
(2009) 04 MAD CK 0533

In the Madras High Court

Case No : Writ Petition No's. 707 to 716, 336 to 350, 779, 780, 844, 1772 to 1788 and W.P. No's. 2085 to 2087 of 2009 and M.P. No's. 1,2,3;1,2,3;1,2,3;1,2,3;1,2,3;1,2,3;1,2,3;1,2,3;1,2,3;1,2,3;1,2,3; etc. batch

Isak Ebinesar

APPELLANT

Vs

The Chairman, Central Board of Excise and Customs, New Delhi, The Commissioner of Customs and The Assistant Commissioner of Customs

RESPONDENT

Date of Decision : 15-04-2009

Acts Referred:

Customs Act, 1962 — Section 14, 146, 159A, 161
Finance Act, 2001 — Section 113
General Clauses Act, 1897 — Section 6

Citation : (2009) 3 CTC 553

Hon'ble Judges : V. Ramasubramanian, J

Bench : Single Bench

Advocate : R. Yashod Vardhan and P. Saravanan, B. Satish Sundar and A.K. Jayaraj, in all W.Ps, for the Appellant; K. Ravi Anantha Padmanaban and Mr. P. Mahadevan for Customs and Central Excise Department in all W.Ps., for the Respondent

Final Decision : Dismissed

Judgement

V. Ramasubramanian, J.—The petitioners have come up with the present Writ Petitions, challenging a notification inviting Applications for the grant of licences to act as Customs House Agents, under a new set of Regulations issued in the year 2004. I have heard Mr. R. Yashod Vardhan, learned Senior Counsel and M/s. P. Saravanan, B. Satish Sundar and A.K. Jayaraj, learned Counsel appearing for the petitioners and Mr. P. Mahadevan and Mr. K. Ravi Anantha Padmanaban, learned Standing Counsel appearing for the Customs and Central Excise Department.

2. In exercise of the powers conferred by sub-section (2) of Section 146 of the

Customs Act, 1962, the Central Board of Excise and Customs, issued a set of Regulations called "Customs House Agents Licensing Regulations, 1984". The scheme of these Regulations, was as follows:

(a) Under Regulation 4, the Commissioner was empowered to invite Applications for the grant of such number of licences, as assessed by him to act as Customs House Agents in the month of January every year. This invitation should be by means of a notice affixed on the Notice Board of each Customs Station as well as through publication in at least two newspapers having circulation in the area of his jurisdiction. The Application should be for clearance work within the jurisdiction of the Commissioner.

(b) Under Regulation 5, an Application for licence should be made in Form-A and should contain the details prescribed therein.

(c) Regulation 6 prescribed the Conditions to be fulfilled by the applicants. As per this Regulation, an applicant should --

(i) be a graduate from a recognised University;

(ii) be an employee of a licensee;

(iii) possess a permanent pass in Form-G prescribed Under Regulation 20 (subject to the Commissioner's power to relax this condition);

(iv) have experience of work relating to clearance of goods through Customs for a period of not less than 3 years in the capacity of a pass holder; and

(v) have financial viability supported by a Certificate from a Scheduled Bank or such other acceptable proof evidencing possession of assets of the value of not less than Rs. 1 lakh in respect of certain Customs Stations and not less than Rs. 50,000/- in respect of the other stations.

(d) Regulation 8 entitled an applicant whose application was received within the time stipulated in the notice under Regulation 4 and who satisfied the requirements of Regulations 5 and 6, to operate as Customs House Agent initially for a period of one year against a temporary licence.

(e) Regulation 9(1) stipulated that the holder of a temporary licence should qualify in an examination conducted by the department and that they shall be given only three chances within a period of 2 years from the date of issue of temporary licences, to qualify in the examination. Under Regulation 9(2), the examination was to be a written and oral examination and was to be conducted twice every year. Regulation 9(3) contained a list of about 16 subjects on which questions might be asked in the examination.

(f) Regulation 10 empowered the Commissioner to grant a regular licence in Form-D to the holder of a temporary licence who qualified in the examination referred to in Regulation 9 and whose performance in relation to (i) the quality/value of cargo cleared and (ii) the absence of delay either in the clearance of

goods or in the payment of duty, was found to be satisfactory.

(g) Regulation 11 dealt with the execution of a bond.

(h) Regulation 12 declared that the regular licences granted under Regulation 10 would be valid for 5 years and renewable from time to time. This Regulation also provided the procedure for renewal of the regular licence.

(i) Regulation 13 declared that the licence was not transferable.

(j) Regulation 14 listed out the obligations of a Customs House Agent. Regulations 15 to 17, dealt with the change in the Constitution of the licensee if the licensee happened to be a Company, Firm or concern.

(k) Regulation 18 enabled a person who qualified in the examination, to engage himself in the work of clearance of goods through Customs on behalf of a licensee.

(l) Regulation 19 imposed an obligation upon the licensee to maintain accounts and Regulation 20 enabled a licensee to employ persons to assist him.

(m) Regulation 21 dealt with suspension or revocation of licence and Regulation 22 empowered the Commissioner to prohibit an agent from working in one or more sections of the Customs Stations. Regulation 23 provided the procedure for suspending or revoking a licence.

(n) Regulations 24 and 25 dealt with accommodation and clearance charges.

(o) Regulation 26 repealed the 1965 Regulations, but at the same time, saved the acts done in pursuance of the 1965 Regulations.

3. The petitioners in all these Writ Petitions are engaged in the work of clearance of goods through Customs. All the petitioners have also cleared the qualifying examination prescribed under Regulation 9 long ago. But unfortunately, the Commissionerates in Tamil Nadu did not invite Applications for the grant of licences under Regulation 4, nor did they issue temporary licences under Regulation 8, in the past nearly two decades. Therefore, despite getting qualified several years ago in the examination stipulated in Regulation 9, the petitioners have not got either temporary licences or regular licences.

4. While so, the Central Board of Excise and Customs, issued a new set of Regulations, in the year 2004, called Customs House Agents Licensing Regulations, 2004, in supersession of the 1984 Regulations. The broad scheme of these Regulations, is as follows:--

(a) Regulation 3 prohibits a person from carrying on business as a Customs House Agent, unless he holds a licence under the Regulations.

(b) Regulations 4 and 5 are the same as Regulations 4 and 5 of the 1984 Regulations.

(c) Regulation 6 prescribes the following conditions for the grant of licence viz.--

(i) that the applicant should have passed the examination referred to in Regulation 8.

(ii) that the applicant should be a graduate from a recognised University and possess a professional degree as CA/MBA/LLB/Diploma in Customs Clearance Work with a working knowledge of computers and Customs procedures or a graduate with 3 years of experience in transacting work as Customs House Agents as a G-Card Holder or a person who has passed the examination referred to in Regulation 8 or a retired Group-A Officer of the Indian Customs and Central Excise Services, having a minimum of 10 years experience in Group-A;

(iii) that the applicant has financial viability for possessing assets of the value of not less than Rs. 2 lakhs and is a citizen of India;

(d) Regulation 8 deals with the conduct of examination, both written and oral, for becoming eligible for the grant of licence.

(e) Regulation 8(6) lists out about 18 subjects in which questions may be asked in the examination.

(f) Regulation 9 deals with the grant of licence and Regulation 10 deals with the execution of bond and furnishing of security.

(g) Regulation 11 prescribes the validity period of licence as 10 years, renewable thereafter.

(h) Regulation 12 makes the licence non-transferable and Regulation 13 deals with the obligations of the agent.

(i) Regulations 14 to 16 deal with the change in the Constitution.

(j) Regulation 17 permits a person who has qualified in the examination to engage himself in the work relating to clearance of goods.

(k) Regulation 18 deals with maintenance and inspection of goods and Regulation 19 deals with employment of persons.

(l) Regulation 20 deals with suspension and revocation of licence and Regulation 21 deals with the power of the Commissioner to prohibit an agent from working in any section.

(m) Regulation 22 deals with the procedure for suspending or revoking the licence.

(n) Regulation 23 speaks about accommodation.

5. After the issue of the new set of Regulations in 2004, clarifications were sought from the Central Board of Excise and Customs, by the Commissionerates, regarding various issues. By a Circular No. 42/2004, dated 10.6.2004, the Central Board issued clarifications on all the issues, one of which is relevant for

our present purpose. It is as follows:

6. Following the issue of the Regulations of 2004 and the issue of the aforesaid clarifications, the Commissioner of Customs issued a public notice bearing No. 140/2008 dated 31.12.2008, which is impugned in the present batch of Writ Petitions, inviting Applications for the grant of licences under Regulation 9(1) of the 2004 Regulations. It is this public notice that triggered the batch of Writ Petitions on hand, since the petitioners who had already passed the qualifying examination as per Regulation 9 of the 1984 Regulations, suddenly found themselves forced to write the qualifying examination under the new Regulations and compete with new hands for the grant of licences.

7. The primary contention of the petitioners is that after having passed the qualifying examination in terms of Regulation 9 of the 1984 Regulations, the petitioners have been waiting for nearly two decades to apply for the grant of a licence. The Commissionerates in Tamil Nadu did not invite Applications in terms of Regulation 4 of 1984 Regulations, for more than a decade. All the petitioners are engaged in the work of clearance of goods through Customs for several years in the hope that Applications would be invited one day for the grant of licences to act as Customs House Agents. All their hopes were shattered with the issue of new Regulations in 2004 and the public notice issued in 2008, inviting Applications.

8. The petitioners rely upon the decision of a learned Judge of the Delhi High Court in Sunil Kohli and Others Vs. Union of India (UOI) and Another, in which the learned Judge held that the new Regulations did not negate the actions taken under the previous Regulations and issued directions to the department to grant licences to those qualified under the old Regulations. The petitioners also rely upon an unreported decision of a Division Bench of the Punjab and Haryana High Court, in Madusudan Komra v. Union of India, where the learned Judges followed the decision of the Single Judge of the Delhi High Court. The petitioners point out that even the Andhra Pradesh High Court has issued an interim direction in an identical matter, directing the grant of licences to persons who had passed the qualifying examination under the old Regulations.

9. Mr. R. Yashod Vardhan, learned Senior Counsel submitted that the petitioners had acquired a right, even if inchoate, by virtue of the old Regulations and that therefore the new Regulations cannot take away the same, in view of Section 6 of the General Clauses Act. In support of this contention, the learned Senior Counsel relied upon the decision of the Supreme Court in Glaxo Smith Kline PLC and Others Vs. Controller of Patents and Designs and Others, The learned Senior Counsel also produced the text of the judgment of the Court of Appeal in Chief Adjudication 1999 (2) All E.R. 859, which was quoted with approval by the Apex Court in the above decision.

10. Mr. K. Ravi Anantha Padmanaban, learned Standing Counsel for the Department, submitted that the decision of the Delhi High Court which was

followed by the High Court of Punjab and Haryana, arose out of a challenge to the new set of Regulations, by persons who applied in response to notices issued under Regulation 4 of the old Regulations, but on whose Applications no decision was taken by the respective Commissionerates. Therefore, the learned Standing Counsel submitted that the petitioners in the present batch of cases, cannot claim similar benefits, since the respondents never issued any notice inviting applications under the old Regulations. Hence no right was created in favour of the petitioners. The learned Standing Counsel relied upon the decision of the Supreme Court in *State of Jharkhand and Others Vs. Ambay Cements and Another*, for the proposition that the mandatory rules have to be strictly observed and that no exemption can be granted overlooking statutory rules.

11. I have carefully considered the rival submissions. Admittedly, the 1984 Regulations under which the petitioners got qualified, were issued, by repealing the 1965 Regulations. While the 1984 Regulations were holding the field, the Government constituted a High Power Committee on Reduction of Transaction Costs of Indian Exports to suggest measures for the reduction of Transaction Costs. It was followed by another Committee known as Kelkar Committee on Indirect Taxes, which suggested measures for simplifying the process and procedures for the grant of Customs House Agents Licences. In implementation of the recommendations of these two Committees, the Central Board of Customs and Excise issued the Regulations of 2004 and they came into effect on 23.2.2004. Any misgiving that the petitioners might have had about the impact of these 2004 Regulations, on their prospects of getting a licence on the basis of the acquisition of qualifications under the old Regulations, should have got dispelled with the issue of a letter of clarification dated 10.6.2004 by the Central Board, under Circular No. 42/2004. Therefore the petitioners should have, in the normal circumstances, sought redressal immediately after the issue of the clarificatory circular dated 10.6.2004. But unfortunately, the petitioners have waited till the issue of a public notice dated 31.12.2008, inviting Applications for the grant of licences, to come to Court. Therefore the petitioners are actually guilty of delay and laches. However I do not wish to non-suit them on this score.

12. As a matter of fact, a person by name G. Saravanan, who had also passed the qualifying examination under the old Regulations of 1984, challenged the clarificatory Circular No. 42/2004, dated 10.6.2004, by way of a Writ Petition in W.P. (MD) No. 10388 of 2005 before the Madurai Bench of this Court. Justice K. Chandru, dismissed the Writ Petition by an order dated 15.6.2007, upholding the Circular. An Appeal was filed against the said order in W.A. (MD) No. 442 of 2007. The Writ Appeal was disposed of by the Division Bench by an order dated 11.8.2008, merely giving liberty to the petitioner therein to apply for a licence and directing the respondents to consider the case of the petitioner in accordance with law. The Division Bench did not say that the Application of the petitioner therein should be considered in accordance with 1984 Regulations.

13. The petitioners assail the new 2004 Regulations and the public notice dated

31.12.2008, mainly on the ground that by passing the qualifying examination under the 1984 Regulations and waiting in the wings for the past more than a decade for the grant of licences, they had acquired a right, which cannot be taken away without due process. The petitioners claim that they had the legitimate expectation of getting licences and that the same has been belied. Since the syllabus for the examination under both the Regulations is one and the same except an addition of two subjects and also since the preamble to the new Regulations, saves even actions omitted to be taken, the petitioners claim that they are entitled to be considered for the grant of licences even under the new Regulations without being forced to write the examinations all over again.

14. At the outset, I am unable to accept the contention that the petitioners had acquired either a vested right or even an "inchoate right", as contended by Mr. R. Yashod Vardhan, learned Senior Counsel. As seen from the scheme of the 1984 Regulations, which I have elicited earlier, the grant of a regular licence, comprised of the following steps:--

(i) Invitation by the Commissioner, of applications for the grant of such number of licences, in the month of January every year, under Regulation 4.

(ii) Submission of applications in Form-A under Regulation 5.

(iii) Scrutiny of applications under Regulation 7 with reference to the qualifications prescribed under Regulation 6.

(iv) The grant of temporary licence for one year in Form-B, under Regulation 8(1).

(v) Appearing for a written and oral examination under Regulation 9 and getting qualified in the examination, and

(vi) Submission of an Application in Form-C, for the grant of regular licence in Form-D, under Regulation 10, by the holders of temporary licences, who qualify in the examination referred to in Regulation 9.

15. Thus, the process for the grant of a regular licence under the 1984 Regulations, was a bit tedious. To get a regular licence under Regulation 10 of the old Regulations, a person must be the holder of a temporary licence and must have passed the qualifying examination. It is only the holders of temporary licences, who were required under Regulation 9(1) of the 1984 Regulations, to qualify in the examination.

16. Admittedly, the petitioners were never granted temporary licences. Therefore it is not known as to how they were permitted to take the qualifying examination. Perhaps, the petitioners were permitted to take the qualifying examination on the basis that they were engaged in the work of clearance of goods through Customs on behalf of a firm or a Company, holding a temporary licence. Thus, out of the several stages to be crossed under the 1984 Regulations for the grant of a regular licence, starting from Regulation 4 upto Regulation 10,

the petitioners had crossed only one stage, namely that of passing the qualifying examination. They had no occasion to cross the other stages, such as calling for Applications (Regulation 4), submission of Applications (Regulation 5), scrutiny of Applications (Regulation 7) and grant of temporary licence (Regulation 8). Therefore, it is extremely difficult to accept the contention that the petitioners acquired any right either inchoate or vested.

17. Similarly, it is also pretty difficult to accept the claim that the petitioners had a legitimate expectation that they would be issued with licences under the old Regulations. Even in a case where an amendment to the Service Rules was issued, half way through a process of selection to the post of Inspectors in the Department of Weights and Measures in the State of Madhya Pradesh, the Supreme Court held in *State of M.P. and Others Vs. Raghuveer Singh Yadav and Others*, , that the legitimate expectation of candidates who had applied and succeeded in the written examination, was confined only to a consideration under the unamended Rules and that the Government was entitled to make final recruitment in accordance with the amended Rules. Similarly, in *P.T.R. Exports (Madras) Pvt. Ltd. and others Vs. Union of India and others*, the Apex Court was concerned with the abolition of a particular system of Export Policy known as "Non-quota Exporters Entitlement", and the introduction of the new Export Policy on Agreement on Textile and Clothing. The Exporters of garments challenged the new policy on the ground that they had made huge capital investments, on an expectation that they had the benefit of quota under the Export Policy of the year 1994-1995 and that such legitimate expectation was blown to pieces. But the Supreme Court rejected the argument on the ground that the Doctrine of legitimate expectation had to be angulated on the question whether it was revised by a policy in public interest or whether the decision was based on any abuse of power,

18. *Union of India (UOI) and Another Vs. International Trading Co. and Another*, , is also a case where certain permits granted under Maritime Laws, for operating deep sea fishing vessels, were not renewed for several years. The High Court applied the Doctrine of legitimate expectation. But the Supreme Court held that though renewal of a permit carries with it, a valuable right, the Doctrine of legitimate expectation would have no application when there is a change in policy at the time when the application for renewal is taken up for consideration. It was held therein that a claim based on mere legitimate expectation, without anything more, cannot ipso facto give a right and that legitimacy of an expectation can be inferred only if it is founded on the sanction of law.

19. In *Bannari Amman Sugars Ltd. Vs. Commercial Tax Officer and Others*, the Supreme Court held that the concept of legitimate expectation is "not the key which unlocks the treasure of natural justice and it ought not to unlock the gates which shut the Court out of review on the merits". Explaining as to how legitimate expectation may arise, the Supreme Court held in the said case that "the expectation may arise either from a representation or promise made by the

authority, including an implied representation or from consistent past practice".

20. Therefore, the petitioners herein cannot succeed on the ground of legitimate expectation unless they establish that there was either a representation or promise made by the respondents or that there was a consistent past practice. In the batch of cases on hand, the petitioners could not even plead that there was either a representation or promise made by the respondents at any point of time. The petitioners could not also establish that there was a consistent past practice, so as to invoke the doctrine. As a matter of fact, the petitioners have passed the qualifying examination under the 1984 Regulations and they have only been waiting for the issue of notifications under Regulation 4, inviting Applications for the grant of licences. Admittedly, the last notification inviting Applications, was issued only in 1998. Regulation 4 of the 1984 Regulations requires the Commissioner to issue notifications inviting Applications, in the month of January every year. But the Commissioner did not issue any notification after 1998. Therefore the only consistent past practice adopted by the respondents, is not to invite Applications and not to issue licences. With the respondents, consistently avoiding the issue of licences over the past more than a decade under the old Regulations, I fail to understand how any kind of expectation, much less legitimate expectation, would have arisen.

21. In *Ram Pravesh Singh and Others Vs. State of Bihar and Others*, the Supreme Court pointed out that "as a ground for relief, the efficacy of the Doctrine (of legitimate expectation) is rather weak as its slot is just above fairness in action but far below promissory estoppel". It was further held therein as follows:

Legitimate expectation is not a legal right. It is an expectation of a benefit, relief or remedy, that may ordinarily flow from a promise or established practice. The term "established practice" refers to a regular, consistent, predictable and certain conduct, process or activity of the decision-making authority. The expectation should be legitimate, that is, reasonable, logical and valid. Any expectation which is based on sporadic or casual or random acts, or which is unreasonable, illogical or invalid cannot be legitimate expectation. Not being a right, it is not enforceable as such. It is a concept fashioned by the Courts for judicial review of administrative action. It is procedural in character based on the requirement of a higher degree of fairness in administrative action, as a consequence of the promise made, or practice established. In short, a person can be said to have a "legitimate expectation" of a particular treatment, if any representation or promise is made by an authority, either expressly or impliedly, or if the regular and consistent past practice of the authority gives room for such expectation in the normal course.

None of the above tests is satisfied in the present batch of cases, so as to apply the doctrine of legitimate expectation. Though Regulation 4 of the 1984, Regulations contemplated the issue of notifications inviting Applications for the grant of licences year after year, the respondents had issued such notices only

occasionally from 1984 till the issue of new Regulations in 2004. Therefore the conduct of the respondents was not such as to give rise to any expectation, at any point of time from 1984 to 2004.

22. In Ram Pravesh Singh's case, the Supreme Court also pointed out the circumstances sufficient to negate the doctrine. These are (i) public interest, (ii) change in policy, (iii) conduct of the expectant and (iv) any other valid or bona fide reason given by the decision maker. In the case on hand, there is a change of policy. This change has been brought forth on the basis of the recommendations of two Committees viz., a High Power Committee on Reduction of Transaction Costs of Indian Exports and Kelkar Committee on Indirect Taxes. Therefore there is no scope for invoking the doctrine to grant any relief to the petitioners.

23. In Ashoka Smokeless Coal Ind. P. Ltd. and Others Vs. Union of India (UOI) and Others, the Supreme Court pointed out that the Doctrine of legitimate expectation has been developed in the context of the Principles of natural justice and that there is a recent trend towards "Doctrine of balancing".

24. In Official Liquidator Vs. Dayanand and Others, a Three Member Bench of the Supreme Court pointed out that "at the root of the Principle of legitimate expectation, is the constitutional principle of rule of law, which requires regularity, predictability and certainty in Government's dealings with the public". Applying these yardsticks, it is easy to realise that in the absence of any notification inviting Applications for the grant of licences in the past more than 10 years, the petitioners could not have had any expectation, since the issues of regularity, predictability and certainty did not arise at all.

25. In Sunil Kohli and Others Vs. Union of India (UOI) and Another, the learned Judge of the Delhi High Court granted relief to persons similarly situated like the petitioners herein, primarily on the basis of the Doctrine of legitimate expectation. A Division Bench of the Punjab and Haryana High Court followed the judgment of the Delhi High Court, without going into detail as to how the doctrine would apply. Both these High Courts, with great respect to the learned Judges, have not taken into account the parameters such as (i) promise or representation, either express or implied and/or (ii) consistent past practice, to apply the doctrine. Therefore, I am unable to persuade myself to follow the ratio laid down in the aforesaid cases.

26. Moreover, in Sunil Kohli's case, a public notice was issued in June 2003 under the 1984 Regulations, inviting Applications for the grant of licences. The petitioners before the Delhi High Court applied for licences in response to that notice. But the Applications were not disposed of for more than 8 months. In the meantime, the new Regulations of the year 2004 came into effect in February 2004 and the Clarificatory Circular was issued in June 2004. Therefore the Writ Petitions were filed in July 2004, after which the Commissioner of Customs issued an order dated 3.3.2005, rejecting the Applications for the grant of

licences on the ground that a new set of Regulations had come into force. The learned Judge of the Delhi High Court took the view that Since the petitioners before him had cleared all the requirements under the 1984 Regulations and also since the respondents failed to take steps to invite Applications for licences on annual basis, the action of the respondents failed to pass the Test of reasonableness in terms of Wednesbury principle.

27. But with great respect, the Delhi High Court did not take note of the tests laid down by the Supreme Court for the application of either the Doctrine of legitimate expectation or the Wednesbury principle of reasonableness. In *Rameshwar Prasad and Others Vs. Union of India (UOI) and Another*, the Supreme Court cautioned that Wednesbury principle is often misunderstood to mean that any administrative decision regarded by the Court as unreasonable must be struck down. The Court clarified that the correct understanding of the Wednesbury principle is that a decision will be said to be unreasonable if (i) it is based on wholly irrelevant material or wholly irrelevant consideration or (ii) it has ignored a very relevant material which should have been taken into consideration or (iii) it is so absurd that no sensible person could ever have reached such a decision. None of these parameters was found by the Delhi High Court to be in place in the case before the Court. Therefore I am unable to toe the line of reasoning adopted by the Delhi High Court.

28. As a matter of fact, the Supreme Court held in *State of M.P. and Others Vs. Hazarilal*, that today the legal parameters of judicial review have undergone a change and that the Wednesbury principle of reasonableness has been replaced by the Doctrine of proportionality.

29. Neither the Doctrine of proportionality nor even the "strict scrutiny test" to which there is a shift by the English Courts, can be invoked in the present case, to hold that the action of the respondents is illegal or arbitrary. The 1984 Regulations contemplated the grant of licences to persons who satisfied the conditions prescribed thereunder, to act as Customs House Agents. Though Regulation 4 required the Commissioner to invite Applications year after year in the month of January, an element of discretion was conferred upon the Commissioner to determine the number of licences to be issued every year. This is clear from the first part of Regulation 4 which reads as follows:

The Commissioner may invite Applications for the grant of such number of licences as assessed by him.....

The words "may" and "such number of licences" used in Regulation 4 steers clear of any doubt that one may entertain about the discretion conferred upon the Commissioner. If the Commissioner had not invited Applications after 1998, till the issue of the new Regulations in 2004 and even thereafter till 31.12.2008, it cannot be categorized as a failure to perform statutory functions.

30. What was cleared by the petitioners is only a qualifying examination and not a competitive examination. A pass in a qualifying examination makes a person

eligible for consideration. If there is no occasion for such consideration, on account of the inaction on the part of the administrative authorities, it cannot give rise to a cause of action.

31. Even now, nothing is really lost for the petitioners. The pass in the qualifying examination that they had taken under the 1984 Regulations, has now become useless. But there is no bar for them Under the 2004 Regulations, if they fulfil the Conditions under Regulation 6, to appear for the qualifying examination now prescribed by the present Regulations. As stated in one of the previous paragraphs, the examination under the 1984 Regulations included questions on 16 subjects. The examination under the 2004 Regulations includes questions on 18 subjects. Apart from the 16 subjects that formed part of the syllabus under the old Regulations, two new subjects are included in the new Regulations. They are (i) Provisions of the Prevention of Corruption Act, and (ii) On-line filing of Electronic Shipping Bills or Bills of Entry and Indian Customs and Central Excise Electronic Commerce/Electronic Data Interchange Gateway and Indian Customs Electronic Data Interchange Systems. Therefore the contention that the pass in the qualifying examination under the 1984 Regulations, should be treated as equivalent to a pass in the examination under the new Regulations, cannot be accepted.

32. Heavy reliance is placed by the petitioners (and also accepted by the Delhi High Court) on the Preamble to the new Regulations, which reads as follows:

In exercise of the powers conferred by sub-section (2) of Section 146 of The Customs Act, 1962 (52 of 1962) and in supersession of the Customs House Agents Licensing Regulations, 1984, except as respect things done or omitted to be done before such supersession, the Central Board of Excise and Customs hereby makes the following Regulations.

According to the petitioners, all actions done or omitted to be done, under the 1984 Regulations, are saved by the Preamble to the 2004 Regulations. Since the failure of the Commissioner to invite Applications for the grant of licences, year after year, under the old Regulation 4, falls under the category of things "omitted to be done", the petitioners contend that their rights are saved by the Preamble.

33. But the above contention of the petitioners cannot be countenanced. The Regulations of the year 1984 contemplated various things to be done by the Commissioners, including inviting Applications for the grant of licences, grant of temporary licences, grant of regular licences, conduct of examinations, enforcement of obligations of the licensees, scrutiny and inspection of accounts of the licensees, suspension and revocation of licences and the fixing of clearance charges to which a Customs House Agent may be entitled. If, before the issue of the Regulations of the year 2004, the Commissioner had already issued a licence (under Regulation 10) or revoked or suspended the licence (under Regulation 21) or fixed clearance charges (under Regulation 25), such acts would fall under the category of "things done", in terms of the Preamble to the 2004 Regulations.

Similarly, if the Commissioner had issued a notice under Regulation 23(1), proposing to suspend or revoke a licence under the 1984 Regulations, but before an order could be passed under Regulation 23(7), the new Regulations of 2004 had come into effect, the action initiated may be saved in terms of the preamble, so as to enable the Commissioner to complete the process, even after the issue of the new Regulations. What was left undone or incomplete, in the procedure prescribed under Regulation 23 of the old Regulations, would fall under the category of "things omitted to be done". Likewise, if an Appeal under Regulation 23(8) of the 1984 Regulations, was pending before the Appellate Tribunal, on the date of issue of the new Regulations, the continuance of further proceedings may be saved by the Preamble under the category of "things omitted to be done".

34. But the omission on the part of the Commissioner to invite applications for the grant of licences under Regulation 4 of the old Regulations, will not certainly fall under the category of "things omitted to be done", to come within the protective cover of the saving clause. Therefore, the reliance placed upon the Preamble to the 2004 Regulations, is actually misplaced.

35. Lastly, the effect of Section 6 of the General Clauses Act, 1897 and the decision cited by Mr. R. Yashod Vardhan, learned Senior Counsel requires consideration. Section 6 of the General Clauses Act, dealing with repeal, reads as follows:

6. Effect of repeal.-- Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then unless a different intention appears, the repeal shall not --

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

36. One need not take recourse to Section 6 of the General Clauses Act, for solving the riddle on hand. By an amendment introduced u/s 113 of the Finance Act, 2001, Section 159A was inserted into the Customs Act, 1962, which reads

as follows:

Section 159A. Effect of amendments, etc., of rules, regulations, notifications or orders.-- Where any rule, regulation, notification or order made or issued under this Act or any notification or order issued under such rule or regulation, is amended, repealed, superseded or rescinded, then, unless a different intention appears, such amendment, repeal, supersession or rescinding shall not --

(a) revive anything not in force or existing at the time at which the amendment, repeal, supersession or rescinding takes effect; or

(b) affect the previous operation of any rule, regulation, notification or order so amended, repealed, superseded or rescinded or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred Under any rule, regulation, notification or order so amended, repealed, superseded or rescinded; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under or in violation of any rule, regulation, notification or order so amended, repealed, superseded or rescinded; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the rule, regulation, notification or order, as the case may be, had not been amended, repealed, superseded or rescinded."

Section 159A of the Customs Act, 1962, is actually in pari materia with Section 6 of the General Clauses Act. There are only two differences between the two provisions viz., (i) while the General Clauses Act, speaks only about Act or Regulation, Section 159A of the Customs Act, speaks about Rules, Regulations, Notifications and Orders and (ii) while the General Clauses Act, speaks only about repeal, Section 159A takes into account any amendment, repeal, supersession or rescission of an existing Rule, Regulation, Notification or Order.

37. Interestingly, the 1984 Regulations repealed the 1965 Regulations. At that time, Section 159A was not there. Therefore, 1984 Regulations contained a provision dealing with repeal and savings, under Regulation 26. There is no corresponding provision for "repeal and savings" under the 2004 Regulations, in view of the fact that Section 159A takes care of the contingency.

38. The principles underlying Section 6 of the General Clauses Act, can be summarised in broad terms, as follows:

(i) It may be invoked either in favour of or against a person.

(ii) To be entitled to the benefit of Section 6, a person must have acquired a right

or privilege under the Repealed Act or Regulation.

(iii) To apply Section 6 against a person, that person should have either incurred an obligation/liability or been imposed with a penalty or forfeiture for any offence committed under the Repealed Act or Regulation.

(iv) The Repeal would neither revive anything that is dead and gone nor affect any investigation, proceedings or remedy in respect of any right, privilege, obligation, liability, penalty or forfeiture.

39. Applying the above principles to the cases on hand, it can be seen without any semblance of a doubt that the petitioners did not acquire any right or privilege under the Repealed Regulations of 1984. Therefore, there is no scope for invoking Section 6 of the General Clauses Act. In Glaxo Smith Kline case, relied upon by Mr. R. Yashod Vardhan, learned Senior Counsel, an application for the grant of Patent and an Application for the grant of "Exclusive Marketing Right" were filed under the Patents Act, 1970. The Applications were rejected by the Controller of Patents on 28.12.2004 and the Amendment Act, 2005, came into operation on 1.1.2005. When the rejection of the Application by the Controller was challenged, a question of maintainability was raised on the basis of the Amendment Act, 2005. The objection was upheld by the High Court. It is in such circumstances that the Supreme Court applied the principles underlying Section 6 of the General Clauses Act. In other words, a series of actions had been taken under the Repealed Act and the question before the Court was about the fate of such actions, in the light of the Repealing Act.

40. But in the present case, no action was taken by the respondents under the 1984 Regulations, either to invite applications under Regulation 4 or to issue temporary licences to the petitioners under Regulation 8 or to process Applications for grant of regular licences under Regulation 10. It is only the actions done or omitted to be done that are normally saved. Inactions are never saved. Therefore, the contention on the basis of Section 6 of the General Clauses Act, is nothing but a last straw on the Camel's back.

41. Despite all the above legal issues, which stare against the petitioners, there is one aspect, which cannot be lost sight of. It appears that pursuant to the judgment of the Delhi High Court, persons similarly placed like the petitioners herein, have been granted licences to act as Customs House Agents by the Commissionerate of Delhi. Similarly, persons from Punjab and Haryana, who are also similarly placed like the petitioners, have been granted licences in pursuance of the judgment of the High Court of Punjab and Haryana, which followed the judgment of the Delhi High Court. The learned Standing Counsel for the Department submitted that the Department had gone on Appeal against the judgment of the Delhi High Court and that of the Punjab and Haryana High Court. However, it is admitted that licences have been granted to persons in Delhi and Punjab in pursuance of the aforesaid decisions. But these licences also contain a rubber stamp/seal affixed by the department to the effect that they are

subject to the ultimate outcome of the cases. In any case, the decision of the Single Judge of the Delhi High Court was rendered 4 years ago. The petitioners before the Delhi and Punjab High Courts are now in enjoyment of a licence, though subject to the outcome of the Appeals.

42. The respondents seek to distinguish the petitioners before the Delhi High Court from the petitioners herein, on the sole ground that before the issue of 2004 Regulations, the Commissioner at Delhi had issued a notice inviting Applications, in June 2003 and the Applications of the petitioners before the Delhi High Court, were kept pending for a long time till the new Regulations were issued in 2004. But this, in my considered view, is no distinction at all. It is well settled that a person who applies for the grant of a licence or permit or even for employment, acquires no vested right or privilege. As a matter of fact, a person who is even selected for appointment, acquires no such right except to the limited extent of being considered before his juniors or persons of lower rank are considered. Therefore, the petitioners before the Delhi High Court and the Punjab High Court, stood on no better footing than the petitioners herein. But they have now derived a benefit, (even if temporarily) solely on the basis of passing the qualifying examination under the old Regulations. If ultimately those persons succeed even in the Appeal, the benefit now conferred on them may become permanent. Therefore, to deprive the petitioners herein of a similar benefit, when the petitioners are also placed on the same pedestal, would violate Article 14. If such a contingency arises, the respondents are obliged to remedy the situation for the petitioners.

43. In the light of what is stated above, the challenge to the impugned Regulations of the year 2004 as well as to the notification inviting Applications, is rejected. However, the Central Board of Excise and Customs, who is the first respondent in these Writ Petitions, is directed to examine the matter and come up with a scheme for extending to the petitioners herein, the same benefits as conferred upon similarly placed persons in Delhi and Punjab and Haryana. In case, the Central Board of Excise and Customs is not in a position to do anything, the Central Government may take appropriate steps, by invoking the power u/s 161 of the Customs Act, 1962, by which they are empowered to do anything to remove the difficulties arising out of the implementation of the 2004 Regulations, in one area, while not implementing the same in other areas (Delhi and Punjab). All the Writ Petitions are disposed of on the above terms. No costs. Consequently connected Miscellaneous Petitions are closed.