

Union of India and Others

Vs

Indian Charge Chrome and Another

Civil Appeal No. 782 of 1995

(S. P. Bharucha, R. C. Lahoti, N. Santosh Hegde, H. Santosh Hedge JJ)

25.08.1999

JUDGMENT

R. C. LAHOTI, J. –

1. In exercise of power conferred by Section 25 of the Customs Act, 1962 to grant exemption from payment of duty of customs leviable under the Act, the Central Government issued Notification No. 71/85 dated 17-3-1985 which reads as under :

"In exercise of the powers conferred by sub-section (1) of Section 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 the goods falling under Heading 84.66 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when imported into India for the industrial plants or projects specified in column (2) of the table hereto annexed, from so much of that portion of the duty of customs leviable thereon which is specified in the said First Schedule, as is in excess of the amount calculated at the rate specified in the corresponding entry in column (3) of the said table, subject to the condition that the importer produces a certificate from an officer not below the rank of a Joint Secretary to the Government of India in the Ministry administratively concerned with the said industrial plants or projects that the goods in question required for the said industrial plants or projects and recommending grant of the above exemption.

TABLE ----- Sl. No. Description Rate (1) (2)
(3) ----- 1. Power projects (including gas turbine Nil power projects) 2. All other industrial plants or projects 20 per cent ad falling under Heading 84.66 (other valorem than power projects, including gas turbine power projects and fertilizer projects) ----- ##

2. Nothing contained in this notification shall affect the exemption granted under any other notification of the Government of India for the time being in force from the duty of customs specified in the said First Schedule in respect of the goods referred to in this notification."

2. On 19-4-1985 Notification No. 133/85 was issued which reads as under :

"In exercise of the powers conferred by sub-section (1) of Section 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 the goods falling under Heading 84.66

of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) when imported into India for power projects (including gas turbine power projects), from the whole of the duty of customs leviable thereon which is specified in the First Schedule, subject to the condition that the importer produces a certificate from an officer not below the rank of a Joint Secretary to the Government of India in the Ministry administratively concerned with the said projects that the goods in question are required for the said projects and recommending grant of the above exemption."

3. On 1-5-1986 came to be issued Notification No. 306/86 which reads as under :

"In exercise of the powers conferred by sub-section (1) of Section 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 directs that each of the notifications of the Government of India in the Ministry of Finance (Department of Revenue), specified in column (2) of the table hereto annexed, shall be further amended in the manner specified in the corresponding entry in column (3) of the said table.

TABLE ----- Sl. No. Notification No. and date Amendment (1) (2) (3) ----- * * * 3.
133/85-Customs, dated the In the said 19-4-1985. notification, the following explanation shall be inserted at the end namely - 'Explanation. - For the purpose of this notification, the expression "power projects (including gas turbine power projects)" shall mean such projects whose output or end product is power, but shall not include captive power plants set up by units engaged in activities other than power generation.' * * *" ----- ##

4. Notification No. 133/85 (as amended by Notification No. 306/86) was superseded by a fresh Notification No. 67/87 dated 1-3-1987 which reads as under :

"In exercise of the powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962), and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 133/85-Customs, dated 19-4-1985, the Central Government being satisfied that it is necessary in the public interest so to do, hereby exempts the goods specified in column (2) of the table hereto annexed and falling under Heading 98.01 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when imported into India, from so much of that portion of the duty of customs leviable thereon which is specified in the said First Schedule as is in excess of the amount calculated at the rate specified in the corresponding entry in column (3) of the said table.

TABLE ----- Sl. No. Description of goods Rate of duty (1) (2) (3) ----- 1. Power projects (including gas turbine 35 per cent ad power projects of capacity 50 valorem megawatts and below) 2. Other power projects (including gas 25 per cent ad turbine power projects) valorem -----

Explanation. - For the purpose of this notification, the expression 'power projects (including gas turbine power projects)' shall mean such projects whose output or end

product is power, but shall not include captive power plants set up by projects engaged in activities other than power generation."

5. The notification dated 1-5-1986 has been the bone of contention and would hereinafter be referred to as the amending notification. The respondents' contention before the High Court and also before this Court has been that the amending notification and the explanation appended to Notification No. 67/87 are violative of Article 14 of the Constitution.

6. M/s. Indian Charge Chrome Ltd., the respondent before us is a public limited company and is a 100 per cent export-oriented unit of charge chrome. The said respondent would hereinafter be referred to as "the Company" for short. In the year 1984 it entered into two contracts respectively with M/s Gotaverken Energy Systems of Sweden and M/s Asea Stal for the supply of power generation equipment for setting up a power plant so as to generate electricity meant for captive consumption of the Company and its sister concern. On 28-1-1986, the respondent moved an application before the Assistant Collector of Customs, Paradeep Port, Paradeep for registration of the two contracts abovesaid under the Project Imports (Registration of Contract) Regulations, 1965 so as to enable being assessed for exemption under Tariff Item 84.66 of the First Schedule to the Customs Tariff Act, 1975 read with Notification No. 71/85 dated 17-3-1985. On 7-2-1986 the Assistant Collector of Customs informed the respondent Company that its contract with M/s. Gotaverken Energy System, Sweden was allowed registration under the 1965 Regulations by the authority. Vide letter dated 20-3-1986, the Assistant Collector sought for certain clarifications from the respondent with respect to its contract with M/s. Asea Stal. The requisite information was provided by the respondent. On 17-8-1987, the respondent Company was informed that in view of the exemption notification having been amended by inserting an explanation thereto, the captive power project of the respondent was not entitled to exemption from payment of duty and therefore the prayer for registration of the contract entered into by the respondent with Asea Stal was being rejected and also the earlier registration of the respondent's contract with M/s. Gotaverken which was allowed earlier on 7-2-1986 was being cancelled.

7. Feeling aggrieved by refusal of registration of one contract and cancellation of the registration of the other contract, the respondent Company filed a writ petition before the High Court of Orissa. The respondent sought for quashing of the cancellation of the earlier registration of one of the contracts and a mandamus commanding the Assistant Collector of Customs to register the other contract. At the same time, challenge was laid to the constitutional validity of the amendment notification and to the validity of the explanation appended to Notification No. 67/87 on the ground that both fell foul of Article 14 of the Constitution suffering from the vice of invidious discrimination. It was also submitted that it was ultra vires of the authority of the Central Government to withdraw an exemption once the power to do so was validly exercised under Section 25 of the Customs Act. The pleas raised by the respondent have found favour with the Division Bench of the High Court which has allowed the petition in its entirety granting all the reliefs sought for by the respondent.

8. It will be useful to briefly set out the conclusions arrived at by the High Court. According to the High Court, no distinction can be drawn between a power project set up for generating electricity meant for distribution generally and a power plant set up by units engaged in activities other than power generation, i.e., whose end product was not necessarily power and power only and therefore the amendment notification and the explanation appended to Notification No. 67/87 which drew a distinction between the two types of power plants by reference to the end product merely and which are otherwise equally situated were bad. In any case, there was no nexus with the purpose sought to

be achieved by carving out two classes in such a manner and therefore the amendment notification and the said explanation were vulnerable to Article 14 of the Constitution. As to refusal to register one of the contracts, the High Court has held that the ground on which the application for registration of the contract has been rejected is unsustainable in law and hence the rejection is liable to be quashed. As to cancellation of registration, the High Court has held that the Assistant Collector of Customs did not have the power to cancel any registration once granted. On these findings, all the reliefs sought for by the respondent have been allowed as already stated hereinabove.

9. The questions arising for decision in this appeal are :

- (i) what is the nature of this power exercised by the Central Government while issuing the amendment notification;
- (ii) whether the Central Government have artificially carved out two classes of power plants though in substance they are one;
- (iii) whether there is no nexus with the object sought to be achieved by treating the power projects generating electricity for distribution differently from the power plants generating electricity for captive consumption only by such units whose end product is not electricity or power;
- (iv) whether the Assistant Collector was justified in refusing to register the respondent's contract with M/s. Asea Stal in view of the amendment notification; and
- (v) whether the action of the Assistant Collector of Customs in recalling/cancelling the registration of the respondent's contract with M/s. Gotaverken Energy Systems is sustainable in law.

10. The first three questions deserve to be taken up for consideration collectively as it would be convenient. Sub-section (1) of Section 25 of the Customs Act, 1962 reads as under :

"25. (1) If the Central Government is satisfied that it is necessary in the public interest so to do it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance), as may be specified in the notification goods of any specified description from the whole or any part of duty of customs leviable thereon."

11. The learned Senior Counsel for the appellants has submitted that Section 25 of the Customs Act has to be read along with Sections 14 and 21 of the General Clauses Act, 1897. He submitted that the very power to issue an exemption notification includes and implies power to issue such notifications from time to time as the occasion may require and also to amend, vary or rescind any exemption granted earlier. In our opinion, need for any detailed discussion on the point stands obliterated by a recent pronouncement of this Court in *Kasinka Trading v. Union of India* ((1995) 1 SCC 274) wherein it has been held : (SCC pp. 287-88, para 21)

"21. The power to grant exemption from payment of duty, additional duty etc. under the Act, as already noticed, flows from the provisions of Section 25(1) of the Act. The power to exempt includes the power to modify or withdraw the same. The liability to pay customs duty or additional duty under the Act arises when the taxable event occurs. They are then subject to the payment of duty as prevalent on the date of

the entry of the goods. An exemption notification issued under Section 25 of the Act had the effect of suspending the collection of customs duty. It does not make items which are subject to levy of customs duty etc. as items not leviable to such duty. It only suspends the levy and collection of customs duty, etc., wholly or partially and subject to such conditions as may be laid down in the notification by the Government in 'public interest'. Such an exemption by its very nature is susceptible of being revoked or modified or subjected to other conditions. The supersession or revocation of an exemption notification in the 'public interest' is an exercise of the statutory power of the State under the law itself as is obvious from the language of Section 25 of the Act. Under the General Clauses Act an authority which has the power to issue a notification has the undoubted power to rescind or modify the notification in a like manner."

12. The learned Senior Counsel for the respondent submitted that the power under Section 25 was exercisable only in "public interest". While the earlier notification granting exemption speaks of the same having been done in public interest, no material has been brought on record of the Court to show the amendment notification dated 1-5-1986 having been issued in the public interest and therefore the same cannot be sustained by reference to Section 25(1) of the Customs Act. The learned Senior Counsel for the appellants submitted that the amendment notification was merely clarificatory in nature. From the very beginning the intention of the Central Government was to grant full exemption from payment of duty to such power projects as were engaged in generation and distribution of power; it was not the intention of the Central Government to confer the benefit of HI exemption from payment of duty on power plants set up by any units for generating power meant for captive consumption and not for distribution generally. The learned Senior Counsel for the appellants has in support of his submission invited our attention to the material available on record. Substantiating his plea and having considered the same we find merit in the plea canvassed on behalf of the appellants.

13. Our attention has been invited to the Industrial Policy Resolution of 1956 of the Government of India wherein to achieve the national objective of adopting the socialist pattern of society the industries in the country were proposed to be classified into three categories of which the first category would consist of industries the future development of which will be the exclusive responsibility of the State though the division of industries into such separate categories did not imply a division into watertight compartments; the possibility of overlapping and dovetailing between industries in the private and the public sectors was not totally excluded. "Generation and distribution of electricity" was placed in Schedule 'A'. The resolution mentions that all new units in these industries (i.e. listed in Schedule 'A'), save where their establishment in the private sector had already been approved would be set up only by the State Government though ordinarily there would be no bar to small privately-owned units undertaking generation of power for local needs and small-scale mining. In the counter-affidavit filed on behalf of the Central Government apart from referring to the said industrial policy resolution, it has further been pointed out that under the Industries (Development and Regulation) Act, 1951 it was not possible for the private units like the respondent to set up a power project for generation and distribution of electricity. The industrial resolution made a clear distinction between "power project" which is set up for generation and distribution of electricity and a "power plant" which is set up to generate power for their own requirement or captive consumption of the industrial unit. The captive "power plant" cannot be considered as "power project" and the two cannot be equated with each other. A power project is set up by the Government to cater to the needs of the public by generating and distributing the electricity generally while a captive power plant is set up by an industrial unit to feed power to its own plant or

unit for manufacturing of goods other than power. Though it is true that an industrial unit installing a power plant to the extent of the electricity generated by it shares the burden of the government power projects generating electricity for distribution and to that extent their purpose may be alike, the fact remains that a power-generating unit in the public sector has its own limitations and shortcomings as well. An industrial unit depending on public power generation source shall have to bear with power cuts, failures and other regulations and restrictions imposed in the public interest. By installing its own power plant, the industrial unit is free to generate and avail uninterrupted power supply or the quantum and flow of electricity suited to its own requirements and thereby it can maximise its production and consequently its profits. It is therefore clear that power plant projects engaged in generation and distribution of power as its end product - the sense in which the expression has been used in the industrial policy resolution constitute a class by themselves distinct from the power plants established by industrial units generating electricity for captive consumption and not for distribution. The two classes are well defined.

14. What is prohibited by Article 14 of the Constitution is class legislation. If the legislature takes care to reasonably classify persons for legislative purposes, so long as the classification is founded on an intelligible differentia which lays down a perceptible differentiation between the two groups and the differentiation has a rational relation with the object sought to be achieved, such a classification does not fall foul of Article 14 of the Constitution. We have already held that the two classes in the case at hand have a well-defined differentiation. There is nothing wrong in the Central Government forming an opinion that it was in the public interest to grant exemption from payment of customs duty to the imports meant for power projects engaged in production of power as an end product meant for public distribution as such while denying a similar benefit to the imports referable to power plants generating electricity for captive consumption only.

15. We agree with the learned Senior Counsel for the appellants in his submission that the exemption granted by Notification No. 133/85 related to the goods falling under Heading 84.66 of the First Schedule to the Customs Tariff Act, 1975 imported into India for power projects (including gas turbine power projects) the end product whereof was electricity meant for public distribution and therefore the amendment notification (No. 306/86) dated 1-5-1986 was only clarificatory in nature. It only clarified that the full exemption from payment of customs duty as granted by the Central Government by Notification No. 133/85 was not intended to apply to such power plants which were set up by units engaged in activities other than power generation and which generated power for captive consumption. The words used in Notification No. 133/85 were - "power projects (including gas turbine power projects)". A power plant is not the same thing as a power project. Chamber's 20th Century Dictionary defines project as "a proposal for undertaking; an undertaking". Plant is defined as "equipment, machinery, apparatus for an industrial activity". The distinction between the two terms is determinable by reference to mass, magnitude or extent of the two. "Project" suggests something very much more extensive than a "plant". The learned Senior Counsel for the appellants is right in submitting that "power project" could not have meant "power plant" also and the scope for confusion or doubts, if any, was done away with by inserting a clarification. Thus the amendment notification was clarificatory merely.

16. In *Kasinka Trading v. Union of India* ((1995) 1 SCC 274) this Court has held that the power of exemption under Section 25(1) of the Act has been granted to the Government by the legislature with a view to enabling it to regulate, control and promote the industries and industrial productions in the country. Where the Government on the basis of the material available before it is satisfied bona fide that the public interest would be served by either granting exemption or by withdrawing, modifying or rescinding an exemption already granted it should be allowed a free hand to do so.

What was given in the public interest can also be curtailed in the-public interest. Individual interest must yield in favour of societal interest. In the case at hand we find the respondent in its writ petition having laid challenge to the validity of the amendment notification on the ground of invidious discrimination but there is no plea raised that formation of opinion as to the public interest was based on no material or was vitiated by mala fides.

17. Coming to the fourth point, insofar as the refusal to register the contract with M/s. Asea Stal is concerned, no fault can be found therewith. Mere making of an application for registration does not confer any vested right on the applicant. The application has to be decided in accordance with the law applicable on the date on which the authority granting the registration is called upon to apply its mind to the prayer for registration. The correspondence between the parties shows that further information - material in nature and having an impact on the acceptability of the respondent's prayer - was called for from the applicant and therefore the prayer was not ripe for consideration. In between there were drastic changes in the factual matrix. The exemption notification had stood clarified and the Project Imports (Registration of Contract) Regulations, 1965 under which the application for registration was made had stood superseded by the Project Imports Regulations, 1986. No fault can be found with the refusal to register the contract. We find no merit in the submission of the learned Senior Counsel for the respondent that one application for registration having been moved in respect of the two contracts and the goods forming the subject-matter of the two contracts being complementary to each other for the purpose of erecting the power plant, the registration of one of the contracts having been allowed, the prayer for registration of the other contract could not have been refused. Though the refusal to register the respondent's contract with M/s. Asea Stal as contained in the letter of the Assistant Collector of Customs, Paradeep dated 17-8-1987 is being upheld, we would like to make it clear that this refusal has to be read in the light of the averments made in the application dated 28-1-1986 of the respondent wherein it was stated that the registration of the contract was sought for securing the benefit of Exemption Notification No. 71/85-Cus. of 17-3-1985 and thereby treating the respondent's imports for power project assessable at nil duty. If the respondent's contract is entitled for registration for any purpose other than the one mentioned in the application, i.e., seeking exemption from payment of customs duty on the plea of the imports being referable to power project, the rejection would not come in the way of the respondent pressing its prayer for registration of the contract for such other purpose. Such an application, if made, shall be dealt with and disposed of by the authority concerned in accordance with law.

18. As to the fifth and last point, the appellants' contract with Gotaverken Energy Systems was registered under the Project Imports (Registration of Contract) Regulations, 1965 promulgated under the Customs Tariff Act, 1975. Under the regulations an importer claiming assessment of articles falling under any of the sub-headings of Heading 84.66 had to apply to the proper officer of the Customs for registration of the contract at the port where the goods were to be imported. The registration was duly applied for and granted by a competent officer. The Project Imports (Registration of Contract) Regulations, 1965 were superseded with effect from 3-4-1986 by the Project Imports Regulations, 1986 issued in exercise of the power conferred by Section 157 of the Customs Act, 1962. The Preamble to the new regulations clearly carves out as exception as regards "things done or omitted to be done before such supersession". The new regulations do not contain any provision for superseding or cancelling any registration of the contract allowed under the superseded Regulations of 1965. Admittedly, no opportunity of hearing was given to the respondent before cancelling the registration of contract. In our opinion the new regulations having specifically saved things done or omitted to be done under the superseded regulations the authority empowered to register the contract could not have cancelled the registration already done, more so without

affording the respondent any opportunity of hearing. The High Court was therefore justified in setting aside the communication by the Assistant Collector of Customs cancelling the registration of the contract. We may however make it clear that what will be the effect of such registration on the dutiability or exemption from payment of duty on the goods imported pursuant to the contract is not an issue before us and therefore we have not expressed any opinion thereon leaving it to be adjudicated upon as and when an occasion may arise for the purpose.

19. This judgment deals only with the notification referred to in the opening part of this judgment and by reference to which only the case was argued before us by the learned counsel for the parties.

20. For the foregoing reasons, the appeal is partly allowed. The judgment of the High Court to the extent to which it strikes down the communication dated 17-8-1987 cancelling the registration of the respondent's contract with M/s. Gotaverken Energy Systems is maintained. The rest of the judgment of the High Court is set aside. The parties are left to bear the costs as incurred throughout.