(1993) 01 KL CK 0033

In the High Court Of Kerala

Case No : O.P. No. 3720 of 1988-P

Aishwara Maritine Service APPELLANT

Vs

Collector of Customs and Another RESPONDENT

Date of Decision : 20-01-1993

Acts Referred:
Customs Act, 1962 — Section 146

Citation : (1993) 47 ECR 40

Hon'ble Judges : T.V. Ramakrishnan, J

Bench : Single Bench

Judgement

T.V. Ramakrishnan, J.—Petitioner is a registered firm carrying on the business of clearing and forwarding of various goods through the customs houses of Cochin and Trivandrum. The Managing Partner of the firm is one Mr. P.K.G. Nair. He was employed in M/s. Binny Ltd., Cochin-3 up to 1986. M/s. Binny Ltd. was having a licence to transact business as custom house agent at Cochin Customs Station originally issued on 5.12.1969 under the Customs Act, 1962 (for short "the Act") and the Customs House Agents Licensing Regulations, 1965 (for short "the 1965 Regulations"). Ext. P2 is a copy of the renewed licence issued to M/s. Binny Ltd., valid up to 4.12.1988. Mr. P.K.G. Nair, the Managing Partner of the firm, who was then an employee of the company, was authorised to act as their agent and was duly recognised by the Customs authorities as evidenced by Ext. P2 licence in Form D issued under Regulation 10 the 1965 Regulations. Before being recognised as a duly authorised agent of the licensee and permitted to act as such on behalf of the licensee company, Mr. P.K.G. Nair has passed the examination passing of which is prescribed as a qualification under Regulation 9 of the 1965 Regulations for being allowed to transact business under the licensee. On the basis of the qualifications so acquired he was acting as an agent for the licensee company till he retired from the company in 1986 even after the repeal of the 1965 Regulations and promulgation of the Customs House Agents Licensing Regulations, 1984 (for short "the 1984 Regulations").

2. On the formation of the firm, the firm applied for the issue of a licence to act as Custom House Agent in Form A prescribed under 1984 Regulations under the cover of their letter, Ext. P3 dated 5.2.1987. In Ext. P3 the firm specifically pointed out that its Managing Partner was acting as an agent of M/s. Binny Ltd. from 1979 to 1986 and as an employee of M/s. Binny Ltd., he has passed the written and oral examinations prescribed as qualification for acting on behalf of a custom house agent. Pursuant to the application submitted by the firm, a temporary licence to operate as custom house agent in Form B was issued under Regulation 8 of 1984 Regulations on 13.4.1987 to the firm valid for a period of one year and evidenced by Ext. P5. One of the conditions of the said licence is that the custom house work of the firm shall be transacted through one of the persons whose names were mentioned in the licence, namely, Mr. P.K.G. Nair or Mrs. Asha Nair. The temporary licence so issued was renewed for a further period of one year valid up to 12.4.1988 as evidenced by Ext. P5(a). As per Ext. P5(a) licence three persons, namely, Mr. P.K.G. Nair, Mrs. Asha Nair and Mr. G.C. Nair were allowed to transact custom house work on behalf of the firm during the period of the licence. Though temporary licence was issued and renewed, regular licence under Regulation 10 of the 1984 Regulations was not issued and as such the firm submitted Ext. P6 representation to the first respondent requesting him to issue regular licence. Along with Ext. P6 they submitted an application for grant of regular licence in Form C prescribed by the 1984 Regulations and also expressed their readiness to remit the required amount and to fulfil further formalities, if any, under the 1984 Regulations. In spite of such request regular licence was not issued to the firm and the firm has filed the O.P. for the issue of a writ of mandamus or other appropriate writ, direction or order to direct respondents to grant the regular licence under Regulation 10 of the 1984 Regulations to the firm recognising its Managing Partner Mr. P.K.G. Nair as duly qualified to transact custom house work without insisting upon him to pass the examination prescribed as qualification for being allowed to act as an agent of the licensee under the Regulations. The firm has alternatively prayed for a direction to be issued to the respondents to exempt Mr. P.K.G. Nair who has already passed the qualifying examination for being recognised as an agent to work on behalf of a licensee and to issue regular licence to the firm recognising its Managing Partner Mr. P.K.G. Nair as its duly authorised agent to transact the business on behalf of the firm. There is a further prayer to declare Mr. P.K.G. Nair as qualified to hold the regular licence under the Regulations without passing any tests or examinations under the Regulations. The other prayers in the O.P. are only incidental prayers to which it is unnecessary to refer to specifically.

3. The first respondent, Collector of Customs, has filed a counter affidavit on his own behalf and on behalf of the second respondent, the Union of India. In the counter affidavit respondents have admitted the fact that Mr. P.K.G. Nair was acting as the duly authorised agent of M/s. Binny Ltd., Cochin-3, a licensee under the Regulations and was transacting the business in the custom house for and on behalf of the company as an employee who was holding a power of attorney from

the licensee company. In the counter affidavit respondents have also specifically admitted that Mr. P.K.G. Nair has appeared for the written examination, a pass in which is prescribed as a qualification under Regulation 9 of the 1965 Regulations for being recognised as an authorised agent of a licensee on 15.12.1978 and viva voce on 17.1.1980 and was declared as passed and was allowed to transact business as a qualified agent on behalf of the licensee company. It was further stated thus in para 7 of the counter affidavit:

...However, as he had passed the examination it may be considered as a self acquisition of a qualification. Hence he can join with the company or any firm which are holding permanent custom house agent licence as a qualified person. Such actions are ratified in the new Regulation under Regulation 26. But it does not mean that the licence of the company/firm is his own personal one....

While admitting the above facts, the respondents have disputed the claim of the petitioner firm that Mr. P.K.G. Nair was the holder of a permanent licence issued u/s 146 of the Act It was specifically asserted that M/s. Binny Ltd. was the licensee and Mr. P.K.G. Nair was recognised only as an authorised agent of the licensee in his capacity as an employee of the licensee company holding a power of attorney from the company. Respondents while refuting the allegation that no action was taken with reference to the request of the firm for issue of regular licence took up the stand that unless of the owners of the firm or any other person on behalf of the firm duly authorised to transact business on its behalf as agent passes the examination under Regulation 9 of the 1984 Regulations, it would not be possible for the authorities to issue regular licence to the firm. In support of their stand, the respondents produced Ext. R1(a) communication received by the first respondent from the Under Secretary to Government of India dated 19.2.1988. Ext. R1(a) is a communication received by the first respondent in reply to a letter seeking clarification regarding the request received from the Power of Attorney holders of licensee to exempt them from the requirement of passing the examination under Regulation 9 of the 1984 Regulation. Ext. R1(a) which purports to be a clarificatory communication issued to first respondent with reference to his letter No. Section 9/17/87-I & D-Cus, dated 3rd September, 1987 is in the following terms:

I am directed to refer to your letter Nos. 9/17/87-I & B-Cus, dated the 3rd September, 1987 on the above noted subject and to say that it is seen that holders of power of attorney of old C.H.A. Licences have not applied for a fresh temporary licence under the new C.H.A.L. Regulations, 1984, under the circumstances the holder of new temporary licence would be governed by the provision of Customs House Agent Licence Regulations, 1984 and it would be necessary for the owner of the firm or any person who actually transacts business through the Custom House on behalf of the firm to pass the examination under Regulation 9 of the said 1984 Regulations. It would, therefore, be advisable to take further action in the matter accordingly.

Relying upon the clarification issued as per Ext. R1(a) communication the respondents have contended that the firm is not entitled to get regular licence issued to them recognising Mr. P.K.G. Nair as its due agent entitled to transact custom house business on its behalf since he has not passed the examination held under Regulation 9 of 1984 Regulations.

4. The relevant provision in the Act which requires the acquisition of a licence to carry on business as a Custom House Agent is Section 146 of the Act. The Section to the extent relevant is thus:

146. Custom house agents to be licensed.-(1) No person shall carry on business as an agent relating to the entry or departure of a conveyance or the import or export of goods at any customs-station unless such person holds a licence granted in this behalf in accordance with the regulations.

(2) The Board may make regulations for the purpose of carrying out the provisions of this section and, in particular, such regulations may provide for-

...

(c) The qualifications of persons who may apply for a licence and the qualifications of persons to be employed by a licensee to assist him in his work as an agent.

In exercise of the powers conferred u/s 146(2) of the Act, the Central Board of Excise and Customs constituted under the Central Board of Revenue Act, 1963 has framed originally regulations called Customs House Agents Licensing Regulations, 1965 and on its repeal, the current regulations, called, Customs House Agents Licensing Regulations 1984. The provisions relevant for the case in the old and new regulations are substantially the same. I may hereafter refer to the provisions of the 1984 Regulations indicating wherever necessary the differences if any existing in the provision of the old and current Regulations.

5. Relevant provisions in the 1984 Regulations excluding the immaterial portions are as follows:

2(C) "Custom House Agent" means a person licensed under these regulations to act as an agent for the transaction of any business relating to the entry or departure of conveyance or the import or export of goods at any customs station:

9(1) The holder of a temporary licence in the case of an individual and the person or persons who will be actually engaged in the work of clearance of goods through customs on behalf of the firm or company holding a temporary licence, as the case may be, shall be required to qualify, in examination at the earliest opportunity. Such person or persons shall be eligible to appear in the examination as soon as a temporary licence is granted and shall be permitted to avail of three chances within a period of 2 years from the date of issue of the temporary licence on payment of prescribed examination fee of Rs. 250/- for each examination.

9(2) The examination referred to in Sub-regulation (i) shall include a written and oral examination and will be conducted twice every year. Each applicant would be permitted to avail of a maximum of three chances to qualify in the said examination but all such chances should be availed of within a maximum period of 2 years from the date of grant of temporary licence.

9(3) The examination may include questions on the following: (Details of the enactments and subjects indicated are omitted).

10(1) The Collector shall, on receipt of an application in Form C, grant a regular licence in Form D on payment of a fee of Rs. 500/- to such holder of a temporary licence who qualifies in an examination referred to in Regulation 9 and whose performance is found to be satisfactory with reference, inter alia, to the following: (Rest omitted).

18. Change in personnel actually engaged in Customs station on behalf of the firm or company.

Any change in the personnel actually engaged in the work in the customs station on behalf of that firm or company shall be communicated forthwith by the firm or the company as the case may be, to the Assistant Collector of Customs and no new person shall be allowed to work in the Customs Station as a duly authorised employee on behalf of that firm or company, unless he has passed the examination referred to in Regulation 9.

26. Repeal,

(1) The Custom House Agents Licensing Regulations, 1965 are hereby repealed.

(2) Notwithstanding such repeal anything done or any action taken under the Custom House Agents Licensing Regulations, 1965 shall be deemed to have been done or taken under the corresponding provisions of these regulations.

One of the main differences between the two Regulations which requires to be noted is that in the 1965 Regulations, there is no provision to issue a temporary licence. But in the 1984 Regulations there is provision made in Regulation 8 to issue a temporary licence. In all other respects the provisions in the repealed and current Regulations are substantially similar.

6. In the light of the above provisions in the Act and Regulations framed under the Act, it is fairly clear that only a person who holds a licence granted u/s 146 of the Act in accordance with the Regulations can carry on business as an agent relating to the entry or departure of a conveyance or the import or export of goods at any custom station. The holder of such a licence alone can be strictly called a ''Custom House Agent''. Such a Custom House Agent may be an individual, a firm or company. For getting a permanent licence under 1984 Regulations an applicant has to obtain first a temporary licence and then has to apply again for a permanent licence after acquiring certain qualifications and satisfying various conditions. After obtaining temporary licence, in the case of individuals, they have to pass themselves the examination prescribed under

Regulation 9 and in the case of firms and companies the persons who will be actually engaged in the work in the custom house on behalf of the firm or company have to pass the prescribed examination. Under the 1965 Regulations, the applicants were to pass the examination prescribed under Regulation 9 of that Regulations at the first instance itself for getting the licence applied for. The examination prescribed under Regulation 9 of the 196S and 1984 Regulations is substantially the same though under the 1984 Regulations 2 or 3 new enactments are also added to the list of subjects in which questions can be included for the examination. Regulation 10 of 1984 Regulations provides for the issue of a permanent licence to holders of temporary licence who qualify in the examination referred to in Regulation 9. It is one of the conditions in the permanent licence that only the persons whose names are mentioned in the licence can act on behalf of the licensee at the custom house. When a change in the personnel actually permitted to act on behalf of a firm or company takes place, the new person authorised to act must also pass the examination and acquire qualification prescribed by the Regulations. It is also important to note that by Regulation 29 of the 1965 Regulations and 26 of the 1984 Regulations, notwithstanding the repeal of the respective earlier Regulations, anything done or any action taken under those repealed Regulations are saved by directing that such things done and actions taken shall be deemed to have been done or taken under the corresponding provisions of the new Regulations. Thus a continuity of actions taken and things done is specifically intended and expressed so in unambiguous terms by incorporating a saving clause in the repealing Section itself in ail the Regulations framed under the Act from time to time. This in fact is the scheme provided under the Act and Regulations for issuing licences and constituting Custom House Agents to deal with the work at customs stations.

7. In the light of the provisions of the Act and Regulations, the learned Counsel Shri K.R. Kurup has contended that Mr. P.K.G. Nair who has passed the examination held under Regulation 9 of 1965 Regulations is bound to be treated a qualified to act as a person entitled to transact the work at custom houses on his own behalf on getting a licence in his name or on behalf of a firm or company holding a licence on their authorisation even under 1984 Regulations without passing any further examination held under Regulation 9 of 1984 Regulations. Accordingly it was further contended that the view taken by the 1st respondent based on Ext. R1(a) communication that Mr. P.K.G. Nair should pass afresh an examination held under Regulation 9 of the 1984 Regulations as a condition for the grant of a permanent licence to the firm of which he is the Managing Partner is highly arbitrary, unreasonable, illegal and as such unsustainable in law. It was submitted that the qualification acquired personally by Mr. P.K.G. Nair cannot be deprived or taken away from him only on the ground that he has severed his connection with the licensee with whom he was working when he secured the required qualification by passing the examination under Regulation 9 of the 1965 Regulations. In this connection, it was pointed out that if Mr. P.K.G. Nair had continued with M/s. Binny Ltd., itself, he would have been recognised as a fully

qualified person to act on its behalf even under 1984 Regulations as has been done in his case till his retirement and is being done in the case of all other authorised agents who have qualified under 1965 Regulations and are continuing with the existing licensees. The counsel also relied specifically upon the admission contained in the counter affidavit to the effect that it is open to Mr. P.K.G. Nair to attend to the work at custom house under licensed Custom House Agents without passing any further examinations under 1984 Regulations. Reliance was also placed on the scope and effect of the provisions in Regulation 26 of the 1984 Regulations to show that every act done and every action taken under the repealed Regulations is directed to be treated as done or taken under 1984 Regulations.

8. In the light of the stand taken by the respondents in the counter affidavit, the only question to be considered is whether Mr. P.K.G. Nair who has passed the examination conducted under Regulation 9 of the 1965 Regulations and was recognised as a qualified Agent entitled to act on behalf of a licensee company as its employee till 1986, is once again bound to appear and pass the examination prescribed under Regulation 9 of the 1984 Regulations for being recognised as a qualified person entitled to act on behalf of the petitioner-firm to which a temporary licence under 1984 Regulations has already been issued and of which he is the managing partner.

9. Before I deal with the main point indicated above, I may deal with two or three other minor aspects of the case. Regarding the prayer for granting exemption to the petitioner from passing the examination, I find that there is no power specifically conferred under the Regulations to exempt a candidate for permanent licence from passing the examination under Regulation 9. Power of exemption given is only under Regulation 20(4) in respect of the examination to be passed by an employee appointed by the licensee to assist it under that Regulation and not for the examination held under Regulation 9. Similarly, prayer (c) to grant licence to Mr. P.K.G. Nair in Form-D permitting to act as Customs House Agent cannot be allowed. Only a licensee can be Customs House Agent and Mr. P.K.G. Nair has not applied for a licence in his name. The firm alone can in this case be granted the licence and strictly he called a Custom House Agent. Mr. P.K.G, Nair was even while in the service of Binny Ltd., acting only as an authorised agent of the licensee Binny Ltd., which alone can be strictly called a Customs House Agent as per the licence issued to it

10. It is clear from the provisions of the Regulations that a pass in the examination prescribed by Regulation 9 is one of the basic qualifications to be acquired by the applicant for licence to become a Custom House Agent. If the applicant is an individual he should himself pass the examination. In the case of a firm or company the person who is to act on behalf of the firm or company should pass the examination and get qualified to transact the business at custom house. Thus whatever may be the capacity in which an individual gets entry to the examination held under the Regulation, a pass in the examination qualifies

the individual to transact the work at the custom house. If the applicant is an individual it qualifies him to get a permanent licence in his name if he satisfied all other conditions prescribed by the other provisions in the Regulation. If on the other hand one passes the examination as a person nominated or authorised by a firm or company as the person to act on its behalf, he gets qualified to transact the work at the Custom House on behalf of such licensee firm or company. In both cases the qualification acquired is by the individual personally and the individual is the entity which acquires the qualification to transact the work at the custom house. It is true that the fact that an individual is qualified to transact the business of custom house may not by itself entitle him to transact business at custom house unless he himself becomes a licensee or gets authorisation to act on behalf of another licensee. An employee of a licensee has also to qualify himself for assisting the licensed Custom House Agent by passing the examination as prescribed by Regulation 23 of 1984 Regulations corresponding to Regulation 20 of 1965 Regulations. Further the provisions in Regulation 26 of 1984 Regulations (corresponding to Regulation 29 of the 1965 Regulations) as already pointed, deems all things done or actions taken under 1965 Regulations as done or taken under the corresponding provisions of the 1984 Regulations. Plainly the effect of the above provision is to make the examination conducted, result declared and status conferred on the examinees who have passed in such examinations held under Regulation 9 of the 1965 Regulations as conducted, declared and conferred under the corresponding provisions of the 1984 Regulations, namely, Regulation 9.

11. If this be the correct legal position, the status acquired by Mr. P.K.G. Nair by passing the examination held under 1965 Regulations must be deemed to be a status or qualification conferred and acquired under the corresponding provision of the 1984 Regulations, namely, Regulation 9. If so, it has to be held that Mr. P.K.G. Nair is liable to be deemed as a person who has passed the examination under Regulation 9 of the 1984 Regulations also. In this view, he is liable to be treated as qualified to transact the work at custom house either under a licence obtained by himself or on behalf of a firm or company holding a licence issued under the Regulations. The insistence of the first respondent that Mr. P.K.G. Nair should actually pass the examination conducted under Regulation 9 of 1984 Regulations to be treated as a person qualified to do the work of clearance of goods through customs on behalf of the firm is, in my view, totally unjustifiable and illegal.

12. This conclusion is strengthened by the fact that even in the counter affidavit filed in this case, the respondents have taken up the stand that Mr. P.K.G. Nair can legally join with any company or firm which holds a permanent licence as a qualified person and such actions will be valid and legal under Regulation 26 of the 1984 Regulations. Further, the absence of any contention in the counter affidavit that persons who have passed the examination held under Regulation 9 of the 1965 Regulations and continuing with existing licence holders are also to pass a fresh examination held under 1984 Regulations would also show that such

qualifications possessed by persons who have passed the examination held under 1965 Regulations are considered as fully sufficient to transact custom house work under the 1984 Regulations also. If such persons who have passed the examination conducted under 1965 Regulations can be treated as fully qualified under 1984 Regulations also without passing fresh examination conducted under 1984 Regulations, there may not be any justifiable reason to insist upon Mr. P.K.G. Nair and others similarly situated who have also passed the same examination to pass the examination conducted under Regulation 9 of the 1984 Regulations afresh for being treated as qualified to be engaged in the work at custom house only for the reason that they have severed their connection with the existing licensees. Such classification of similarly situated persons for different treatment may not be permissible in law. The fact that Sri P.K.G. Nair has severed his connection with M/s. Binny Ltd. cannot be a legally justifiable ground to treat him as unqualified to transact the work at custom houses on behalf of a new licensee. Further, the fact that he is now proposing to act on behalf of a new firm of which he is the managing partner and having only a temporary licence, cannot also be a ground to treat him as a person who is liable to pass again the examination conducted under 1984 Regulations for acquiring necessary qualification for the work he was already carrying on under 1965 and 1984 Regulations as an authorised agent of Binny Ltd.

13. For the above reasons, I hold that Mr. P.K.G. Nair is liable to be treated by the respondents as a person who has passed the examination prescribed by Regulation 9 of the 1984 Regulations having passed the examination prescribed by Regulation 9 of the 1965 Regulations. Further, I hold that the application for the grant of permanent licence submitted by the petitioner firm is liable to be considered on its merit treating Mr. P.K.G. Nair as a fully qualified person authorised to act on its behalf being its managing partner. Respondents are accordingly directed to take all necessary steps to issue permanent licence to the petitioner firm on the basis of the findings and observations contained in this judgment in case the application submitted is found to be in order and the petitioner firm is otherwise found to be entitled to a permanent licence under Regulation 10 of the 1984 Regulations. Since the matter relates to the grant of a licence to act as Custom House Agent and the matter is pending from 1988 onwards, I direct the respondents to take expeditious steps to implement the directions contained in the judgment. Though there was a prayer to fix a time limit for passing final orders in the application for issue of permanent licence, I am not doing so hoping that the respondents would do the needful avoiding all avoidable delays and expediting the matter as far as possible.

The Original Petition is disposed of in the manner indicated above. No costs.

