Supreme Court of India
Union Of India vs A.B.P Pvt.Ltd. on 12 May, 2023
Author: S. Ravindra Bhat
Bench: S. Ravindra Bhat, Dipankar Datta

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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S). 986 OF 2011

UNION OF INDIA & ORS.

VERSUS

A. B. P. PVT. LTD. & ANR. …

JUDGMENT

S. RAVINDRA BHAT, J.

1. This civil appeal arises from a judgment 1 of the Calcutta High Court which held the withdrawal of a customs notification invalid.

I

2. ABP Pvt Ltd ("assessee/respondent") in October 2003, imported one set of high speed cold set (Universal 70) Web Offset printing machine along with the necessary parts and accessories and claimed exemption from payment of the duty relying upon the notification dated May 28, 2003 (hereinafter, "First Notification").2 The First Notification provided for levy of custom duty on the Signature Not Verified Digitally signed by Harshita Uppal Date: 2023.05.12 16:42:44 IST Reason: 1 Dated December 23, 2008, in Writ Petition No 298/ 2004 2 Notification No 86 of 2003 (Cus) Classification 844 311 00. import of High Speed Cold-Set Web Offset Rotary Printing Machines with a minimum speed of 70,000 copies per hour (hereafter, "Imported Machine") at a concessional rate of 5 %. Relying upon the first notification, the assessee caused an irrevocable letter of credit3 to be issued, for the purchase of the Imported Machine. This First Notification was subsequently amended by the Central Government through a fresh notification dated November 11, 2003 4 (hereafter, "Amended Notification"). The Amended Notification shifted the benefit of the concessional rate from "High Speed Cold-Set Web Offset Rotary Printing Machine with minimum speed of 70,000 copies per hour" to "High Speed Cold- set Web Offset Rotary Double Width Four Plate Wide Printing Machine with a minimum speed of 70,000 copies per hour".

3. On 09.02.2004, the assessee filed a Bill of Entry claiming the benefit of a 5% concession (under the First Notification). However, owing to the Amended Notification, the assessee was ineligible for the benefit of the previously enjoyed concession, under the First Notification, and was liable to pay customs duty at 39.2% on the value of the Imported Machine amounting to 1,92,54,318. Assesee filed a writ before the High Court 5 for declaring the Amended Notification ultra vires Section 25(1) of the Customs Act 1962 (hereafter, "the Act") and thus sought, a declaration for withdrawal of the 3 Dated 18th October, 2003 4 Notification No 164 of 2003 5 Writ Petition No 298/ 2004 Amended Notification. On 18.03.2004, a single judge made an interim order 6 directing the release of the imported machinery provisionally on payment of a concessional rate of duty against the bank guarantee for the differential amount of 1,67,98,410.

4. On December 5, 2005, a single judge bench 7 set aside the amended notification on the ground that no intelligible differentia existed for granting concession on one type of machinery and withdrawing concession to other types of machinery. The court therefore, directed that the exemption be granted to the imported machinery of the assessee. Aggrieved by the order of the single judge bench, the Union preferred an appeal to the Division Bench of the High Court. The Union contended that its power to grant exemption also includes the power to modify or alter any of the exemption, already granted and that delegation done is within the powers of the legislature. The Union further argued before the Division Bench that the subject matter involves economic policy over which the legislature has exclusive domain.

5. The High Court by its impugned judgment upheld the judgment and order of the single judge bench. The High Court observed that the imported machine was neither manufactured in any part of the country at the relevant point of time nor any copy of representation received from domestic manufacturers 6 Order dated 18.03.2004 in WP No 298/ 2004 7 By order dated 5 December, 2005 in WP No 298/ 2004 questioning the exemption granted to the imported machine was shown by the revenue.

6. The High Court relied upon the affidavit of the Union where it was contended that the imported machine has no indigenous angle. The High Court further placed reliance upon the decision of this court in Indian Express Newspapers v. Union of India8 (hereafter, "Indian Express Newspapers") and observed that actions of the Government under Section 25(1) of the Act are not immune from judicial scrutiny and the power must be exercised reasonably and in furtherance of "public interest". In the absence of any intelligible differentia between the imported machine and newly exempted machine (as both have the same capacity of production and neither of them was manufactured in the country), no case for exemption in furtherance of 'public interest' is made out.

7. The High Court further noted that the assessee is entitled to claim the benefit of the concessional rate of customs duty paid on the imported goods instead of the higher tariff as sought by the amended notification. The union is aggrieved by the impugned order and has approached this court.

II

8. Mr. N. Venkatraman, learned Additional Solicitor General for the Union (hereafter, "ASG") submitted that the impugned order challenges the fundamental powers of the government to issue a notification under Section 8 [(1985) 2 SCR 287] 25(1) of the Act which may have serious implications on their exercise of power in future. The ASG further submitted that the assessee cannot claim concessions/exemptions in respect of a commodity as a matter of right as the same falls within the policy domain of the government.

9. Learned counsel further submitted that the commodities granted exemption under the amended notification relate to technological advancement and modernization of the industrial sector in the country and thus the element of "public interest" is ingrained in the amended notification.

10. The learned ASG also placed reliance on section 21 of the General Clauses Act, 1897 to argue that the Union's power to issue a notification includes the power to withdraw the same. Section 21 of the General Clauses Act, 1897 reads as:

> "21. Power to issue, to include power to add to, amend, vary or rescind notifications, orders, rules, or bye-laws .- Where, by any (Central Act) or Regulations, a power to (issue notifications) orders, rules, or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and condition (if any), to add to, amend, vary or rescind any (notifications), orders, rules or bye-laws so (issued)."

11. Learned counsel further submitted that there exists merit in excluding single width two plate machines from exemption as those were manufactured in the country. There was rationale to exclude such machines from the scope of concessions. Moreover, the concession granted was for cold-set web offset Rotary Double Width Four Plate Wide Printing Machines with a minimum speed of 70,000 copies per hour. Thus, considering the indigenous angle and the representations received from the domestic manufacturers of the equipment (i.e. single width two plate machines with 50000 copies per hour speed) it was necessary to exclude such single width two plate machines, from the scope of concessions.

III

12. Mr. Kaushik Murali, learned counsel for the assessee submitted that the Union could not withdraw or amend the First Notification issued under section 25(1) of the Act without any justification. To support the argument, counsel placed reliance on this court's decision in Kasinka Trading & Anr. V. Union of India9 (hereafter, "Kasinka") and urged that though the Union has the power to amend or withdraw an exemption notification granted under section 25(1) of the Act, yet the reasons given by the revenue for justifying withdrawal of the exemption notification must be "relevant" and "sufficient" to the exercise of the power in "public interest". In Kasinka (Supra), this court had observed that:

> "[..] Thus, the Union of India has disclosed the circumstances under which the exemption was initially granted as well as the change of circumstances which

warranted the withdrawal of the exemption notification. The reasons given by the Union of India justifying withdrawal of the exemption notification, in our opinion, are not irrelevant to the exercise of the power in "public interest", nor are the same shown to be insufficient to support the exercise of that power.

[..]"

9 [(1994) Supp 4 SCR 448]

13. Learned counsel further submitted that the power of the Central Government under Section 25(1) of the Act to grant or amend an exemption is not unrestricted and the government is duty bound to examine the issue in light of public interest. Reliance was placed on this court's judgment in Indian Express Newspapers (Supra) to contend that the power to grant exemption from payment of the customs duty under section 25(1) of the Act is not a delegated power to tax but a power expressly conferred under the Act and thus principles of administrative law will be applicable.

14. Learned counsel for the assessee also placed reliance on Dai-ichi Karkaria Limited v. Union of India & Ors., (hereafter, "Dai-ichi Karkaria")10 and MRF Ltd. v. Commissioner of Sales Tax (hereafter, "MRF Ltd.") 11 to argue that in the present case, while amending the First Notification, the government failed to discharge its burden of establishing before the court as to what 'public interest' existed that necessitated government to reduce the extent of exemption and how the withdrawal/amendment of the First Notification is in furtherance of "public interest". In the present case, the Union failed to justify the "public interest" in confining the concessional rate of duty to rotary printing machines of double width four plate variety and not extending the same to rotary printing machines of the single width two plate variety despite both the machines having minimum speed of 70,000 copies per hour. It was further argued that the 10 [(2000) 4 SCC 57] 11 (2006) Supp 6 SCR 417 machined imported by the Respondents was neither manufactured nor sold in India. Further, the argument of the Appellant that the Amended Notification was on account of representations received from several domestic manufacturers cannot be accepted as the Imported Machine was purchased from a foreign country and the same was neither manufactured nor sold by any of the domestic manufacturers.

15. Learned counsel also placed reliance on Shrijee Sales Corporation v. Union of India12 and Bannari Amman Sugars Ltd v. CTO 13 to contend that the principle of promissory estoppel is applicable against the government and though the government also has the right to resile from its promise but it must give a reasonable opportunity to the promisee to restore the status quo ante. In the present case, the assessees had paid advances to a French supplier through an irrevocable letter of credit prior to the enactment of the amended notification and the issuance of the amended notification resulting in the imposition of enhanced custom duty has rendered it impossible for the

assessees to revoke the letter of credit and restore the status quo.

IV

16. Before proceeding with the merits of the parties' contentions, it would be worthwhile to notice that on 25.03.2004, the Tax Research Unit of the Department of Revenue, Union Ministry of Finance had issued a letter, 12 [(1997) 3 SCC 398] 13 (2004) Supp 6 SCR 264 justifying the withdrawal of tax exemption. The relevant extract of that letter is as follows:

> "This amendment was done taking into account representations from domestic manufacturers of printing machines seeking reconsideration of the said concession.

The intention was to restrict the concessional customs duty of 5% with Nil CVD and Nil SAD only to those high - speed cold - offset printing machines which have no indigenous angle." The reply, or return filed by the Union before the High Court (in the form of a supplementary affidavit) inter alia, averred as follows:

> "I further say and submit that the power to grant exemption was utilized in the instant case for the purpose of regulation, control and promotion in the public interest. It is obvious that no representation was held out to the public that the first notification would be continued indefinitely. The tax research unit of the respondent authorities considered the relevant facts and market conditions and upon being satisfied that the first notification required amendment issued the second notification amending the description of the goods in respect of which the exemption was to be prospectively allowed as a matter of fiscal policy. It is submitted that the tax research unit duly assessed the priorities in the matter of grant of exemption and accordingly the second notification was issued. Serial No. 267A of notification No.21/2002-Customs was amended vide Notification No.164/2002-Customs was amended vide notification no.164/2003- Customs dated 11th November, 2003 so as to restrict the benefit of customs duty concession available for· specified printing machinery only to 'high speed cold set web offset rotary double width four plate printing machines with a minimum speed of 70,000 copies per hour'. This amendment was done as a matter of fiscal policy taking into account several representations from domestic manufacturers of printing machines seeking reconsideration of the earlier concession. The intention as a matter of policy was to restrict the concessional customs duty of 5% with nil CVD and Nil SAD only to those high- speed cold offset printing machines which have no indigenous angle. The earlier notification, significantly, did not hold out any, far less any unequivocal promise that it would be continued indefinitely. Hence, the earlier notification was amended after due consideration of the fiscal circumstances warranting the change in description in respect of which the benefit was to be provided. The alteration was made in the public interest after assessing the circumstances relating to the particulars of the machinery covered by the earlier and the later notification."

17. The Union has sought to rely on an Office Memorandum 14 which virtually reiterates the stand taken in its counter affidavit before the High Court; it also states that the Central Government had received representations from the Indian Printing and Packaging and Allied Machinery Manufacturer's Association (IPPAMMA) for reconsidering the exemption under the first notification since the domestic industry had the capacity to produce machines and heat set machines, with capacity up to 60,000 copies per hour. The representation also requested that in view of such indigenous capacity, concessional duty should not be given to single width two plate wide machines, and should be restricted to four plate wide double width high speed offset printing machines.

18. The assessee had during the hearing opposed the reliance on the additional affidavit and, in particular, the office memorandum, contending that these contained reasons given after the decision, and could not be the basis of justifying the Amended Notification.

19. The reasons given by the Union, in its affidavit were considered in the impugned order, which rejects the rationale for the amended notification:

> "As said above it is the element of public interest that governs the field. The ground of withdrawal of concession, namely several representations from domestic manufacturers of the printing machines prompted recalling the concession does not appear to be tenable because the Indian products have the capacity nor more than 60,000 copies per hour and did not have comparable label of automation of 14 Dated 30th September, 2010 issued by the Tax Research Unit of the Department of Revenue, Govt of India the printing quality as that of the foreign machine imported. It cannot be said that withdrawal of the concession was to facilitate the indigenous manufacturers. Indigenous angle therefore was not germane to withdrawal of exemption and this being the position element of public interest which must govern in the case of grant or withdrawal of the grant is lost. There could hardly remain any distinction between the two types of machines as both were having the same technology. No reasonable differentiation could be made between the two types of machines as both the machines have the same capacity of production and both were to be imported and were not manufactured in the country. Therefore, to our mind the Hon'ble Trial Judge did not commit any illegality in holding that element of public interest could not be perceived in withdrawal of exemption."

20. The assessee is, in the opinion of this court, correct in asserting that every action of the executive government, including exercise of its power to grant or withdraw tax exemption, should be suffused with public interest. In Indian Express Newspapers (Supra), this court, speaking in the context of a customs withdrawal notification [challenged on the ground of violation of the right to freedom of speech under Article 19 (1) (a)] stated that:

> "18. In cases where the power vested in the Government is a power which has got to be exercised in the public interest, as it happens to be here, the Court may require the Government to exercise that power in a reasonable way in accordance with the spirit of the Constitution. The fact that a notification issued under Section 25(1) of the

Customs Act, 1962 is required to be laid before Parliament under Section 159 thereof does not make any substantial difference as regards the jurisdiction of the Court to pronounce on its validity." The court later also said that:

"19. Section 25 of the Customs Act, 1962 under which the notifications are issued confers a power on the Central Government coupled with a duty to examine the whole issue in the light of the public interest. It provides that if the Central Government is satisfied that it is necessary in the public interest so to do it may exempt generally either absolutely or subject to such conditions goods of any description from the whole or any part of the customs duty leviable thereon. The Central Government may if it is satisfied that in the public interest so to do exempt from the payment of duty by a special order in each case under circumstances of an exceptional nature to be stated in such order any goods on which duty is leviable. The power exercisable under Section 25 of the Customs Act, 1962 is no doubt discretionary but it is not unrestricted."

21. The court, however, did not strike down the withdrawal notification, but recorded that the government failed to consider the impact of the withdrawal, on newspaper publishers, and how that would affect the exercise of freedom of speech. Therefore, the court required the executive to review the matter, after considering all relevant factors. In Dai-Ichi Karkaria (supra), a customs notification which reduced exemption from 75% to 25% for a particular period (30-12-1986 to 10-9-1987) was held unjustified because the executive had "not taken into account all the relevant factors while issuing the impugned notifications reducing the exemption to 25% for the aforesaid period" and "failed to discharge its statutory obligation while issuing the impugned notifications. Justifications offered, to say the least, is far too naive to be accepted."

22. In Kasinka (supra), the court again described the power under Section 25 of the Act, and the legitimacy of exercise of grant or withdrawal of exemption and observed that:

"[..] The withdrawal of exemption "in public interest" is a matter of policy and the courts would not bind the Government to its policy decisions for all times to come, irrespective of the satisfaction of the Government that a change in the policy was necessary in the "public interest". The courts, do not interfere with the fiscal policy where the Government acts in "public interest" and neither any fraud or lack of bona fides is alleged much less established. The Government has to be left free to determine the priorities in the matter of utilisation of finances and to act in the public interest while issuing or modifying or withdrawing an exemption notification under Section 25(1) of the Act. It needs no emphasis 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, bona fide, is satisfied 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. We are unable to agree with the learned counsel for the appellants that Notification No. 66 of 1979 could not be withdrawn before 31-3-1981. First, because the exemption notification having been issued under Section 25(1) of the Act, it was implicit in it that it could be rescinded or modified at any time if the public interest so demands and secondly it is not permissible to postpone the compulsions of "public interest" till after 31-3-1981 if the Government is satisfied as to the change in the circumstances before that date. Since, the Government in the instant case was satisfied that the very public interest which had demanded a total exemption from payment of customs duty now demanded that the exemption should be withdrawn it was free to act in the manner it did. It would bear a notice that though Notification No. 66 of 1979 was initially valid only up to 31-3-1979 but that date was extended in "public interest", we see no reason why it could not be curtailed in public interest. Individual interest must yield in favour of societal interest."

23. In Bannari Amman Sugars Ltd. (supra), the court held that there is no "vested right as to tax-holding is acquired by a person who is granted concession. If any concession has been given it can be withdrawn at any time and no time-limit should be insisted upon before it was withdrawn." This court also held that promissory estoppel "can be invoked only if on the basis of representation made by the Government, the industry was established to avail benefit of exemption."

24. The reliance by the assessee, on MRF Ltd (supra), in this court's opinion, is unfounded. This court held that the denial of exemption, through an amendment, effected retrospectively, was arbitrary and agreed with view taken by Kerela HC in M.M Nagalingam Nadar Sons v. State of Kerela15 wherein it was observed that:

> "[..] Government has also no power to levy a tax with retrospective effect. The retrospective cancellation/withdrawal of an exemption or a reduction in rate tantamounts to levy of a tax, or tax at a higher rate from a date in the past, for which the Government has no power under sub-section (3). [..]"

25. The decision in Mahabir Vegetable Oils (P) Ltd. v. State of Haryana16 is along the same lines as MRF Ltd. (supra), which is that benefits once granted, cannot be divested by a retrospective statute or notification. These decisions, in this court's opinion stand on a different footing, because they primarily concern exercise of statutory power, i.e. withdrawal, in a manner that has an extremely prejudicial or unreasonable impact, which is retrospective in effect.

26. So far as the question of promissory estoppel is concerned, a recent decision of this court, in Prashanti Medical Services & Research Foundation v. Union of India17 placed the matter in correct perspective, when it observed that:

> "26. [..] a plea of promissory estoppel is not available to an assessee against the exercise of legislative power and nor any vested right accrues to an assessee in the

> matter of grant of any tax concession to him. In other words, neither the appellant nor the assessee has any right to set up a plea of promissory estoppel against the exercise of legislative power such as the one exercised while inserting sub-section (7) in Section 35-AC of the Act (see Motilal Padampat Sugar Mills Co. Ltd. [Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P., (1979) 2 SCC 409] and other cases relied on by the learned counsel for the respondent Revenue). It is more so when we find that this sub-

section was made applicable uniformly to all alike the appellant prospectively." 15 (1993) 91 STC 61 16 (2006) 2 SCR 1172 17 (2019) 9 SCR 828

27. In the present case, the principal, or rather the sole ground which persuaded the High Court, to set aside the Amended Notification is that withdrawal of the concession could not be said to facilitate indigenous manufacturers. It was also held that "Indigenous angle therefore was not germane to withdrawal of exemption" and therefore, "public interest which must govern in the case of grant or withdrawal of the grant is lost." The third ground was that there was no "distinction between the two types of machines as both were having the same technology."

28. Once it is recognized that it is the executive's exclusive domain, in fiscal and economic matters to determine the nature of classification, the extent of levy to be imposed, and the factors relevant for either granting, refusing or amending exemptions, the role of the court is confined to decide if its decision is backed by reasons, germane, and not irrelevant to the matter. Judicial scrutiny can also extend to consideration of legality, and bona fides of the decision. The wisdom or unwisdom, and the soundness of reasons, or their sufficiency, cannot be proper subject matters of judicial review. In the present case, the impugned judgment has virtually conducted a merits review of the concerned economic measure [Vivek Narayan Sharma (Demonetisation Case-5 J.) v. Union of India18]:

"13.4.[..] That the court may not undertake a foray into the merits, demerits, sufficiency or lack thereof, success in realising the 18 2023 (1) SCR 1 objectives, etc. of an economic policy, as such an analysis is the prerogative of the Government in consultation with experts in the field."

29. This court is of the opinion, that the High Court, by the impugned judgment, erred in judging the merits of the reasons which led the executive government to issue the Amended Notification. No mala fides or oblique considerations were pleaded or urged; the exercise of power was in line with the provisions of the Act. The indigenous angle, i.e. availability of equipment, cannot be characterized as an irrelevant factor or consideration, since grant of exemption to a class of goods, which are similar to those manufactured within the country, and its likely adverse impact on such manufacturers or producers, is germane and relevant.

30. For the above reasons, it is held that the impugned judgment cannot be sustained; it is accordingly set aside. The appeal is allowed, without order on costs.

.....J. [S. RAVINDRA BHAT] .....J. [DIPANKAR DATTA] NEW DELHI;

MAY 12, 2023.

ITEM NO.1501 COURT NO.12 SECTION XVI

S U P R E M E C O U R T O F I N D I A

RECORD OF PROCEEDINGS

Civil Appeal No(s). 986/2011

UNION OF INDIA & ORS. Appellant(s)

VERSUS

A.B.P PVT.LTD. & ANR. Respondent(s)

([HEARD BY : HON'BLE S. RAVINDRA BHAT and HON'BLE DIPANKAR DATTA,JJ.].....) Date : 12-05-2023 This appeal was called on for hearing today.

For Appellant(s) Mr. Mukesh Kumar Maroria, AOR

For Respondent(s) M/S. Karanjawala & Co., AOR

UPON hearing the counsel the Court made the following O R D E R Hon’ble Mr. Justice S. Ravindra Bhat pronounced the reportable judgment of the Bench comprising His Lordship and Hon’ble Mr. Justice Dipankar Datta.

The appeal is allowed without order on cost in terms of the signed reportable judgment.

Pending application(s), if any, are disposed of.

(HARSHITA UPPAL) (MATHEW ABRAHAM)

SENIOR PERSONAL ASSISTANT COURT MASTER (NSH)

(Original signed Reportable Judgment is placed on the file)