(2003) 07 BOM CK 0112

In the Bombay High Court

Case No : Writ Petition No''s. 1626 and 1627 of 1993

Dinesh R. Dung and Another	APPELLANT
Vs	
Union of India (UOI) and Others	RESPONDENT

Date of Decision : 28-07-2003

Acts Referred:
Customs Act, 1962 — Section 25

Citation : (2004) 1 BomCR 796

Hon'ble Judges : V.C. Daga, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : M. Jaykar and S.R. Garud, instructed by Khaitan and Jaykar, for the Appellant; S.V. Bharucha, for the Respondent

Final Decision : Dismissed

Judgement

V.C. Daga, J.—By these two petitions, the petitioners are challenging the action on the part of the respondents whereby the bills of entry filed by the petitioners were sought to be assessed denying the benefit of Notification No. 191/90-Cus. dated 21st July, 1993 on the ground that the said notification was withdrawn by the 1st respondent and that it was substituted by another Notification bearing No. 152/93 issued on 21st July, 1993.

2. According to the petitioners, the newly issued notification dated 21st July, 1993 can be given effect only after it was made available to the public at large and the importers like the petitioners. The petitioners contend that said newly published notification and information thereof was received by the respondents by telex dated 22nd July, 1993. The copy thereof was made available to the public as late as on 27th July, 1993, as such, the said Notification No. 152/93 Cus. dated 21st July, 1993 could not have been given effect with effect from the date of its publication. The petitioners then contend that the said rescinding notification has no application to the imports made by the petitioners; in respect of which the bills of entry were filed by the petitioners through their clearing agent on 21st July, 1993.

3. The petitioners submit that the respondents are claiming and demanding countervailing duty as against nil duty on the basis of the said notification No. 152/93-Cus. dated 21st July, 1993. The petitioners say and submit that on 21st July, 1993 the Official Gazette in which the said notification was required to be published was not made available to the public at all. According to them, as a fact, the office of the 2nd respondent got information about issuance of this notification only on 22nd July, 1993. According to the petitioners, the change of duty structure by an amending notification could not take place until there is a duly published notification in the Official Gazette and copies thereof made available for sale to the general public.

4. The petitioners submit that it is a settled law that a notification required to be published in the Official Gazette takes effect only when the Official Gazette has in fact been made available to the public. No such notification was made available, in the present case, until 22nd July, 1993. As such according to the petitioners, the petitioners were not affected by the purported amending Notification No. 152/93-cus. and the respondents cannot in any way, be allowed to claim or demand or recover additional duty from the petitioner. According to the petitioner, the action on the part of the respondents in not permitting the petitioners to clear their goods covered by the bills of entry at nil rate of additional duty and seeking to claim or demand and/or recover additional duty at the rate of 15% is void, illegal and is of no effect.

5. When this matter came up for admission, this Court had issued rule and granted interim relief in terms of prayer Clause (c) on condition that the petitioners should furnish bank guarantee of 50% differential duty and personal bond for balance amount.

6. Learned Counsel appearing for the respondents has filed affidavit and produced on record copy of notification No. 152/93 dated 24th July, 1993. According to the affidavit of the respondents, it is not in dispute that the bills of entry have been filed on 21st July, 1993, on the same day when Notification No. 152/93 cus, was issued in place of Notification No. 191/90 cus, which was holding the field till midnight of 20th July, 1993.

7. Learned Counsel for the respondent contended that u/s 25 of Customs Act, 1962, the Government of India has properly issued and published the said Notification No. 152/93 cus. on 21st July, 1993 as such it has to be given effect w.e.f. 21st July, 1993. He placed reliance on the judgment of the Apex Court in the case of Pankaj Jain Agencies v. Union of India 1992(72) E.L.T. 805(S.C.) , in support of his contention. In the said case, the Supreme Court was dealing with similar contention that it was not sufficient that a law, Regulation, statutory instrument or sub-ordinate legislation is promulgated, and for their coming into operation, it is necessary that they are made known through broadcast or in some other recognisable way, so that all men know what it is. In the said case, it was also contended that until the notification was made available in Bombay and/ or shown to be available, the statutory Rule or instrument would not become

operative. This contention was negatived by the Apex Court after relying on its earlier decisions in the case of State of Maharashtra Vs. Hans George, and B.K. Srinivasan and Others Vs. State of Karnataka and Others, . In the said decision the Supreme Court had observed that the method of publication prescribed by section 25(1) of the Customs Act was complied with as soon as the notification was published in the Official Gazette. The Apex Court ruled and held that there was no substance in the contention that, notwithstanding the publication in the Official Gazette, there was yet a failure to make the law known and that, therefore, the notification did not have the elements of operatives and enforceability. In the said case, the Supreme Court has referred to its earlier decision in case of Bharat Surfactants (Private) Ltd. and Another Vs. Union of India (UOI) and Another, and observed as under :

"The provisions of section 25 are clear in themselves. The date on which a Bill of Entry is presented u/s 46 is, in the case of goods entered for home consumption, the date relevant for 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."

The learned Counsel for the respondent also brought to our notice a three Judge Bench judgment in case of Union of India and Others Vs. M/s. Ganesh Das Bhojraj, , wherein 3 Judges Bench of the Apex Court having noticed conflicting ratio of decision in the case of Pankaj Jain Agencies v. Union of India; Collector of Central Excise v. New Tobacco Co. and ITC v. Collector of Central Excise, had to make reference to the larger Bench vide its order dated 15-10-1999. In the said judgment, the Apex Court affirmed its earlier view expressed in case of Pankaj Jain Agencies v. Union of India, and overruled the judgment in the case of Collector of Central Excise Vs. New Tobacco Co. Etc. Etc., . The Court observed :

".....Section 25 of the Customs Act empowers the Central Government to accept either absolutely or subject to such conditions, from the whole or any part of the duty of customs leviable thereon by a notification in the Official Gazette. The said notification cannot be modified or cancelled. The method and mode provided for grant of exemption or withdrawal of exemption is issuance of notification in the Official Gazette. For bringing the notification into operation, the only requirement of the section is its publication in the Official Gazette and no further publication is contemplated. Additional requirement is that u/s 159 such notification is required to be laid before each house of Parliament for a period of thirty days as prescribed therein. Hence, in our view, Mayer Hans George which is followed in Pankaj Jain Agencies case represents the correct exposition of law and the notification u/s 25 of the Customs Act would come into operation as soon as it is published in the Gazette of India i.e. the date of publication of the Gazette. Apart from the prescribed requirement u/s 25, the usual mode of bringing into operation such notification followed since years in this country is its publication in the Official Gazette and there is no reason to depart from the same by laying down additional requirement."

"From the aforesaid observations, it is plain that the decision in B.K. Srinivasan also reiterates that the notification will take effect only when it is published through the customarily recognised official channel, namely, the Official Gazette. We also agree with the reasons recorded in Mayor Hans George and hold that notification u/s 25 of the Customs Act would come into operation as soon as it is published in the Official Gazette and no further publication is required. Hence, the decision rendered in Pankaj Jain Agencies represents the correct exposition of law on the subject. The decision rendered in New Tobacco followed in Garware Nylons Ltd. does not lay down the correct law."

8. Learned Counsel for the petitioner further contended that assuming but not admitting that notification was effective from 21st July, 1993, in that event, it could not be said to be effective w.e.f. 21st July, 1993. The day on which it was published needs to be excluded. As such in the submission of the petitioners, the said notification could only be held effective from the next day. This submission is also without any substance. As referred to hereinabove, the Apex Court categorically ruled that where the notification is published in the Official Gazette then, it becomes effective on the date of publication and not from the point of time when it was actually issued.

9.As pointed out in Stroud''s Judicial Dictionary ''Date'' means day. Now, the question is what is the point of its commencement. Answer could be found in In re F.B. Warren 1938(2) All.E.R. 331, wherein it has been held that a judicial act will be referred to the first moment of the day on which it is done.

10. Considering the ratio of this judgment, it is logical to hold that the notification is issued in the Official Gazette on the very day, in this case, from the commencement of that day i.e. from the previous midnight.

11. In this view of the matter, we see no merits in this petition. Accordingly, we hold that the petitioners are liable to pay to the respondents duty at the rate of 85% + 15% instead of 85%. As per the interim order, the petitioners have cleared the goods on furnishing a bank guarantee for 50% of the differential duty and a personal bond for the balance. As such, the petitioners are directed to pay the differential duty of 15% with interest @ 10% p.a. from the date of clearance of the goods till repayment in full and final. If the amount is not paid with interest within 8 weeks from today, rate of interest payable shall be 18% p.a. instead of 10% as indicated hereinabove. The respondents are at liberty to encash the bank guarantee furnished by the petitioners towards realisation of the differential duty.

Rule is discharged. Petition is dismissed in terms of this order with no order as to costs.

