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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.01.2022

CORAM

THE HONOURABLE MR.JUSTICE R.MAHADEVAN  
and  
THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

W.A.Nos.1552 to 1573 of 2013  
and  
M.P.Nos.1 to 1 and 2 to 2 of 2013

1.UNION OF INDIA

REP BY ITS SECRETARY  
MINISTRY OF FINANCE,  
DEPARTMENT OF REVENUE  
NORTH BLOCK, NEW DELHI 110 001

...1<sup>st</sup> APPELLANT IN ALL WA's/1<sup>st</sup> RESPONDENT

2.THE COMMISSIONER OF CUSTOMS

CUSTOMS HOUSE  
CHENNAI.1

...2<sup>nd</sup> APPELLANT IN WA Nos.1552 to 1563 /2013  
/ 2ND RESPONDENT

3.THE ADDL.COMMISSIONER OF

CUSTOMS, CUSTOMS HOUSE,  
TUTICORIN

...3<sup>rd</sup> APPELLANT IN WA Nos.1552 to 1563/2013,  
2<sup>nd</sup> APPELLANT IN WA Nos. 1564, 1565, 1566,  
1567,1568,1569,1570,1571, 1572,1573/2013/  
3<sup>rd</sup> RESPONDENT/2<sup>nd</sup> RESPONDENT

3.THE DEPUTY COMMISSIONER OF

CUSTOMS, CUSTOM HOUSE,  
TUTICORIN.

...3<sup>rd</sup> APPELLANT IN WA 1564,1565,1566,1567,  
1568, 1569, 1570, 1571, 1572,  
1573/2013

-VS-

M/S DINDIGUL SPINNERS ASSOCIATION,  
REG NO. 330/97,  
NO 27-28 MATHA BUILDINGS,  
MAIN ROAD, DINDIGUL 624 001  
REP BY ITS SECRETARY DR. P. PERIATHAMBI

...RESPONDENT in WA Nos.1552,1553,1554 of 2013



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M/S RADHA TEXTILES PVT. LTD.  
KALATHUPATTI,  
KULITHALAI ROAD,  
MANAPARAI -621 306  
REP BY M.SUBBIAH M.D.

...RESPONDENT in WA No.1555 of 2013

M/S NATIONAL SEWING THREAD CO LTD,  
NO. 11, VENUGOPALA PILLAI ROAD,  
CHIDAMBARAM 608 001,  
REP BY ITS JOINT DIRECTOR  
B. RAMACHANDRAN

...RESPONDENT in WA No.1556 of 2013

M/S SALONA COTSPIN LTD,  
SF NO.74/12, 75/3,  
SAKTHI MAIN ROAD,  
TUNGAMPALLI, VALIPALAYAM POST,  
SAKTHI TALUK  
ERODE DISTRICT,  
REP BY ITS MD SHYAMALAI AGARWALA

...RESPONDENT in WA No.1557 of 2013

M/S BEST COTTON MILLS LTD,  
BEST INDUSTRIAL ESTATE,  
45 AVINASHI ROAD,  
REP BY ITS MANAGING DIRECTOR  
R.RAMASAMY

...RESPONDENT in WA No.1558 of 2013

M/S SULOCHANA COTTON SPINNING MILLS LTD,  
UNIT-I&II,  
416 & 424 KAMARKS ROAD  
TIRUPUR, REP BY ITS  
MD S.KRISHNAKUMARI

...RESPONDENT in WA No.1559 of 2013

M/S GOVARDHAN SPINNERS LTD  
REP BY ITS DIRECTOR  
K. NARAYANAN  
PLOT NO. 12,  
BHARANI COLONY,  
SALIGRAMAM, CHENNAI-93

...RESPONDENT in WA No.1560 of 2013

M/S SOUNDARARAJA MILLS LTD,  
REP BY ITS MANAGER  
RAMESH, ADMINISTRATIVE OFFICE,  
G.T.N. SALAI, DINDUGUL.

...RESPONDENT in WA No.1561 of 2013



M/S GOBI TEXTILES LTD,  
GD ROAD, KALPAWR,  
GOBI REP BY ITS DIRECTOR  
P.S. MUTHUVELAPPON

...RESPONDENT in WA No.1562 of 2013

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M/S RAJNARAYAN TEXTILES LTD  
POLLACHI MAIN ROAD,  
SOUNDARAPURAM, COIMBATORE,  
REP BY ITS JOINT MANAGING DIRECTOR  
KASI V.THAGARAJAN

...RESPONDENT in WA No.1563 of 2013

M/S SRI MANIKKA VINAYAGAR  
SPINNING MILLS LTD,  
NO.163 NETAJI ROAD,  
MADURAI - 625 001.  
REP BY ITS JOINT MANAGING DIRECTOR

...RESPONDENT in WA No.1564 of 2013

M/S MAPPILLAI VINAYAGAR SPINNING MILLS LTD,  
NO.163 NETAJI ROAD,  
MADURAI, REP BY ITS JOINT MD

...RESPONDENT in WA No.1565 of 2013

M/S CPG TEXTILES  
A PARTNERSHIP FIRM,  
REPTD BY ITS POWER OF ATTORNEY AGENT  
R.SELLVA NARANAPURAM,  
PALLADAM - 641 664.  
COIMBATORE.

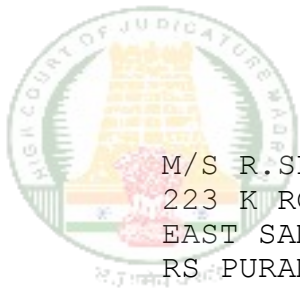
...RESPONDENT in WA No.1566 of 2013

M/S SRI THIRUVETTAI AYYANAR SPINNERS P LTD,  
REPTD BY ITS AUTHORISED SIGNATORY  
R.SELLVA,  
PLOT NO.B-4(P) & B-5  
SIDCO INDUSTRIAL ESTATE,  
KAPPALUR, MADURAI-628 008.

...RESPONDENT in WA No.1567 of 2013

M/S DHANDAPANI TEXTILES  
A PARTNERSHIP FIRM,  
REPTD BY ITS POWER OF ATTORNEY AGENT  
R.SELLVA,  
NAGAMNAICKENPATY,  
VELLAKOVIL, ERODE

...RESPONDENT in WA No.1568 of 2013



M/S R.SELLVA PROPRIETOR OF MALAI YAARNS,  
223 K ROYAL CASTLE PARTMENTS,  
EAST SAMBANDAM ROAD,  
RS PURAM, COIMBATORE.

...RESPONDENT in WA No.1569 of 2013

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M/S MTA MILLS P LTD,  
REPTD BY ITS POWER OF ATTORNEY AGENT R.SELLVA  
10/32, PAARAI THOTTAM,  
KANNAMPALAYAM POST,  
SULUR VIA COIMBATORE

...RESPONDENT in WA No.1570 of 2013

M/S AVE MARIA SPINNING MILLS P LTD,  
REPBY ITSPower OF ATTORNEY R.SELLVA  
10/32, PARAI THOTTAM, KANNAMPALAYAM POST,  
SULUR VIA, COIMBATORE.

...RESPONDENT in WA No.1571 of 2013

M/S FATHIMA MILLS  
POWER OF ATTORNEY  
R.SELLVA, 10/32-F  
KANNAMPALAYAM PO,  
SULUR VIA COIMBATORE

...RESPONDENT in WA No.1572 of 2013

M/S SRI RAMIAH SPINNERS LTD  
4 KRISHNASAMY ST,  
KRISHNAPURAM COLONY ,  
MADURAI 625 014,  
REP BY ITS AUTHORISED SIGNATORY

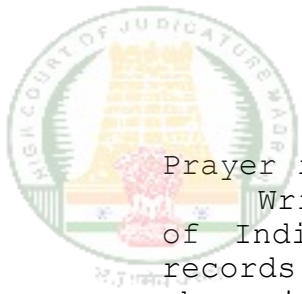
...RESPONDENT in WA No.1573 of 2013

PRAYER:

Writ Appeal filed under Section 15 of Letter patent praying to set aside the order dated 29/01/2013 passed by the learned single judge in WP.Nos. 750, 5967, 4743, 11579, 5049, 5966, 7266, 8125, 11352, 11578, 23009, 36122, 906, 924, 1243, 1244, 1245, 1246, 1496, 1497, 3142, 4854/2002 respectively.

PRAYER in WP 750/2002:

Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari calling for the records relating to the proceedings of the 1<sup>st</sup> respondent herein above in the Notification No.2/2002 dated 8.1.2002 quash the same in so far as the imported cotton in transit and for also purchased contracts already entered into the members of the petitioner Association before the issue of the impugned Notification.



Prayer in WP.5967/2002 :

Writ Petition filed under article 226 of the constitution of India to issue a writ of Certiorari to calling for the records relating to the proceedings of the 1st Respondent herein above in the Notification No.2/2002, dated 08.01.2002, quash the same in so far as the imported cotton in transit and for also purchased contracts already entered into the members of the Petitioner Association before the issue of the impugned Notification.

Prayer in WP.4743/2002:

Writ Petition filed under article 226 of the Constitution of India to issue a writ of certiorari calling for the records relating to the proceedings of the 1st Respondent herein above in Notification No.2/2002 dated 08.01.2002 quash the same.

PRAYER in WP 5049/2002:

Writ Petitioner filed under article 226 of the Constitution of India to issue a writ of Certiorari to calling for the records of the proceedings of the 1st respondent herein above in his notification No.2/2002 dated 08.01.2002 and quash the same.

Prayer in WP 5966/2002:-

Writ Petitioner filed under article 226 of the Constitution of India to issue a writ of Certiorari to calling for the records of the proceedings of the 1st respondent herein above in his notification No.2/2002 dated 08.01.2002 and quash the same.

PRAYER in WP 7266/2002:

Writ Petition filed under article 226 of the Constitution of India to issue a writ of certiorari calling for the records relating to the proceedings of the 1st Respondent herein above in Notification No.2/2002 dated 08.01.2002 quash the same in so far as the imported cotton in transit and for also purchase contracts already entered into by the petitioner mills before the issue of the Impugned Notification.

Prayer in WP 11579/2002:

Writ Petition filed under article 226 of the Constitution of India to issue a writ of certiorari, calling for the records relating to the proceedings of the 1st Respondent herein in the Notification No.2/2002 dated 08.01.2002 quash the same in so far as the imported cotton in transit and for also purchase contracts already entered into by the members of the Petitioner Association.

Prayer in WP 8125/2002 :

Writ Petition filed under article 226 of the Constitution of India to issue a writ of certiorari calling for the records relating to the proceedings of the 1st Respondent herein above



in Notification No.2/2002 dated 08.01.2002 quash the same.

Prayer in WP 11352/2002:

Writ Petition filed under article 226 of the Constitution of India to issue a writ of certiorari calling for the records relating to the proceedings of the 1st Respondent herein above in Notification No.2/2002 dated 08.01.2002 quash the same in so far as the imported cotton in transit and for also purchase contracts already entered into by the petitioner mills before the issue of the Impugned Notification.

Prayer in WP 11578/2002 :

Writ petition filed under article 226 of the Constitution of India to issue a writ of certiorari calling for the records relating to the proceedings of the 1st respondent herein above in the Notification No.2/2002, dated 08.01.2002, published in the Gazette dated 08.01.2002, quash the same in so far as the imported cotton in transit and for also purchase contracts already entered into by the petitioner mills before the issue of the impugned Notification.

Prayer in WP 23009/2002:-

Writ Petitioner filed under article 226 of the Constitution of India to issue a writ of Certiorari to calling for the records of the proceedings of the 1st respondent herein above in his notification No.2/2002 dated 08.01.2002 and quash the same.

Prayer in WP 36122/2002:-

Writ Petitioner filed under article 226 of the Constitution of India to issue a writ of Certiorari to calling for the records of the proceedings of the 1st respondent herein above in his notification No.2/2002 dated 08.01.2002 and quash the same.

Common Prayer in WP 906, 924, 1243 to 1246, 1496, 1497 of 2002 and 3142 of 2002 :

Petitioner filed under Article 226 of the Constitution of India, praying to issue a writ of Declaration, declaring that the rate of duty as per customs Notification No.2/2002 dated 08.01.2002 does not apply to consignments of Cotton received at the several ports in India, particularly at Tutocorin for which orders have been placed by the petitioner for supply of cotton by import prior to 08.01.2002 in so far as the petitioner is concerned and that the petitioner is liable to pay import duty of 5% only on such import even though the consignments are received subsequently to 08.01.2002.

Prayer in WP 4854/2002:-

Writ Petitioner filed under article 226 of the Constitution of India to issue a writ of Certiorari to calling for the records relating to the order dated 08.01.2002 custom



notification No.2/2002 passed by the 1<sup>st</sup> Respondent and quash the same.

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|                |   |                                   |
|----------------|---|-----------------------------------|
| For Appellants | : | Mr.V.Sundareshwaran,              |
| in all cases   |   | Senior Standing Counsel           |
| For Respondent | : | Mr.R.Thiagarajan, senior counsel  |
|                |   | for M/s.R.S.Pandayaraj            |
|                |   | in WA 1552 to 1559, 1561/2013     |
|                | : | K.Sridhar Associates for          |
|                |   | Mr.Kishore in WA 1560,1567,       |
|                |   | 1573/2013                         |
|                | : | Mr.L.Rajasekar in WA No.1562/2013 |
|                | : | M/s. Palani Selvaraj              |
|                |   | in WA No.1563/2013                |
|                | : | Mr.N.Manokaran in WA No.1568/2013 |

#### COMMON JUDGMENT

MOHAMMED SHAFFIQ, J.

This batch of intra court appeals are filed by the revenue, aggrieved by the order of the learned Judge in setting aside the Notification No.2/2002-Customs dated 08.01.2002 issued by the Central Government in exercise of the power under Section 8A of the Customs Tariff Act, 1975, as invalid inasmuch as the circumstances/conditions precedent for the Central Government to issue such a notification, do not exist.

#### BRIEF FACTS:

2. Originally, the batch of writ petitions were filed by the Dindigul Spinners Association and a number of individual Mills, who are respondents in this batch of Writ Appeals filed by the revenue. The members of the respondent association/mills and the other individual mills are engaged in the manufacture of yarn both cotton as well as synthetic. Their main raw material is cotton and the major component in their input cost is the price of cotton, which works out to about 40% to 50% of their production cost.

3. The respondent mills use different varieties of cotton for manufacture of different counts of yarn. Cotton being a seasonal product, the mills are forced to procure the required quantity of cotton in advance, as and when it is available on the basis of the orders placed on the mills and also on the basis of the prospective orders and market requirements, which



include both local and international. The respondent mills import cotton in view of the fact that adequate quantity of cotton may not be available within the country. Importantly, it is submitted by the respondent association/mills that the duty element is taken into account, while deciding the import and also offering quotation to its customers. The orders on the foreign exporters are normally placed 5 to 6 months in advance and the prices are fixed on the basis of the duty prevailing on the date on which such orders are placed.

4. While so, the Central Government passed the impugned notification No.2/2002-Customs dated 08.01.2002 thereby increasing the rate of duty from 5% to 10% with effect from 09.01.2002, which was challenged in the writ petitions inter alia on the premise that the circumstances/conditions precedent for exercise of power under Section 8A of the Customs Tariff Act, 1975, have not been set out in the notification. It was further submitted by the respondents that if the enhanced rate in terms of the impugned notification is made applicable to the raw materials already in transit and contracts already entered into with the foreign suppliers, it would cause undue hardship as the cost of the sale price had already been fixed and the orders were obtained on the basis of the duty structure prevailing then.

5. Accepting the submissions of the respondents, the writ petitions were allowed by setting aside the impugned notification, holding that it does not satisfy the requirements of section 8A(1) of the Customs Tariff Act, 1975, by a common order dated 29.01.2013, which is questioned in this batch of writ appeals by the revenue.

ORDER IN ISSUE:

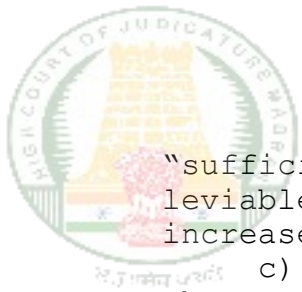
6.1 The learned Judge held that the impugned notification is bad in law, on the following grounds:

a) That the Ministry of Finance, Department of Revenue is not in a position to satisfy the existence of the following conditions precedent for issuance of notification under Section 8A(1) of the Customs Tariff Act, 1975 viz.,

i) That the Central Government at the time of issuing the notification was satisfied that the import duty leviable under Section 12 of the Customs Act, 1962 should be increased and

ii) Circumstances exist which render it necessary to take immediate action.

b) That though a specific challenge was made as to the existence of the circumstances/conditions precedent for exercise of power under section 8A of the Customs Tariff Act, 1975, the Central Government is unable to satisfy the Court that there was



"sufficient material" to satisfy itself that the import duty leviable under Section 12 of the Customs Act, 1962 should be increased and circumstances exist for immediate action.

c) That despite repeated directions issued by this Court, the Department of Revenue had not produced the file relating to passing of the impugned notification, instead a counter affidavit was filed, wherein reference was made to starred question in Parliament by some members and response of the concerned Ministry in relation to the impugned notification. Therefore, the learned Judge was of the view that no effective counter affidavit has been filed by the Ministry of Finance, Department of Revenue.

d) In any event, the counter affidavit which has been subsequently filed explaining that the impugned notification was issued with a view to restrict undesired cotton imports thereby protecting the interest of domestic cotton, is unacceptable, in view of the law laid down in *Mohinder Singh Gill and another v. the Chief Election Commissioner, New Delhi and others*<sup>1</sup> that the case of the Central Government cannot be improved on the basis of counter affidavit.

6.2 It was thus, concluded by the learned Judge that the impugned Notification No.2/2002-Customs dated 08.01.2002 does not satisfy the requirements of Section 8A(1) of the Customs Tariff Act, 1975, and is hence, set aside.

#### SUBMISSIONS OF THE PARTIES:

7.1 The learned senior standing counsel appearing for the appellants submitted that the order of the learned Judge holding the impugned notification as invalid on the premise that the prerequisites / conditions precedent for invoking Section 8A(1) of the Customs Tariff Act, 1975, do not exist, is contrary to the statutory provisions as well as the law interpreted by the Apex Court in a catena of cases and the materials available on record.

7.2 It is also submitted on the side of the appellants that pursuant to the issuance of notification No.2/2002 dated 08.01.2002 with effect from 09.01.2002 under section 8A of the Customs Tariff Act, 1975, the rate of duty was increased to 10% from 5% in order to curb the undesired heavy imports of cotton from abroad due to the international crashing of cotton price and to protect the interest of local farmers. Adding further, the learned senior standing counsel submitted that the power of taxation can be used not merely for raising revenue, but also to regulate the economy to discourage the import of certain goods and for serving social objectives of the State. Therefore, the notification impugned in the writ petitions does not suffer from any infirmity for quashing the same.

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<sup>1</sup> AIR 1978 SC 851



7.3 The learned senior standing counsel further submitted that the impugned notification issued under section 8A of the Customs Tariff Act, 1975, having been placed before the Parliament in compliance with sections 7(3) and 7(4) of the Customs Tariff Act, 1975, is immune from challenge on the ground that it is unreasonable and arbitrary, inasmuch as the notification on being approved by the Parliament, becomes an Act of legislature and represents the will of people. Thus, the non-production of the note filings before the learned Judge, will in no way affect the notification issued; and the necessity to improve the case on the basis of counter affidavit, does not arise herein.

7.4 It is also pointed out by the learned senior standing counsel that the legislative provisions levying customs duty authorise the Central Government in appropriate cases either to reduce or increase or grant exemption, having regard to the prevailing circumstances and hence, impugned notification was issued well within the framework of the enabling provision and not in violation of any of the Constitutional mandate.

7.5 Placing reliance on the various decisions of the Hon'ble supreme court to substantiate his contentions, the learned senior standing counsel appearing for the appellants sought to allow these writ appeals by setting aside the order of the learned Judge.

8.1 Mr.R.Thiagarajan, learned senior counsel appearing for the respondents contended that by the Notification No.2/2002 dated 08.01.2002, an unilateral increase of import duty on the import of cotton to India was sought to be enforced from the then existed rate of 5% to 10% without the stakeholders being put on notice in any manner. When the same was put to challenge in the batch of writ petitions by the respondents, by contending that the ingredients of section 8A(1) of the Customs Tariff Act, 1975 are not satisfied warranting the increase in import duty from 5% to 10% and the notification was issued arbitrarily and in exercise of power capriciously, the learned Judge, after providing sufficient opportunities to the appellants, has ultimately concluded that the said notification does not satisfy the requirements of section 8A (1) of the Customs Tariff Act, 1975 and accordingly, set aside the same and thereby allowed the writ petitions.

8.2 Pointing out that the increase of import duty was introduced with immediate effect by Notification No.2/2002 dated 08.01.2002, which was in force till 08.07.2008 and the same was removed with nil rate of customs duty by Notification No.84/2008 dated 08.07.2008, the learned senior counsel appearing for the



respondents submitted that while removing the import duty or exempting from the import duty, no adverse effects are seen at any levels, however imposition or increase in the import duty all of a sudden, would have strong impacts in the cotton textile industry, where the Industry has to absorb the cost on increase in all its final products including exports and hence, the import duty structure cannot be increased without the stakeholders being put on notice and without allowing sufficient time to clear the materials in the pipeline, which are booked based on the import duty structure available at the time of placing the purchase orders or opening the letter of credits.

8.3 Thus, according to the learned senior counsel for the respondents, the appellants have not made out any case for consideration either on merits or in law, and in that event, the order of the learned Judge does not require any interference at the hands of this court.

#### QUESTIONS FOR CONSIDERATION:

9. In the given factual matrix, on consideration of the pleadings raised by the respective parties, the two main questions that arise for determination in this batch of writ appeals, are as under:

(1) Whether the impugned notification No.2 of 2002 dated 08.01.2002 issued by the Central Government in exercise of its powers under Section 8A of the Customs Tariff Act, 1975 is valid in law?

(2) Whether it is permissible to treat the impugned notification as not being applicable to cotton in transit at the time of issuance of notification and also cotton in respect of which orders have been placed with the foreign exporters prior to the issuance of impugned notification?

#### ANALYSIS:

##### Question No.1

10. To answer this question, 'whether the impugned notification issued by the Central Government in exercise of power under section 8A of the Customs Tariff Act, 1975 is valid in law', the following issues are required to be considered herein:

##### Issue No.1

Whether it is permissible to invalidate a notification only on the ground that the notification does not explicitly set out/elaborate the circumstances warranting the exercise of power and what is the relevance and sanctity which ought to be attached to a recital in a notification stating that the pre-requisites for issuance of notification exist?

10.1.1 In this context, it may be relevant to refer to Section 8A of the Customs Tariff Act, 1975 which reads as under:





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Customs Tariff Act, 1975, the Central Government hereby directs that the First Schedule of the said Customs Tariff Act shall be amended in the following manner, namely.,

In the First Schedule to the said Customs Tariff Act, in Section XI in Chapter 52, against heading 52.01 occurring in Column(2), for the entry in Column (4) of the entry "10%" shall be substituted.

2. This Notification shall come into force on the 9<sup>th</sup> day of January, 2002." (emphasis supplied)

On a reading of the aforesaid impugned notification, it is apparent that it contains a recital showing the satisfaction/existence of the twin conditions which are sine qua non for exercise of power by the Central Government under Section 8A(1) of the Customs Tariff Act, 1975.

10.1.3 The learned Judge has proceeded with the subject matter on the premise that the notification does not disclose the reasons which warranted exercise of power by the Central Government nor was the file pertaining to the impugned notification submitted despite repeated directions of this Court. Further, the proceedings in the form of response to starred questions by some members, placed before the Parliament, was not relevant. In any event, the materials produced, in the view of the learned Judge, were not sufficient. For better understanding, the observation of the learned Judge is extracted below:

"15. ....In the case on hand, when a specific challenge has been made, the first respondent is unable to satisfy the Court that there was sufficient material before the Central Government to satisfy itself that import duty leviable under Section 12 of the Customs Act, 1962 should be increased and circumstances did exist rendering it necessary for immediate action. Since the Ministry of Finance, Department of Revenue had failed to satisfy this Court that such a contingency did exist, the Court is inclined to interfere with the notification, as has been laid down in decisions, referred to above. It is trite law that Courts will not interfere with the decision taken by Department concerned one way or the other, but it can certainly interfere if the decision-making process does not satisfy the requirement of the statute or if it is arbitrary or irrational or that it is based on no material."

The above reasoning of the learned Judge appears to be in conflict with the law laid down by the Hon'ble Supreme Court, considering the relevance and sanctity to be attached to a recital by a delegate/subordinate legislation.



10.1.4 In this connection, it is apt to refer to the following judgments, which would show that once the notification contains a recital, a presumption would arise that the necessary conditions for issuance of notification stand fulfilled and the burden is on the person challenging the correctness of the recital, to prove the contrary by letting in cogent, appropriate and convincing material/evidence. The said view has been expressed by the Hon'ble Federal Court in *King Emperor v. Sibnath Banerjee*<sup>2</sup> and the same reads as follows:

"It is quite a different thing to question the accuracy of a recital contained in a duly authenticated order, particularly where that recital purports to state as a fact the carrying out of what I regard as a condition necessary to the valid making of that order. In the normal case, the existence of such a recital in a duly authenticated order will, in the absence of any evidence as to its inaccuracy be accepted by a court as establishing that the necessary condition was fulfilled."

(emphasis supplied)

10.1.5 The Hon'ble Supreme Court and various High Courts including this Court, after quoting the above passage with approval, has consistently reiterated the above view. The Hon'ble Supreme Court in *Swadeshi Cotton Mill Co. Ltd. v. State Industrial Tribunal*<sup>3</sup>, held as under:

"31...Our conclusion therefore is that where certain conditions precedent have to be satisfied before a subordinate authority can pass an order, (be it executive or of the character of subordinate legislation), it is not necessary that the satisfaction of those conditions must be recited in the order itself, unless the statute requires it, though, as we have already remarked, it is most desirable that it should be so, for in that case the presumption that the conditions were satisfied would immediately arise and burden would be thrown on the person challenging the fact of satisfaction to show that what is recited is not correct. But even where the recital is not there on the face of the order, the order will not become illegal ab initio and only a further burden is thrown on the authority passing the order to satisfy the court by other means that the conditions precedent were complied with. In the present case this has been done by the filing of an affidavit before us."

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<sup>2</sup> AIR 1943 FC 75 : 1944 FCR 1, 42

<sup>3</sup> AIR 1961 SC 1381



10.1.6 The above view of the Hon'ble supreme court was reiterated in Narayan Govind Gavate v. State of Maharashtra<sup>4</sup> wherein, with regard to presumption that is raised by a recital in the notification, it was held as under:

"28. The High Court opined that the presumption of regularity, attached to an order containing a technically correct recital, did not operate in cases in which Section 106 Evidence Act was applicable as it was to the cases before us. We do not think that we can lay down such a broad general proposition. An order or notification, containing a recital, technically correct on the face of it, raises a presumption of fact under Section 114 illustration (e) of the Evidence Act. The well-known maxim of law on which the presumption found in illustration (e) to Section 114 of Evidence Act is: "Omnia praesumuntur rite esse acta" (i.e. all acts are presumed to have been rightly and regularly done)....."

(emphasis supplied)

10.1.7 The above view with regard to presumption in view of the provisions of the Evidence Act and the maxim 'omnia praesumuntur rite esse acta' i.e. 'all acts are presumed to have rightly and regularly been done' was reiterated in the following judgments:

- a. Ayaaubkhan Noorkhan Pathan v. State of Maharashtra<sup>5</sup>
- b. Karewwa v. Hussensab Khansaheb Wajantri<sup>6</sup>
- c. Engg. Kamgar Union v. Electro Steels Castings Ltd. <sup>7</sup>
- d. Mohd. Shahabuddin v. State of Bihar<sup>8</sup>
- e. SEB v. Ashwani Kumar<sup>9</sup>
- f. M. Chandra v. M. Thangamuthu<sup>10</sup>
- g. R. Ramachandran Nair v. State of Kerala (Vigilance Deptt.)<sup>11</sup>

Thus, it could be seen that a recital in a notification raises a presumption though not conclusive, however, the burden is on the person who assails the recital as not reflecting the true state of affairs, to demonstrate the same by letting in cogent and appropriate material and mere assertion however strong, may not be an adequate discharge of such burden.

10.1.7 The above judgments of the Hon'ble Supreme Court would show that it is not necessary that the satisfaction of the conditions for issuance of a notification must be recited in the

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<sup>4</sup> (1977) 1 SCC 133

<sup>5</sup> (2013) 4 SCC 465 : (2013) 2 SCC (Civ) 658 : (2013) 2 SCC (L&S) 296 : 2012 SCC OnLine SC 926 at page 488

<sup>6</sup> (2002) 10 SCC 315 : AIR 2002 SC 504



notification itself. Importantly, once the notification contains a recital that conditions/prerequisites exist, then presumption would arise as to the said conditions being satisfied. The impugned notification expressly states that the twin conditions/prerequisites for issuance of notification under Section 8A(1) of the Customs Tariff Act, 1975, exist resulting in raising a presumption as to the correctness thereof and also casting a burden on the respondents challenging the correctness of the said recital.

10.1.8 In the light of the view expressed by the Federal Court in *Sibnath Banerjee*<sup>2</sup> which view has been affirmed by the Supreme Court in *Swadeshi Cotton*<sup>3</sup> and which in turn has been reiterated in *Narayan Govind Gavate*<sup>4</sup> and *Prafulla Churan Law*<sup>12</sup> with regard to the relevance and sanctity to be attached to a recital in the subordinate legislation, we are of the view that the notification cannot be said to be invalid, on the premise that the notification itself does not elaborate the circumstances/reasons for issuance of the same. Accordingly, the first issue is answered.

Issue No.2:

Whether the order of the learned Judge setting aside the notification on the premise that the Central Government is unable to satisfy the Court that there was "sufficient material", before the Central Government to satisfy itself that import duty leviable under Section 12 of the Customs Act, 1962 should be increased and circumstances exist rendering it necessary for immediate action under Section 8A(1) of the Customs Tariff Act, 1975, is legal and valid, when viewed in the light of the presumption as to the constitutionality of a subordinate legislation?

10.2.1 According to the respondents, the notification does not set out the reasons which warrant the exercise of power under Section 8A(1) of the Customs Tariff Act, 1975. The learned Judge has observed that the appellants failed to produce the file pertaining to the impugned notification; and they did not demonstrate with "sufficient material" that the impugned notification was issued in compliance with the twin conditions set out in Section 8A(1) of the Customs Tariff Act, 1975.

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7 (2004) 6 SCC 36 : 2004 SCC (L&S) 782

8 (2010) 4 SCC 653 : (2010) 2 SCC (Cri) 904

9 (2010) 7 SCC 569 : (2010) 3 SCC (Civ) 147

10 (2010) 9 SCC 712 : (2010) 3 SCC (Civ) 907 : AIR 2011 SC 146



10.2.2 We are not inclined to accept the above reasoning of the learned Judge as it is contrary to facts and law. It was explained on the side of the appellants that the non-production of the file pertaining to the notification was, in view of the fact that it was misplaced and not traceable due to efflux of time. However, they filed a counter and also produced copies of the proceedings placed before the Lok Sabha regarding the questions raised in relation to the increase of customs duty through the impugned notification and the explanation / reason given by the Ministry, the relevant passage of which is profitably reproduced below:

"(e) & (f): After taking into account the requirement of the Industry and the prevailing difference between the domestic and international prices, Government hiked the customs duty on import of cotton from 5% to 10% with effect from 09.01.2002. The hike in duty would restrict undesired cotton imports. Moreover, the Cotton Corporation of India Ltd., (CCI) has undertaken support price operation, to protect the interests of the farmers, wherever market price of kapas (seed cotton) touched the Minimum Support Price (MSP) announced by the Government. During the current cotton season, upto 28.02.2002, CCI has purchased 38,63,837 quintals of kapas (equivalent to lint cotton of 7,25,344 bales of 170 kg. Each) under support price operation."

(emphasis supplied)

10.2.3 It is further stated that after setting out the increase in the quintals of cotton that has been imported from 1997-98 to 2000-01 which shows the increase from 4.13% (in lakh bales) for the year 1997-98 to 22% (in lakh bales) for the year 2000-2001, i.e., almost 500% increase. For better appreciation, the import of cotton during the last four years (October-September) is given in the following table:

(in lakh bales of 170 kgs.)

| 1997-98 | 1998-99 | 1999-2000 | 2000-2001 |
|---------|---------|-----------|-----------|
| 4.13    | 7.87    | 22.01     | 22.00     |

10.2.4 To understand the sanctity of the above information, it may be relevant to note that in the official website of the Rajya Sabha, in the booklet, which is part of the Rajya Sabha Practice and Procedure Series, while dealing with the relevance of the "Question Hour" and the sanctity attached to the response given by the Ministry, it is stated as under:

11 (2011) 4 SCC 395 : (2011) 2 SCC (Cri) 251 : (2011) 2 SCC (L&S) 691

2 AIR 1943 FC 75 : 1944 FCR 1, 42

3 AIR 1961 SC 1381

4 (1977) 1 SCC 133

12 (2011) 4 SCC 537



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#### "DISCUSSION IN RAJYA SABHA:

The 'Question Hour' is an important part of the parliamentary proceedings which gives the institution of Parliament the great significance it possesses. This Hour has assumed greater importance because the members can elicit information through questions on matters affecting the day-to-day life of the citizens for which Ministers are collectively and severally answerable to the legislature. This parliamentary device, in fact, is primarily meant for exercising a kind of legislative control over executive actions. Besides, the Members also find an opportunity through this device to criticise Government's policies and programmes; ventilate public grievances; expose Government's lapses; and extract promises from Ministers. Members also get opportunity to give vent to their feelings when they are not satisfied with the answers by putting supplementaries. The Question Hour serves another purpose. The Ministers are also made aware of the working of their departments at the ground level which otherwise could have gone unnoticed.

Although the apparent purpose of asking a question is to elicit information, the real object of the member is to point out shortcomings of the administration; to ascertain the thinking of the Government on a particular matter or even to help the Government in formulating their policy; and where policy already exists, in making suitable modifications in that policy. Thus, answers to questions achieve twin objectives -- one, the public at large comes to know of the policies of the Government and two, information about public reaction and public opinion about a Government policy and its implementation including its shortcomings is fed back to the Government to enable them to make necessary modifications, if required in the public interest.

Ministers have to be precise and accurate while answering questions. The information given through the answers is always taken as authentic. So, Ministers have to be very careful while giving answers. They cannot afford to mislead the House by giving wrong and inaccurate answers which might lead to raising questions of privilege. If a Minister later finds that the information supplied is inaccurate or incorrect, he may make a statement in the House correcting the previous answer, in case it is a starred question or lay a statement on the Table of the House, in case of an unstarred question. Where a Minister feels that he cannot supply authentic information when the question



is asked, he may ask for time and assure the House to supply it as soon as it is available."

(emphasis supplied)

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The above extract would show that the information given through the answers during the "Question Hour", must be taken as authentic. Whereas, the learned Judge has erred in overlooking the material in the form of recital to the impugned notification and the answers furnished during the "Question Hour" to the effect that the Central Government issued the impugned notification in exercise of its powers under Section 8A(1) of the Customs Tariff Act, 1975 "to restrain undesired import of cotton" and "protect the interest of farmers". It is thus, evident that the reasoning of the learned Judge that the appellants failed to demonstrate the existence of circumstances warranting the exercise of power under Section 8A(1) of the Customs Tariff Act, 1975, is contrary to the material on record in the form of "recital in the notification", the Minister's answers during "Question Hour", and the counter affidavit filed by the appellants relating to the circumstances warranting the issuance of the impugned notification.

10.2.5 Further, the reasoning of the learned Judge that the Central Government failed to satisfy the Court with "sufficient material" that the twin requirements for issuance of the impugned notification under Section 8A(1) of the Customs Tariff Act, 1975 existed, is contrary to the law laid down by the Hon'ble Supreme Court and contrary to the facts on record as discussed supra.

10.2.6 In any event, the aforesaid reasoning of the learned Judge viz., failure to satisfy the court that there was "sufficient material" with the Central Government for issuance of notification and thus setting aside the impugned notification, is also contrary to the law as to the scope of judicial review, while testing the validity of a subordinate legislation. Adequacy or wisdom of legislative measures be it plenary or subordinate falls within the exclusive domain of the Legislature and its delegate and the courts have adopted "hands off" approach qua economic legislation. The legislature and its delegate are the sole repositories of the power to decide what policy should be pursued in relation to the matters covered by the Act and there is no scope for interference by the Court unless the particular action impugned before it, can be said to be wholly beyond the scope of the delegate or it being inconsistent with any of the provisions of the parent enactment or in violation of any of the limitations imposed by the Constitution. Thus, it may not be permissible for the Court to



look at the adequacy of the material, which necessitated the issuance of a notification.

10.2.7 In this regard, it may be relevant to refer to the following judgments of the Hon'ble Supreme Court:

a. Narayan Govind Gavate v. State of Maharashtra<sup>4</sup>

"10....That test basically is: Was the authority concerned acting within the scope of its powers or in the sphere where its opinion and discretion must be permitted to have full play? Once the court comes to the conclusion that the authority concerned was acting within the scope of its powers and had some material, however meagre, on which it could reasonably base its opinion, the courts should not and will not interfere...."

(emphasis supplied)

b. State of U.P. v. Hindustan Aluminium Corpn.<sup>13</sup>

"41. .... We have no doubt that the State Government formed its opinion about the necessity and expediency of making the Order for the purpose of maintaining the supply and securing the equitable distribution of energy at a time when that was called for, and this Court cannot sit as a Court of appeal to examine any and every argument in an attempt to show that the opinion of the State Government was vitiated for one fanciful reason or the other. It has to be appreciated that the question whether the reasons which led to the making of the Order were sufficient, was essentially for the State Government to consider."

(Emphasis supplied)

c. Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupeshkumar Sheth<sup>14</sup> :

"14..... It would be wholly wrong for the Court to substitute its own opinion for that of the legislature or its delegate as to what principle or policy would best serve the objects and purposes of the Act and to sit in judgment over the wisdom and effectiveness or otherwise of the policy laid down by the regulation-making body and declare a regulation to be ultra vires merely on the ground that, in the view of the Court, the impugned provisions will not help to serve the object and purpose of the Act.... the Court should not

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4 (1977) 1 SCC 133

13 (1979) 3 SCC 229 at page 246

14 (1984) 4 SCC 27



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concern itself with the wisdom or efficaciousness of such rules or regulations. It is exclusively within the province of the legislature and its delegate to determine, as a matter of policy, .....It is not for the Court to examine the merits or demerits of such a policy "

"16. In our opinion, the aforesaid approach made by the High Court is wholly incorrect and fallacious. The Court cannot sit in judgment over the wisdom of the policy evolved by the legislature and the subordinate regulation-making body. It may be a wise policy which will fully effectuate the purpose of the enactment or it may be lacking in effectiveness and hence calling for revision and improvement. But any drawbacks in the policy incorporated in a rule or regulation will not render it ultra vires and the Court cannot strike it down on the ground that, in its opinion, it is not a wise or prudent policy, but is even a foolish one, and that it will not really serve to effectuate the purposes of the Act.

(emphasis supplied)

d. Corpn. of the City of Bangalore v. Kesoram Industries and Cotton Mills Ltd.<sup>15</sup>

"9. The court has no jurisdiction to examine the validity of the reasons that goes into the decision or the motive that induced the delegated authority to exercise its powers. No judicial duty is laid on the authority in discharge of the statutory obligations and, therefore, the only question to be examined is whether the statutory provisions have been complied with."

#### PRESUMPTION OF CONSTITUTIONALITY:

10.2.8 The above reasoning of the learned Judge also overlooks the presumption as to the Constitutionality of a subordinate legislation. In this regard, it may be useful to refer to the following judgments:

a. St. Johns Teachers Training Institute v. Regional Director, NCTE<sup>16</sup>

"12. .... It is also well settled that in considering the vires of subordinate legislation one should start with the presumption that it is intra vires and if it is open to two constructions, one of

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151989 Supp (2) SCC 753 at page 757

16 (2003) 3 SCC 321



which would make it valid and the other invalid, the courts must adopt that construction which makes it valid and the legislation can also be read down to avoid its being declared ultra vires."

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b. State of T.N. v. P. Krishnamurthy<sup>17</sup>

"15. There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid."

The above decision was followed by the Supreme Court in

(i) Cellular Operators Assn. of India v. TRAI<sup>18</sup>; and

(ii) Global Energy Ltd. v. Central Electricity Regulatory Commission<sup>19</sup>.

10.2.9 Thus, we are of the opinion that the above limitation on the power of judicial review of the subordinate legislation and also the presumption as to its Constitutionality would show that the order of the learned Judge insofar as it examined the validity of the notification on the basis of the sufficiency of reasons/material available with the Central Government warranting exercise of its power in issuing such notification, is erroneous and unsustainable and the second issue is decided accordingly.

Issue No.3

Whether the order of the learned Judge insofar as it placed reliance on the judgment of the Hon'ble Supreme Court in M.Jhangir Bhatusha v. Union of India<sup>20</sup> to conclude that the notification itself must set out elaborately the circumstances/reasons which warranted exercise of power under Section 8A(1) of the Customs Tariff Act, 1975, is legal?

10.3.1 The order of the learned Judge insofar as it placed reliance on the judgment of the Hon'ble Supreme Court in M.Jhangir Bhatusha<sup>20</sup> and interpreted Section 25(2) of the Customs Act, 1962, is misplaced. It may be relevant to note the difference in the language employed in Section 8A of the Customs Tariff Act, 1975 and Section 25(2) of the Customs Act, 1962, which is tabulated below:

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<sup>17</sup> (2006) 4 SCC 517

<sup>18</sup> (2016) 7 SCC 703 : 2016 SCC online SC 486

<sup>19</sup> (2009) 15 SCC 570 : 2009 SCC OnLine SC 1112

<sup>20</sup> 1989 Supp (2) SCC 201



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| Section 8A of the Customs Tariff Act, 1975                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | Section 25(2) of the Customs Act, 1962                                                                                                                                                                                                                                             |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Emergency powers of Central government to increase import duties                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | Power to grant exemption from duty                                                                                                                                                                                                                                                 |
| (1) Where in respect of any article included in the First Schedule, the Central Government is satisfied that the imported duty leviable thereon under Section 12 of the Customs Act, 1962 (52 of 1962) should be increased and that circumstances exist which render it necessary to take immediate action, it may, by notification in the Official Gazette, direct an amendment of that Schedule to be made so as to provide for an increase in the import duty leviable on such article to such extent as it thinks necessary. | If the Central government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from the payment of duty, under circumstances of an exceptional nature to be stated in such order, any goods on which duty is leviable. |

10.3.2 The Hon'ble Supreme Court in the case of M.Jhangir Bhatusha<sup>20</sup> looked into the reasons in the order itself, since Section 25(2) of the Customs Act, 1962, necessitated that the order must set out/state the circumstances warranting exercise of power under Section 25(2) of the Customs Act, 1962. However, Section 8A of the Customs Tariff Act, 1975 which is the enabling provision, does not impose a condition on the delegate to set out /state the circumstances warranting exercise of power under Section 8A(1) of the Customs Tariff Act, 1975 in the notification itself and thus reliance on the decision in M.Jhangir Bhatusha<sup>20</sup> is wholly misplaced. The third issue is answered accordingly.

#### Issue No.4

Whether a subordinate legislation can be challenged on the ground of non-compliance of the principles of natural justice?

10.4.1 It is submitted by the respondents that the notification which has resulted in certain adverse consequences,

<sup>20</sup> ibid

**20 1989 Supp (2) SCC 201**

**20 1989 Supp (2) SCC 201**



is bad inasmuch as it was made without affording an opportunity to the parties, who are likely to be adversely affected.

10.4.2 The above submission is contrary to the well settled principle that delegated legislation, which is legislative in character, cannot be questioned for violating the principles of natural justice in its making, except where the statute itself provides for that requirement. In this regard, it may be relevant to refer to the following judgments:

a. Ramesh Chandra Kachardas Porwal v. State of Maharashtra<sup>21</sup>

"17. .... We are here not concerned with the exercise of a judicial or quasi-judicial function where the very nature of the function involves the application of the rules of natural justice, or of an administrative function affecting the rights of persons, wherefore, a duty to act fairly. We are concerned with legislative activity; we are concerned with the making of a legislative instrument, the declaration by notification of the government that a certain place shall be a principal market yard for a market area, upon which declaration certain statutory provisions at once spring into action and certain consequences prescribed by statute follow forthwith. The making of the declaration, in the context, is certainly an act legislative in character and does not oblige the observance of the rules of natural justice. In *Bates v. Lord Haisham* [(1972) 1 WLR 1973], Megarry, J., pointed out that the rules of natural justice do not run in the sphere of legislation, primary or delegated, and in *Tulsipur Sugar Co. v. Notified Area Committee* [(1980) 2 SCC 295 : (1980) 2 SCR 1111], our brothers Desai and Venkataramiah, JJ. approved what was said by Megarry, J., and applied it to the field of conditional legislation too. In *Paul Jackson's Natural Justice* (2nd Edn.), it has been pointed out (at p. 169):

"There is no doubt that a minister, or any other body, in making legislation, for example, by statutory instrument or by law, is not subject to the rules of natural justice - *Bates v. Lord Haisham* of *St. Marylebone* [(1972) 1 WLR 1973] - any more than is Parliament itself; *Edinburgh and Dalkeith Ry. v. Wauchop* [(1842) 8 Cl & F 710, 720] per Lord Brougham; *British Railways Board v. Pickin* [(1974) AC 765 : (1974) 1 All ER 609 (HL)] ."

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<sup>21</sup> (1981) 2 SCC 722 at page 740



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Prof. H.W.R. Wades has similarly pointed out in his Administrative Law (4th Edn.): "There is no right to be heard before the making of legislation, whether primary or delegated, unless it is provided by statutes". There is, therefore, no substance in the invocation of the rules of natural justice."

b. Union of India v. Cynamide India Ltd.<sup>22</sup>

"5. ....The second observation we wish to make is, legislative action, plenary or subordinate, is not subject to rules of natural justice. In the case of Parliamentary legislation, the proposition is self-evident. In the case of subordinate legislation, it may happen that Parliament may itself provide for a notice and for a hearing – there are several instances of the legislature requiring the subordinate legislating authority to give public notice and a public hearing before say, for example, levying a municipal rate – in which case the substantial non-observance of the statutorily prescribed mode of observing natural justice may have the effect of invalidating the subordinate legislation. The right here given to rate payers or others is in the nature of a concession which is not to detract from the character of the activity as legislative and not quasi-judicial. But, where the legislature has not chosen to provide for any notice or hearing, no one can insist upon it and it will not be permissible to read natural justice into such legislative activity."

10.4.3 It is thus clear that the submission of the respondents that the notification is bad for non-compliance of the principles of natural justice, is untenable. This issue is decided accordingly.

Issue No.5

"Whether the judgment of the Hon'ble Supreme Court in Mohinder Singh Gill<sup>1</sup> insofar as it holds that a counter cannot be used to improve an order is applicable while deciding the vires/validity of a notification?"

10.5 The decision of the Hon'ble Supreme Court in Mohinder Singh Gill<sup>1</sup> holding that an order cannot be improved upon through a counter, may not be relevant, while examining the validity of a notification. The above principle may have relevance only in relation to an administrative or a quasi-judicial order, but not to a notification, which is legislative in character. Thus, the reliance on the decision of the Hon'ble

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**22** (1987) 2 SCC 720 at page 734

<sup>1</sup> AIR 1978 SC 851

<sup>1</sup> AIR 1978 SC 851



Supreme Court in Mohinder Singh Gill<sup>1</sup> case, while deciding the validity of a notification, which is a piece of a subordinate legislation is wholly misplaced and erroneous. This would also be clear that while examining the validity of a notification, there is a presumption as to its Constitutionality and to sustain the Constitutionality it is permissible to take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived as existing at the time of legislature as held in RK Garg<sup>23</sup> and Charajit Lal<sup>24</sup>.

In such view of the matter, we find that the order of the learned Judge in setting aside the notification, is erroneous and contrary to law. Hence, the first question raised herein deserves to be answered in favour of the appellants and is accordingly, answered.

#### Second Question:

11.1 We shall now proceed to examine the second question that the impugned notification should not be made applicable to cotton in transit at the time of issuance of notification and also cotton in respect of which the orders have been placed with the foreign exporters at the time of the impugned notification.

11.2 The above submission is clearly unsustainable inasmuch as the effective date with reference to which Customs duty becomes payable on imports to India, is governed by Section 15 of the Customs Act, 1962, which reads as under:

"15. Date for determination of rate of duty and tariff valuation of imported goods.—

(1)[The rate of duty and tariff valuation, if any, applicable to any imported goods, shall be the rate and valuation in force,—

(a) in the case of goods entered for home consumption under section 46, on the date on which a bill of entry in respect of such goods is presented under that section;

(b) in the case of goods cleared from a warehouse under section 68, on the date on which \*[a bill of entry for home consumption in respect of such goods is presented under that section];

(c) in the case of any other goods, on the date of payment of duty:

[Provided that if a bill of entry has been presented before the date of entry inwards of the vessel or the arrival of the aircraft by which the

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<sup>1</sup> ibid

<sup>23</sup> 1981 (4) SCC 675

<sup>24</sup> AIR 1951 SC 41

\* Substituted by Act 32 of 2003, S.106, for "the goods are actually removed from the warehouse" (w.e.f. 14-05-2003).



goods are imported, the bill of entry shall be deemed to have been presented on the date of such entry inwards or the arrival, as the case may be.]

A reading of the aforesaid provision would postulate that the rate of duty, which is applicable to any imported goods, shall be the rate in force in the case of goods entered for home consumption under Section 46 of the Customs Act, 1962, on the date of which the bill of entry is presented. Thus, if the bill of entry is presented for home consumption under Section 46 of the Customs Act, 1962 after the issuance of the impugned notification, the imports would be governed by the amended rate prevailing then. In other words, on the date when the bill of entry was presented under Section 46 of the Customs Act, 1962, the rate that was prevailing was 10%. It has been repeatedly held by the Hon'ble Supreme Court that irrespective of the circumstances/contingency the rate of duty that is applicable would be the date in force on the date on which the bill of entry is presented for home consumption under Section 46 of the Customs Act, 1962 (or) in the case of goods cleared from a warehouse under Section 68 of the Customs Act, 1962, the date on which the goods are actually removed from the warehouses (or) on the date of payment of duty.

11.3 The above position would be clear from the following decisions of the supreme court:

1. Bharat Surfactants (P) Ltd. v. Union of India<sup>25</sup>

In that case, the ship arrived in Bombay Port on 09.07.1981 and the rate of customs duty prevailing on that date was 12.5% however, as the vessel was unable to secure a berth in the Port of Bombay, it was compelled to proceed to Karachi to discharge the cargo pertaining to that Port. It was submitted that but for the non-availability of the berth, the voyage to Karachi would not have been made and the vessel would have discharged the consignment meant for Bombay on that day, in which event, the Customs duty that could have been levied was only 12.5%. However, when the goods returned to Bombay, there was a material change in the rate. It was submitted that the rate applicable is the one prevailing on 09.07.1981 when the ship originally arrived in the Bombay Port, though the vessel was unable to discharge the imported material for no fault of the petitioners therein and therefore a reasonable construction must be given to Section 15 of the Customs Act, 1962. Rejecting the above contention, it was held by the supreme court as under:

"14. ....We do not find it possible to accept this submission. The provisions of Section 15 are clear in themselves. The date on which a Bill of Entry is presented under Section 46 is, in the case of goods entered for home consumption, the date relevant for

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25 (1989) 4 SCC 21



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determining the rate of duty and tariff valuation. Where the Bill of Entry is presented before the date of Entry Inwards of the vessel, the Bill of Entry is deemed to have been presented on the date of such Entry Inwards." (emphasis supplied)

2. Northern Corpn. v. Union of India<sup>26</sup>:

After the arrival of the goods into India, the same was stored in warehouse by executing a bond in view of certain prohibitory orders under Section 132 of the Income Tax Act, 1961. The importers were thus unable to clear the goods immediately and the goods were cleared only after obtaining a no objection certificate from the Income Tax Department in view of the prohibitory orders under Section 132 of the Income Tax Act, 1961. The question arose as to the rate of duty that would be applicable is whether the rate of duty in force on the date of actual removal of the goods after obtaining the no-objection certificate or on the date when the bills of entry for ex-bond clearance were filed. It was submitted that the importer was always willing to pay the duty when the goods crossed the Customs barriers, but the delay in clearance was only in view of the prohibitory orders of the Income Tax Department under Section 132 of the Income Tax Act, 1961. Thus, the levy of enhanced duty on account of the delay which is not attributable to the importer thus, cannot result in exposing the importer to a higher rate of duty. Rejecting the said contention, it was held thus:

"10. ....It must be accepted that the prohibitory orders, arbitrary or not, would postpone the date of clearance and as such would postpone the determination of the duty..."

3. Dhiraj Lal R. Vohra And Ors. vs Union Of India (Uoi) And Ors.<sup>27</sup>

This was a case where the ship had entered into Indian waters on February 20, 1989 ready to discharge the cargo and awaiting clearance into the port. However, due to reasons beyond the control of the ship or the importer, the goods could not be cleared until March 2, 1989 by which time the rate of duty had materially changed. It was submitted that the cargo was ready for discharge in the Indian waters since February 20, 1989 and the importer has presented the bill of entry for home consumption on February 28, 1989 which was received by the appraising section on February 28, 1989 and thus, the duty which is leviable, should be one of the above dates and not March 02, 1989, when the goods were cleared. Rejecting the said contention, it was held by the Hon'ble Supreme Court as follows:

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<sup>26</sup> (1990) 4 SCC 239

<sup>27</sup> 1993 Supp (3) SCC 453



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2. ".....We find no force in the contention Section 15 of the Customs Act of 1962 for short 'the Act' prescribe the rate of duty and tariff valuation on imported goods....
3. It is clear from bare reading of these relevant provisions that the due date to calculate the rate of duty applicable to any imported goods shall be the rate and valuation in force, in the case of the goods entered for home consumption under Section 46, is the date on which the bill of entry in respect of such goods is presented under that section and in the case of goods cleared from a warehouse under Section 58, the date on which the goods are actually removed from the warehouse.....Therefore, the relevant date under Section 15(1)(a) is the date on which entry inwards after delivery of import manifest was granted to discharge the cargo for the purpose of the levy of the customs duty and rate of tariff. The contention, therefore, that the ship entered Indian territorial waters on February 20, 1989 and was ready to discharge the cargo is not relevant for the purpose of Section 15(1) read with secs. 46 and 31 of the Act. The prior entries regarding presentation of the bill of entry for clearance of the goods on February 27, 1989 and their receipt in the appraising section on February 28, 1989 also are irrelevant. The relevant date to fix the rate of customs duty, therefore, is March 2, 1989. The rate prevailed as on that date would be the duty to which the goods imported are liable to the impost and the goods would be cleared on its payment in accordance with the rate of levy of customs prevailing as on March 2, 1989."

4. Union of India v. Apar (P) Ltd.<sup>28</sup>:

It was found that when the goods entered the territorial waters of India, from foreign country and also on the day they were stored in the bonded warehouse, they were held exempt from payment of basic customs duty under a notification issued under Section 25 of the Customs Act, 1962. When the goods were sought to be removed subsequently from the bonded warehouse, the exemption notification has been rescinded and the exemption was withdrawn. It was submitted that since the goods had entered the Indian territorial waters and also stored in the bonded warehouse, during which period it was exempt the subsequent increase or withdrawal of the exemption notification is



inapplicable. The said contention was rejected by the Hon'ble Supreme Court and it was held as under:

"5. In our opinion, this question is no longer res integra. At least two decisions of this Court, namely, Bharat Surfactants (P) Ltd. v. Union of India [(1989) 4 SCC 21] and Dhiraj Lal H. Vohra v. Union of India [1993 Supp (3) SCC 453] were directly concerned with a similar contention that had been raised. Dealing with the same, this Court has in clear terms come to the conclusion that what is relevant is the day on which the bill of entry in respect of the goods is presented under Section 46 and in the case of goods which are warehoused the relevant date would be the date on which the goods are actually removed from the warehouse...."

#### 5.Kiran Spg. Mills<sup>29</sup>:

When the goods were imported into India, the Ordinance providing for Special Additional Duty had not been promulgated. However, the goods which were imported were cleared from the bonded warehouse on subsequent dates by which time the Ordinance providing for Special Additional Duty had been promulgated. While considering the submission that as the ordinance had not been promulgated at the time the goods were imported into India, the levy of Special Additional Duty introduced subsequently cannot be applied was rejected holding as under:

"6. .... We are unable to accept the contention of Mr Ramachandran that what has to be seen is whether additional duty of excise was payable at the time when the goods landed in India or, as he strenuously contended, they had crossed into the territorial waters. Import being complete when the goods entered the territorial waters is the contention which has already been rejected by this Court in Union of India v. Apar (P) Ltd. [(1999) 6 SCC 117] decided on 22-7-1999. The import would be completed only when the goods are to cross the customs barriers and that is the time when the import duty has to be paid and that is what has been termed by this Court in Sea Customs case [ Sea Customs Act, S. 20(2), Re, AIR 1963 SC 1760 : (1964) 3 SCR 787, 803] (SCR at p. 823) as being the taxable event. The taxable event, therefore, being the day of crossing of customs barrier, and not on the date when the goods had landed in India or had entered the territorial waters, we find that on the date of the taxable event the additional duty of excise



was leviable under the said Ordinance and, therefore, additional duty under Section 3 of the Tariff Act was rightly demanded from the appellants."

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6. DCM vs. Union of India<sup>31</sup>:

"7..... A reading of Sections 15, 46 and 68 makes it clear that they provide an option to the importer either to file a bill of entry for home consumption straightaway (in which case he has to pay the duty determined with reference to that date) or to file a bill of entry for warehousing. In the latter case, the goods are merely warehoused. The import duty will be levied at the rate and on the basis of the valuation determined in accordance with the provisions prevailing on the date of clearance from the warehouse for which purpose the importer has to file a fresh bill entry for home consumption. In other words, it is the date of filing the bill of entry for home consumption which determines the rate of duty in clauses(a) and (b) of Section 15. Inasmuch as the matter is left to the option of the importer and also because a uniform principle is adopted by the Act, as explained above, the Hon'ble Supreme court sees no room for any legitimate grievance of discrimination. There is also no presumption that rate of duty always goes up. It may also go down, in which case, the importer stands to gain."

7. Union of India vs. G.S. Chatha Rice Mills<sup>29</sup>:

In this recent judgment, the Supreme Court has considered the question, as to whether a notification issued under Section 8A of the Customs Tariff Act, 1975 would be effective from a particular time in the day when the notification was uploaded in the E-Gazette or from the first moment of the day in which the notification was issued. The said question arose in view of the peculiar facts wherein a notification under Section 8A(1) of the Customs Tariff Act, 1975 was issued at 20:46:58 hrs on 16.02.2019 resulting in enhancement of rate of duty from nil to 200%. The imports in question had entered the Indian Territory before 18.00 hrs on 16.02.2019. The bill of entry was self-assessed at 18.08 hrs on 16.02.2019 under the provisions of the Customs Act, 1962. Question arose as to whether the enhanced rate imposed vide notification No.5 of 2019 would apply only to Bills of entry for home consumption presented after 20:46:58 hrs on 16.02.2019 or it would apply from the first moment of

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31 (2021) 2 SCC 209

29 (2021) 2 SCC 209



16.02.2019. While it was contended by the assessee that the notification would apply only to bills of entry for home consumption presented after 20:46:58 hrs on 16.02.2019. It was the contention of the Union that Section 15 which prescribes the method and the manner for determining the rate of duty only refers to date and not time and therefore once a notification has been issued, it should be given effect from the first moment on that day. The Hon'ble Supreme Court after referring to the various case laws under Section 15, held as under:

"46. The presentation of a bill of entry for home consumption under Section 46 is hence the definitive event with reference to which the customs' duty payable for import is determined. The duty in force on the day when the bill of entry for home consumption is presented is the duty which is applicable under Section 15(1)(a). It is in view of this principle that the entry of the vessel into territorial waters, before the presentation of the bill of entry, has been held not to fix the rate of duty where the rate of duty has undergone a change."

The Hon'ble Supreme Court proceeded to reject the contention of the Union that the notification would have applicability from the first moment of that day, though uploaded in E-Gazette only at 20:46:58 hours on 16.02.2019.

"59. .... The submission of the ASG, simply put, is that because Notification No. 5/2019 was issued on 16-2-2019, the Court must regardless of the time at which it was uploaded on the e-gazette treat it as being in existence with effect from midnight or 0000 hours on 16-2-2019. The consequence of this interpretation would be to do violence to the language of Section 8-A(1) of the Customs Tariff Act, and to disregard the meaning, intent and purpose underlying the adoption of provisions in the Customs Act in regard to the electronic filing of the bill of entry and the completion of self-assessment"

11.4 The above judgments make it clear that rate of duty is governed by Section 15 of the Customs Act, 1962 and the same shall be the rate in force-

a. In the case of goods entered for home consumption under Section 46 of the Customs Act, 1962 on the date on which bill of entry was presented for home consumption.

b. In the case of goods cleared from a warehouse under Section 68 of the Customs Act, 1962 the date on which goods are actually removed from warehouse \*(the date on which a bill of

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\* Substituted by Act 32 of 2003, S.106, for "the goods are actually removed from the warehouse" (w.e.f. 14-05-2003).



entry for home consumption in respect of such goods is presented under that section).

c. In the case of any other goods on the date of payment of the duty.

d. Provided that if a bill of entry has been presented before the date of entry inwards of the vessel or the arrival of the aircraft on the date of such entry inwards or arrival as the case may be.

11.5 The fact that the goods were in transit or the orders have been placed at the time when a lower rate of duty prevailed, will have no bearing for the rate of duty that would be applicable, shall be the rate of duty prevailing on the dates mentioned in Section 15 of the Customs Act, 1962 as explained by the various decisions referred above.

11.6 We are thus unable to accept the contention of the respondents that the enhanced rate leviable by the impugned notification should not be made applicable to cotton in transit at the time of issuance of notification and cotton in respect of which orders were placed with foreign exporters prior to the issuance of impugned notification. Accordingly, the second question raised in this batch of appeals, is also answered in favour of the appellants and against the respondents.

#### CONCLUSION:

12. In the ultimate analysis, we have no hesitation to allow these writ appeals filed by the Revenue. Accordingly, all the writ appeals stand allowed by setting aside the order of the learned Judge. Consequently, the connected miscellaneous petitions are closed. No costs.

Sd/-

Assistant Registrar (CS-IX)

//True Copy//

Sub Assistant Registrar

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To

1. The Secretary, Union of India,  
Ministry of Finance,  
Department of Revenue,  
North Block, New Delhi-110 001.



2. The Commissioner of Customs,  
Customs House, Chennai.

3. The Additional Commissioner of Customs,  
Custom House, Tuticorin.

4. The Deputy Commissioner of Customs,  
Custom House, Tuticorin.

+2ccs to Mr.V.Sundareswaran, SPC, SR. No.3569

+1cc to Mr.N.Manokaran, Advocate SR. No.3762

+1cc to Mr.L.Rajasekar, Advocate SR. No.3750

W.A.Nos.1552 to 1573 of 2013

NRL (CO)

PR (22/02/2022)