

conveying the property when a mere loan was intended on the security of the property. It is unfortunate, having regard to the provision of s. 58(c) of the Transfer of Property Act, that the plaintiff is debarred from proving that the transaction was in the nature of a mortgage. In the circumstances we direct that there will be no order as to costs throughout.

Appeal allowed.

ORIENT WEAVING MILLS (P) LTD.

v.

THE UNION OF INDIA

(B. P. SINHA, C. J., J. L. KAPUR, M. HIDAYATULLAH,
J. C. SHAH and J. R. MUDHOLKAR, JJ.)

Central Excise—Power of Central Government to grant exemption—Rule—Notification granting exemption to co-operative society—Constitutional validity—Central Excises and Salt Act, 1944 (1 of 1944), ss. 37(2), cl. (xvii)—Central Excise Rules, 1944, r. 8(1)—Constitution of India, Arts. 14, 19(1)(f) and (g), 43.

By r. 8 (1) of the Central Excise Rules, 1944, framed by the Central Government in exercise of its Power under s. 37(2) cl. xvii of the Central Excises and Salt Act, 1944, "the Central Government may from time to time, by notification in the Official Gazette, exempt subject to such conditions as may be specified in the notification any excisable goods for the whole or any part of the duty leviable on such goods." By two notifications issued under the said rule the Central Government exempted cotton fabrics produced on power looms owned by co-operative societies from the duty leviable thereon subject to certain conditions. Under s 38 of the Act the said rule and notifications on publication in the Official Gazette had effect as if enacted in the Act. The petitioners, apprehending loss of business in competition with the fifth respondent, a co-operative society, challenged the rule and the notifications on the grounds(1) that the power of exemption conferred on the Union Government violated Arts. 14, 19(1)(f) and (g) of the Constitution and (2) that assuming that it did

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not do so, the exemption granted by the notifications was in excess of the power granted by r. 8(1).

Held, that the contentions were without substance and must fail.

Rule 8 of the Rules was as much a part of the Act as s. 37(2) cl. (xvii) and it was always open to the State to tax certain classes of goods and not to tax others. It was the function of the State to determine what kind of taxes should be levied and in what manner. Regard being had to the directive principles contained in Art. 43 of the Constitution, there was no doubt that the State in differentiating between goods produced in big establishments and similar goods produced by small power-loom weavers in a co-operative society, had made a classification that was constitutionally valid. There could, therefore, be no excessive delegation of the power to grant exemption.

It was fallacious to contend that exemption, if at all, had to be granted in respect of any particular specified variety of 'cotton fabrics', and not with reference to persons producing them. The tax was on the production of the goods but was payable by persons producing them. The exemption granted was, therefore, within the terms of the notifications.

ORIGINAL JURISDICTION : Petition No. 110 of 1961.

Petition under Art. 32 of the Constitution of India for enforcement of Fundamental Rights.

A. V. Viswanatha Sastri and R. Gopalakrishnan, for the Petitioners.

K. N. Rajagopal Sastri, P. K. Chatterjee and P. D. Menon, for the respondents.

1962. February 28. The Judgment of the Court was delivered by

Sinha C. J.

SINHA, C. J.— By this petition, under Art. 32 of the Constitution, the petitioners challenge the constitutionality of certain provisions of the Central Excises and Salt Act (1 of 1944) which will be referred in the course of this judgment as the Act, read with r.8 of the Central Excise Rules, 1944 (1960) and the notifications thereunder, to be hereinafter set out. The first petitioner is the Orient

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Weaving Mills Private Ltd. (which will be termed hereinafter as the Company), and the second petitioner is a director of the Company. The respondents to the petition are (1) Union of India, through the Secretary to Government of India, Ministry of Finance (Department of Revenue), New Delhi, (2) Secretary, Central Board of Revenue, New Delhi, (3) Superintendent, Central Excise, Cuttack, (4) Collector, Central Excise, Calcutta, (5) Board of Directors, Madhunagar Powerloom Weavers' Co-operative Society Ltd., through its President (to be hereinafter referred to as the Society).

The petition is founded on the following allegations. The Company is incorporated under the Indian Companies Act, 1913, with its head office at Nayabazar, Cuttack. The second petitioner is the director of the Company, which runs a weaving mill at Nayabazar in Cuttack. There are 160 looms operating in the mill, and nearly 300 employees are employed in the factory, which produces, on the average, about 45 lakh yards of cloth (4 1/2 million yards). The paid-up capital of the Company is Rs. 7,10,000, divided into 7,100 shares of the value of Rs. 100 each. It has 8 directors, including a representative of the Government of Orissa. The Company commenced production on October 1, 1955, and has been sustaining losses ever since it started functioning "due to adverse circumstances in the State of Orissa and due to the heavy taxation and duties". Eversince the Company started production, it has been paying excise duty—Rs. 2,16,670 for the year 1958-59, Rs. 1,82,529 for the year 1959-60 and Rs. 2,15,500 for the year 1960-61. "Cotton fabrics" is one of the items in the first schedule of the Act, which sets out the description of goods and the rate of duty leviable under s. 3 of the Act. The petitioner's chief grievance is that the respondent No. 5, the Society, is being granted exemption

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from the excise duty, though, it is contended, it has installed 100 looms in the same premises and 100 workmen are employed therein. The authorised capital of the aforesaid Society is Rs.2,40,000, divided into shares of the value of Rs. 100 each. It is said to be a profit earning concern, whose profit is disposed of in accordance with its bye-law 35. The Society, it is further contended, is for all practical purposes similarly situated along with the petitioner Company in the matter of production, distribution and marketing of their produce. It is further stated that the weavers of the Society stand on the same or similar footing as the shareholders of the Company. The exemption was granted to the Society in virtue of the Central Government Notification No. 74 of 1959, dated July 31, 1959, and Notification No. 70 of 1960, dated April 30, 1960, issued by the Ministry of Finance, Government of India, (Department of Revenue). The notifications are in these terms :

“Government of India, Ministry of Finance (Department of Revenue) New Delhi. The 31st July, 1959.

G. S. R. In pursuance of sub-rule (1) of rule 8 of the Central Excise Rules 1944 as in force in India and as applied to the State of Pondicherry, the Central Govt. hereby exempt cotton fabrics produced by any co-operative society formed of owners of cotton power-looms, which is registered or which may be registered on or before the 31st March, 1961 under any law relating to co-operative societies, from the whole of the duty leviable thereon, subject to the following conditions :—

(a) that every member of the co-operative societies had been exempt from excise duty for three years immediately preceding the date of his joining such society;

(b) that the total number of cotton powerlooms owned by the co-operative society is not more than four times the number of members forming such society;

(c) that a certificate is produced by each member of the co-operative society from the State Govt. concerned or such Officer as may be nominated by the State the number of cotton powerlooms in his ownership and actually operated by him does not exceed four and did not exceed four at any time during the three years immediately preceding the date of his joining the society, and that he would have been exempt from excise duty even if he had not joined the co-operative society; and

(d) that the exemption shall be available...

(i) for a period ending on the 31st July, 1962 in respect of registered co-operative societies which have commenced production prior to the date of this notification; and

(ii) for a period of three years from the date of commencement of production in respect of co-operative societies which have been registered but have not commenced production or which may be registered on or before the 31st March, 1961.

(No. 74/59)

Sd/-Illegible

S. K. Bhattacharjee,

Deputy Secretary to Govt. of India.

F. N. 74/59/F. No. 13/59-CXIII".

"Government of India, Ministry of Finance (Department of Revenue) New Delhi.
The 10th April. 1960,

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GSR. In pursuance of sub-rule (1) of rule 8 of the Central Excise Rules, 1944 as in force in India and as applied to the State of Pondicherry and in supersession of the Notification of the Govt. of India Ministry of Finance (Department of Revenue) No. 74/59-Central Excise dated the 31st July 1959 the Central Govt. hereby exempts cotton fabrics produced on powerloom owned by any co-operative society or owned by or allotted to the members of the society, which is registered or which may be registered on or before the 31st March 1961 under any law relating to co-operative societies from the whole of the duty leviable thereon, subject to the following conditions :—

(a) that every member of the co-operative society who has been a manufacturer of cotton fabrics on powerlooms has been exempt from excise duty for three years immediately preceding the date of his joining such society;

(b) that the total number of cotton powerlooms owned by the co-operative society or owned by or allotted to its members is not more than four times the number of members forming such society.

(c) that each member of the co-operative society produce a certificate from the State Govt. concerned or such officer as may be nominated by the State Govt. that he is a bonafide member of the society and that the number of cotton powerlooms owned by or allotted to him and actually operated by him does not exceed four and did not exceed four at any time during the three years immediately preceding the date of his joining the

society, and that he would have been exempt from excise duty even if h^o had not joined the co-operative societies and

(d) that the exemption shall be available...

(i) for a period ending on the 31st July 1962 in respect of registered co-operative societies which have commenced production prior to the date of the notification; and

(ii) for a period of three years from the date of commencement of production in respect of co-operative societies which have been registered but have not commenced production or which may be registered on or before 31st March, 1961.

No. 70/60

Sd./Illegible

G. P. Durairaj,

Under Secretary to the Govt. of India

No. 70/60/P. No. 13/1/59 CXIII"

The Company made a representation to the relevant authorities but to no purpose. As the Company is to pay excise duty on the "cotton fabrics" produced by it, its cost of production, as compared to that of the Society, was higher by 12.5% in 1958 and 10% in 1959, with the result that the Company is at a disadvantage, as compared to the Society, in the competitive market of Orissa. Due to heavier taxation on fine cloth, the Company has abandoned the production of that quality and has restricted its production to coarse and medium cloth. The apprehension of the Company is that on account of the exemption granted to the Society, the Company's business will be very adversely affected. It is contended that r. 8 of the Central

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Excise Rules, 1944, under the Act, vests the Government with unguided power wholly or partially to exempt any goods from the duty leviable under the Act, and is, therefore, clearly discriminatory as against the petitioner. The Government notifications exempting the Society, or such other similar societies as may hereafter come into existence, have the effect of violating the petitioners' fundamental rights under Arts. 14 and 19(1)(f) & (g) of the Constitution. It is also contended that the power conferred upon the Government under the Rules, aforesaid, being unguided and uncontrolled, goes beyond the permissible limits of a valid delegation, and is, therefore, void. The petitioners moved the High Court of Orissa under Art. 226 of the Constitution, challenging the constitutionality of the Government measures aforesaid, but the Court refused to grant any relief on the ground that it had no jurisdiction to issue any writ to the Union Government in New Delhi. In the premises, the petitioners pray for a declaration that the levy of excise duty on the piece-goods produced by the petitioners be declared to be unconstitutional, and for a direction that the respondents 1-4 treat them on the same footing as the Society and exempt them from the payment of the excise duty, as also for an appropriate writ or order for the enforcement of their fundamental right guaranteed under Arts. 14 and 19(1)(f) & (g) of the Constitution.

The application was opposed on behalf of the respondents 1-4, and an affidavit sworn to by an Under Secretary, Ministry of Finance (Department of Revenue) Government of India, was filed in opposition. It was stated on behalf of the Union Government and the Revenue that the relevant provisions of the Act and the Rules, and the notifications which have been impugned by the petitioners, did not infringe any provisions of the Constitution, and that the exemption granted to the society was in pursuance of the well recognised

principle, being acted upon by the Government, to confer self-employment benefits in the interest of small producers, and with a view to encourage cottage industries and small scale industries employing a limited number of hands. The Society, it was contended, was not the owner of the powerlooms, but each weaver was the owner of not more than 4 powerlooms: the Society was run on a co-operative basis for the benefit of the weavers, who shared the profits earned by working on a co-operative basis, by sale of the cloth produced by each weaver on his looms, after paying for the services rendered by the Society to its members; hence it was not correct to characterise the Society as running a mill with an installed capacity of 100 looms. It is further stated that the Society, as such, is not a profit earning concern, as wrongly contended on behalf of the petitioners. The Society, under the sanctioned scheme, purchases the cloth produced by the weaver on his looms at a price equivalent to the cost of the raw materials, cost of the services rendered by the Society and cost of labour of the weaver, plus a margin of profit for him. The Society undertakes the sale of the piece-goods produced by the weaver without making any profit to itself, except that it levies handling charges, which are paid by the buyer. If the Society makes any savings out of the handling charges thus realised, the weaver gets a share of the savings by way of dividend. Unlike the Company, the Society is not the owner of the looms. The Society is only a servant of the weaver-owners and renders them services, which they need, to help them to market their produce. The Society is, thus, only an organisation which assists all individual owners of looms in the production and sale of the products of their respective looms, for their exclusive benefit. It is, therefore, claimed that the exemption granted in respect of the goods produced in co-operative societies, of which the

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weavers are the owner members, each individual not possessing more than 4 looms, is in pursuance of the Notification No. 70/60 dated April 30, 1960, issued under r. 8, under the provisions of the Act, and is based on a valid classification, and does not infringe the provisions of Arts. 14 and 19(1)(f) & (g) of the Constitution.

On those pleadings, and on the arguments at the Bar, the following points arise for decision in this case, namely, (1) whether the power of exemption conferred upon the Union Government violates Arts. 14 and 19(1)(f) & (g) of the Constitution on the ground that it is uncontrolled and unguided, and (2) whether, assuming that the power is not unconstitutional, the exemption granted by the notifications, aforesaid, is in excess of the power granted by r. 8.

Before discussing the vires of the law, or of the notification issued under the Act, read with r.8 aforesaid, it is necessary to examine the relevant provisions of the Act and the Rules. The Act consolidates and amends the law relating to central duties of excise on goods manufactured or produced in certain parts of India, and to salt. Under s. 2(d), "excisable goods" means "goods specified in the First Schedule as being subject to a duty of excise and includes salt". The first schedule contains the description of goods and rates of duty leviable under s. 3, which is the charging section and is in these words :

"3(1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in, or imported by land into, any part of India, as, and at the rates, set forth in the First Schedule.

- (1A)
 (2)
 (3) Different tariff values may be fixed
 for different class or description of the same
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Item No. 19 in the First Schedule is "cotton fabrics", and means all varieties of fabrics manufactured either wholly or partly from cotton, with certain specified exemptions, including fabrics manufactured on handloom, and then follow the description of different kinds of cotton fabrics, with their relative rates of duty. Section 37 authorises the Union Government to make rules to carry into effect the purposes of the Act. By sub-s. (2) of s. 37, it is provided that rules may be framed providing for a number of matters recited therein, including cl. (xvii), which is in these terms:

"exempt any goods from the whole or any part of the duty imposed by this Act."

In pursuance of this rule making power, the Union Government has made Rules. For the purposes of this case, it is only necessary to quote r. 8, which is as follows:

"Power to authorise exemption from duty in special cases:

(1) The Central Government may from time to time, by notification in the Official Gazette, exempt subject to such conditions as may be specified in the notification any excisable goods from the whole or any part of the duty leviable on such goods,

(2) The Central Board of Revenue may by special order in each case exempt from the payment of duty, under circumstances of an exceptional nature, any excisable goods."

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In pursuance of the powers conferred on the Central Government by sub-r.(1) of r.8, the notifications referred to above were issued by the Central Government. By virtue of s. 38 of the Act, all rules made and notifications issued by the Central Government, as aforesaid, are required to be published in the Official Gazette, and thereupon those rules and notifications "shall have effect as if enacted in this Act". Thus it is manifest that the notifications and the rule impugned in this case have been incorporated into the Act itself, and have become part of the taxing statute. It is also noteworthy that the petitioners have not challenged the vires of the Act. The petition is directed against r.8 and the notifications aforesaid, exempting the goods produced by the co-operative societies, like the 5th respondent, from payment of the excise duty. That being so, it is a little difficult to appreciate the first prayer of the petitioners, asking for a declaration that the levy of excise duty on the piece goods produced by the petitioners be declared to be unconstitutional. It is one thing to attack the constitutionality of the provisions of the Act authorising the levy of the excises duty on the petitioners; it is quite a different thing to complain of the exemption granted in respect of the goods produced by the 5th respondent. As the vires of the Act itself has not been challenged, we need not say anything more on that aspect of a possible controversy which has not been actually raised in the petition.

The petition is substantially based upto the contention that r.8 suffers from the vice of excessive delegation of powers to the Central Government to exempt partly or wholly any excisable goods, and, secondly, that the power even if constitutional has been invalidly exercised in so far as the notifications aforesaid containing the exemption operating in favour of the 5th respondent have been made. In our opinion, there is no substance in

either of the two contentions. Rule 8 is as much a part of the statute as s. 37(2) cl. (xvii). It is always open to the State to tax certain classes of goods and not to tax others. The legislature is the best judge to decide as to the incidence of taxation, as also as to the amount of tax to be levied in respect of different classes of goods. The Act recognises and only gives effect to the well established principle that there must be a great deal of flexibility in the incidence of taxation of a particular kind. It must vary from time to time, as also in respect of goods produced by different processes and different agencies. The same principle has been recognised in s. 23 of the Sea Customs Act (VIII of 1878), which has been applied to excise duty also, by virtue of s. 12 of the Act. The latter section has authorised the Central Government to apply the provisions of the Sea Customs Act, to excise duty imposed by the Act, with such modifications and alterations as it may consider necessary or desirable to adapt them to circumstances. It is a function of the State in order to raise revenue for State purposes, to determine what kind of taxes shall be levied and in what manner. Its function, therefore, is to raise revenues for public purposes. The State naturally is interested in raising all the revenue necessary for public purposes, without sacrificing the legitimate interests of persons and groups, who deserve special treatment at the hands of the State for reasons, which the State may determine, entitling them to be placed in a special class. The Directive Principles of the Constitution, contained in Part IV, lay down the policies and objectives to be achieved, for promoting the welfare of the people. In the context of the present controversy, the following words of Art. 43 are particularly apposite:

“.....and in particular, the State shall endeavour to promote cottage industries

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on an individual or co-operative basis in rural areas."

It has rightly been pointed out in the affidavit filed on behalf of the respondents :-4 that the exemption granted by the impugned notifications is meant primarily for the protection of petty producers of cotton fabrics not owning more than four power looms, from unreasonable competition by big producers, like the petitioner Company. The State has, therefore, made a valid classification between goods produced in big establishments and similar goods produced by small powerloom weavers in the *mofussil*, who are usually ignorant, illiterate and poor and suffer from handicaps to which big establishments like the petitioner Company are not subject. It has also been pointed out that the exemption was available to individual weavers, who employed not more than five looms on their own account. The fact that they have banded together in a co-operative effort to increase their efficiency and to take advantage of State aid should not count against them. It must, therefore, be held that there is no room for the contention that there has been excessive delegation of power to exempt.

It was next contended that if it were held that r. 8 is valid and constitutional, the notifications are bad in so far as they exempt certain classes of persons and not classes of goods from the excise duty. It is argued that the tax is a duty of excise on "any goods", and item 12 has reference to a particular variety of goods, namely, 'cotton fabrics'; the exemption if any could have been granted in respect of any particular specified variety of 'cotton fabrics' and not with reference to the persons producing the same variety of those fabrics. There is apparently a fallacy in this argument. The tax is on the production of any goods, but it is payable by persons producing such goods. The exemption also is

with reference to such goods as come within the description of excisable goods. The respondent No. 5 has been exempted from payment of excise duty in respect of goods produced by the weavers. It has not been exempted from the payment of a personal tax, like Income Tax. The exemption must, therefore, have reference to the same kind of tax which would otherwise have been leviable but for the exemption. From the notifications set out above, it is manifest that the Government has exempted cotton fabrics produced on power-looms owned by a co-operative society, and in the present instance owned by the members of the Co-operative Society. It has not been contended before us that the conditions laid down for granting the exemption have not been fulfilled by the members of the Co-operative Society, the respondent No. 5. Hence, the exemption granted is within the terms of the notifications aforesaid, which have effect as if enacted as a part of the Statute. The vires of the Statute, as already indicated, has not been questioned.

It must, therefore, be held that there is no merit in this petition. It is, accordingly, dismissed with costs to the answering respondents.

Petition dismissed.

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