the Kerala High Court in W.A. No. 2122 of 2010 by an order dated 22.12.2010 had observed as follows:

...the rights of the importers and the obligation of the State to enforce the provisions of the Environment (Protection) Act, 1986, they deem it appropriate to dispose of the writ petition itself directing the Department to pass a final order after such examination of the imported materials as they deem fit and proper in the circumstances after giving a reasonable opportunity to the Respondent regarding the permissibility or otherwise of the clearance of the imported materials for home consumption. The Hon'ble Court further observed that after the appropriate examination of the imported materials, if Appellants come to the conclusion that either a part or whole of the imported materials cannot be cleared for home consumption, they shall pass a speaking order indicating the reasons.

24. Therefore, the case of the Petitioners will have to be seen only in the light of these facts. The two Supreme Court decisions relied on by the learned Senior Counsel appearing for the Petitioners have No. application to the case on hand. It is not the case where the third Respondent has violated any circular issued by the Central Board nor assumed power in terms of Section 151-A of the Customs Act. As already noted, the impugned circular is only an inter-office communication upon which the Petitioners have No. right to challenge. The courts have always ruled that the administrative orders issued by the Governmental authorities are not open to scrutiny under Article 226 of the Constitution of India.

25. In this context, it is necessary to refer to a decision of the Supreme Court in Income Tax Appellate Tribunal, Hyderabad Special Bench, Hyderabad Vs. Dy. Commissioner of Income Tax (Assts) III, Hyderabad, A.P. and Others, and in paragraph 14, it was observed as follows:

14...We fail to appreciate how the High Court in exercise of its power u/s 226 of the Constitution could sit in appeal or judgment over the administrative decision of the President who might have felt that the case was of all-India importance and was required to be decided by a larger bench of three members. Such an administrative order is not open to scrutiny under Article 226 of the Constitution of India except in extraordinary cases wherein the order is shown to be a mala fide one.....

26. Further, even for exercising the quasi judicial power, the executive authorities in order to determine certain objective facts, as a preliminary step to discharge an executive function and those decisions are administrative in character and are not amenable to the writ of certiorari as held by the Supreme Court in Province

of *Bombay Vs. Kusaldas S. Advani and Others*, and in paragraph 6, the Supreme Court had observed as follows:

6... The word "quasi-judicial" itself necessarily implies the existence of the judicial element in the process leading to the decision. Indeed, in the judgment of the lower court, while it is stated at one place that if the act done by the inferior body is a judicial act, as distinguished from a ministerial act, certiorari will lie, a little later the idea has got mixed up where it is broadly stated that when the fact has to be determined by an objective test and when that decision affects rights of someone, the decision or act is quasi-judicial. This last statement overlooks the aspect that every decision of the executive generally is a decision of fact and in most cases affects the rights of someone or the other. Because an executive authority has to determine certain objective facts as a preliminary step to the discharge of an executive function, it does not follow that it must determine those facts judicially. When the executive authority has to form an opinion about an objective matter as a preliminary step to the exercise of a certain power conferred on it, the determination of the objective fact and the exercise of the power based thereon are alike matters of an administrative character and are not amenable to the writ of certiorari....

27. The Supreme Court while construing the direction issued u/s 43-A of the Motor Vehicles Act held that those orders do not confer any legal enforceable right on the motor vehicle importers as done in the case in *R. Abdulla Rowther v. The State Transport Appellate Tribunal, Madras* and Ors. reported in AIR 1959 SC 896 and in paragraph 16, it was observed as follows:

16. These directions issued u/s 43A are not required to be published and may not even be known to the several persons applying for permits. They have been issued not for the information of the applicants, but for the information and guidance of the authorities; and that is not surprising because the public-at-large would be entitled to know these directions only if they confer any legal enforceable rights on the applicants for permits. Therefore, reading the Government Order as a whole, we feel no difficulty in agreeing with the view of the High Court that by this Order the State Government has issued executive instructions for the guidance of the transport authorities; and that the said instructions are not in the nature of statutory rules having the force of law.

28. For making judicial review under Article 226 as to what constitute an unreasonable act came to be considered by the Supreme Court in *U.P. Financial Corporation Vs. Gem Cap (India) Pvt. Ltd. and Others*, and in paragraphs 10 and 11, the Supreme Court had observed as follows:

10.... What does acting unfairly or unreasonably mean? Does it mean that the High Court exercising its jurisdiction under Article 226 of the Constitution can sit as an appellate authority over the acts and deeds of the corporation and seek to correct them? Surely, it cannot be. That is not the function of the High Court under Article 226. Doctrine of fairness, evolved in administrative law was not

supposed to convert the writ courts into appellate authorities over administrative authorities. The constraints - self-imposed undoubtedly - of writ jurisdiction still remain. Ignoring them would lead to confusion and uncertainty. The jurisdiction may become rudderless.

11. The obligation to act fairly on the part of the administrative authorities was evolved to ensure the rule of law and to prevent failure of justice. This doctrine is complementary to the principles of natural justice which the quasi-judicial authorities are bound to observe. It is true that the distinction between a quasi-judicial and the administrative action has become thin, as pointed out by this Court as far back as 1970 in *A.K. Kraipak v. Union of India*¹. Even so the extent of judicial scrutiny/judicial review in the case of administrative action cannot be larger than in the case of quasi-judicial action. If the High Court cannot sit as an appellate authority over the decisions and orders of quasi-judicial authorities it follows equally that it cannot do so in the case of administrative authorities. In the matter of administrative action, it is well known, more than one choice is available to the administrative authorities; they have a certain amount of discretion available to them. They have "a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred". (Lord Diplock in *Secretary of State for Education and Science v. Metropolitan Borough Council of Tameside*².) The Court cannot substitute its judgment for the judgment of administrative authorities in such cases. Only when the action of the administrative authority is so unfair or unreasonable that no reasonable person would have taken that action, can the Court intervene....

29. Finally as contended by the Respondents, the concern for issuance of the impugned Standing Order is also an innumerable concern and such concern cannot be ignored while discussing the precautionary principle. The Supreme Court held that the statutory authorities must anticipate, prevent and attack the causes of environmental degradation. When there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation as held in the case in *S. Jagannath Vs. Union of India and others*, . In paragraph 49, the Supreme Court had observed as follows:

49. This Court in *Vellore Citizens' Welfare Forum v. Union of India*¹ has dealt with the concept of "sustainable development" and has specifically accepted "The Precautionary Principle" and "The Polluter Pays Principle" as part of the environmental laws of the land. The relevant part of the judgment is as under: (SCC pp. 657-60, paras 10-14)

"The traditional concept that development and ecology are opposed to each other is no longer acceptable. "Sustainable Development" is the answer. In the international sphere, "Sustainable Development" as a concept came to be known for the first time in the Stockholm Declaration of 1972. Thereafter, in 1987 the concept was given a definite shape by the World Commission on Environment

and Development in its report called "Our Common Future". The Commission was chaired by the then Prime Minister of Norway, Ms G.H. Brundtland and as such the report is popularly known as "Brundtland Report". In 1991 the World Conservation Union, United Nations Environment Programme and Worldwide Fund for Nature, jointly came out with a document called "Caring for the Earth" which is a strategy for sustainable living. Finally, came the Earth Summit held in June 1992 at Rio which saw the largest gathering of world leaders ever in the history - deliberating and chalking out a blueprint for the survival of the planet. Among the tangible achievements of the Rio Conference was the signing of two conventions, one on biological diversity and another on climate change. These conventions were signed by 153 nations. The delegates also approved by consensus three non-binding documents namely, a Statement on Forestry Principles, a declaration of principles on environmental policy and development initiatives and Agenda 21, a programme of action into the next century in areas like poverty, population and pollution. During the two decades from Stockholm to Rio "Sustainable Development" has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting ecosystems. "Sustainable Development" as defined by the Brundtland Report means "Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs". We have no hesitation in holding that "Sustainable Development" as a balancing concept between ecology and development has been accepted as a part of the customary international law though its salient features have yet to be finalised by the international law jurists.

Some of the salient principles of "Sustainable Development", as culled out from Brundtland Report and other international documents, are Inter-Generational Equity, Use and Conservation of Natural Resources, Environmental Protection, the Precautionary Principle, Polluter Pays Principle, Obligation to Assist and Cooperate, Eradication of Poverty and Financial Assistance to the developing countries. We are, however, of the view that "the Precautionary Principle" and "the Polluter Pays Principle" are essential features of "Sustainable Development". The "Precautionary Principle" - in the context of the municipal law - means:

- (i) Environmental measures - by the State Government and the statutory authorities - must anticipate, prevent and attack the causes of environmental degradation.
- (ii) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.
- (iii) The "onus of proof" is on the actor or the developer/ industrialist to show that his action is environmentally benign.

30. Looking in the above angle, the impugned circulars, i.e. Standing Orders and note instructions, do not call for any interference. Accordingly, all the writ

petitions will stand dismissed. No. costs. Consequently, connected miscellaneous petitions stand closed.