

(2004) 01 GUJ CK 0048
In the Gujarat High Court

Case No : Special Civil Application No. 280 of 2004

Mahamaya Overseas Pvt. Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 23-01-2004

Acts Referred:

Foreign Trade (Development and Regulation) Act, 1992 — Section 3, 5
Government of India Act, 1935 — Section 293

Citation : (2010) 256 ELT 383

Hon'ble Judges : M.S. Shah, J;A.M. Kapadia, J

Bench : Division Bench

Advocate : G.L. Rawal and K.S. Jhaveri, for Petitioner Nos. 1-2, for the Appellant; D.N. Patel, for the Respondent

Final Decision : Allowed

Judgement

M.S. Shah, J.—Rule. Mr. D.N. Patel, learned Senior Central Government Standing Counsel waives service of rule.

In the facts and circumstances of the case and in view of the urgency shown by the learned counsel for the petitioners, the petition is taken up for final disposal today.

2. Petitioner No.1 Company is engaged in the business of import of diverse goods specially in kerosene oil and has been importing the same which is commercially known as Superior Kerosene Oil ("SKO" for short). The petitioners have entered into a contract with Aavanti Industries PTE of Singapore (Annexure"A" to the petition) for purchasing 25,000 MTS + 10% of SKO for which the shipment was to be made latest by 31.1.2004. Payment was to be made in US Dollars without discount, deductions or offset on the basis of net bill of lading quantity by confirmed irrevocable Letter of Credit ("LC" for short) in the form and substance acceptable to the seller. The value of LC should be for minimum US\$ 6,750,000.00. There were various other terms and conditions specified in the LC which are not relevant for the purposes of the present petition.

3. It is the petitioners' case that pursuant to the above contract, on 25.11.2003, Punjab National Bank opened an irrevocable LC under which 25,000 MTS + 10% of SKO was to be purchased as per the contract dated 12.11.2003. The LC was for US\$ 1,339,000.00 in the following terms:-

"Currency Code Amount US\$ 1,339,000.00. PCT Credit Amount Tolerance Plus/Minus 10 PCT."

The LC further provided for "latest date of shipment" as "31st Jan. 2004".

It is the petitioners' case that after the aforesaid LC was opened on 25.11.2003, the petitioners' came to know that Government of India has issued notification dated 25.11.2003 imposing restriction on import of SKO and canalizing it only through State Trading Agencies. The petitioners, therefore, requested the Director General of Foreign Trade that since the LC was opened on 25.11.2003 before the notification was made available to the public at large, the petitioners may be permitted to import SKO as per the LC, subject to its shipment on or before 31.1.2004. The petitioners also invoked the provisions of para 1.3 read with para 1.1 of the EXIM Policy. It appears that the petitioners also addressed a letter dated 3.12.2003 stating that the above referred notification dated 25.11.2003 was made available for public sale on 27.11.2003, therefore, the said fact may be taken into consideration.

It also appears that on 4.12.2003 the Assistant Controller, Department of Publications, Government of India, responded to the petitioners' letter dated 2.12.2003 regarding the date of availability of Gazette of India, Extra-Ordinary, part II Section 3 sub-section (ii) dated 25.11.2003 issue No.1062 wherein he has stated that the said gazette was made available for public sale on 27.11.2003 as per the record of the Department (Annexure "E" to the petition). Relying on the said letter, the petitioners again requested the Director General of Foreign Trade by letter dated 8.12.2003 to consider the petitioners' application dated 3.12.2003 in light of the above.

4. Since the respondents did not grant the petitioners' request, the present petition came to be filed on 12.1.2004 for the substantive reliefs to declare that the petitioners are entitled to import contracted quantity of SKO 25,000 MTS + 10% pursuant to the contract dated 12.11.2003 and Letter of Credit dated 25.11.2003; the petitioners are entitled to import the same in pursuance of para 1.3 of the EXIM Policy of 2002-2007 and that the restrictions and provisions of notification dated 25.11.2003 do not apply to the contract LC of the petitioners and does not affect the petitioners' right to import the same as freely importable goods. The petitioners' have also prayed for consequential directions to the Customs Authorities.

5. In response to the notice issued by this Court, affidavit in reply dated 23.1.2004 has been filed by Deputy Director of Foreign Trade in the office of the Joint Director of Foreign Trade, Ahmedabad. Affidavit in reply dated 23.1.2004 is also filed by the Deputy Commissioner of Customs, Gandhidham on behalf of

respondent Nos.1 and 2.

The gist of the affidavit in reply filed on behalf of respondent Nos.1 and 2 is that the notification dated 25.11.2003 canalizing import of SKO came into effect from the date of its issue and that the respondents do not accept the say of the petitioners that the petitioners came to know about the notification dated 25.11.2003 only on 27.11.2003. The respondents have contended that the contract was made on 12.11.2003 but the LC was opened only on 25.11.2003,, i.e., the date on which restriction was imposed and made effective. Hence the petitioners are not entitled to get benefit of the LC opened on the date of imposition of the restrictions.

In the affidavit filed on behalf of respondent No.3, detailed reasons are given for the change of policy as embodied in the notification dated 25.11.2003. It is stated that decision to restrict the import through State Trading Agencies was taken in order to prevent diversion of SKO for adulteration in diesel and also being substituted for transportation and for power generation and also because the domestic production of kerosene matches with the demand and also to prevent illegal activities of parallel marketers.

6. At the hearing of this petition, Mr. Rawal, learned counsel with Mr. K.S. Jhaveri for the petitioners have submitted as under:

(i) Para 1.3 of the EXIM Policy has been framed in order to protect the persons who have made arrangements for importing commodities and if any such restriction regarding import of a commodity is brought into force with immediate effect and applied to all transactions and if such restriction is not made known to the parties, the parties who have already made arrangements for import of commodities will be put to tremendous loss and therefore when the respondent authorities have stated in their letter dated 4.12.2003 that the notification dated 25.11.2003 was made available to the public at large on 27.11.2003, and the petitioners also did not come to know about the notification till 27.11.2003, the LC opened by the petitioners on 25.11.2003 was covered by the protection contemplated by para 1.3 of the EXIM Policy;

(ii) The learned counsel has relied on legal glossary issued by the Ministry of Law, Justice and Company Affairs in Government of India defining the word "publish" as to make generally accessible or available; to place before or offer to public; to bring before the public for sale or distribution;

(iii) The learned counsel has relied on the decision of Delhi High Court in Universal Cans & Containers Ltd. v. Union of India and others 1991 (4) DLaw131 and the decision of the Andhra Pradesh High Court in M/s. Jayalakshmi Talkies Vs. The Assistant Commercial Tax Officer, Chirala, in support of his submission that the orders in the form of daily routine resolutions do not come into force before they are made available to the public at large unlike the Acts or Parliament or State Legislature about which people come to know on account of the deliberations in the public forum.

7. On the other hand, Mr. D.N. Patel, learned Senior Central Government Standing Counsel, has submitted as under :-

7.1 Para 1.3 of the Exim policy is intended to protect the goods in the pipeline, that is to say, the goods which are shipped before the date of imposition of the restriction and since in the instant case no shipment has admittedly taken place, the petitioners are not entitled to get benefit of para 1.3 of the Exim Policy.

7.2 The notification will come into force as soon as the same is issued. The notification becomes effective on the date of issue and not with effect from the date on which it is made available to the public at large.

7.3 The object of the change in policy is explained in the reply affidavits and it is in public interest that the Government imposed restrictions on import of SKO through State Trading Agencies in order to prevent diversion of such kerosene for illegal purposes such as adulteration in diesel and illegitimate use for power generation or as fuel.

7.4 In any view of the matter, the contract for supply of 25,000 MTS SKO provided that the LC should be for minimum US\$ 6,750,000.00 whereas the LC has been opened for only US\$ 1,339,000.00 and, therefore, the contract is not valid.

8. Having heard the learned counsel for the parties, it appears to us that the scope and ambit of para 1.3 of the Exim Policy has not been properly appreciated by the respondents. Paras 1.1 and 1.3 of the Exim Policy for the period from 1.4.2002 to 31.3.2007 read as under:

"1.1. In exercise of the powers conferred u/s 5 of The Foreign Trade (Development and Regulation Act), 1992 (No.22 of 1992), the Central Government hereby notifies the Export and Import Policy for the period 2002-2007. This Policy shall come into force with effect from 1st April, 2002 and shall remain in force upto 31st March, 2002 and will be co-terminus with the Tenth Five Year Plan (2002-2007). However, the Central Government reserves the right in public interest to make any amendments to this Policy in exercise of the powers conferred by Section 5 of the Act. Such amendment shall be made by means of a Notification published in the Gazette of India."

"1.3. In case an export or import that is permitted freely under this Policy is subsequently subjected to any restriction or regulation, such export or import will ordinarily be permitted notwithstanding such restriction or regulation, unless otherwise stipulated, provided that the shipment of the export or import is made within the original validity of the irrevocable letter of credit established before the date of imposition of such restriction."

The submission made by Mr. Patel that para 1.3 of the Exim Policy only protects the goods in the pipeline, i.e., goods which are already shipped before the date of imposition of restriction cannot be accepted because in case an export or import that is permitted freely under the Policy is subsequently subjected to any

restriction or regulation, the original validity of the irrevocable letter of credit established is to be seen and not the shipment of the export or import. What is contemplated is that when the party has already made an irrevocable LC for importing or exporting goods, the party should not be made to suffer if any restriction is subsequently imposed on export or import of such goods covered by the irrevocable LC. It is not necessary for availing the benefit of para 1.3 of Exim Policy that the shipment should have been made before the date of imposition of restriction. The only restriction is that the shipment has to be made within the original validity period of the irrevocable LC. Hence on the question of interpretation of para 1.3 of the Exim Policy, we find that there is considerable substance in the submission of Mr. Raval, learned counsel for the petitioners.

9. The next question is whether the irrevocable LC opened by the petitioners would be covered by para 1.3 of the Exim Policy. According to Mr. Patel, the LC was opened on 25.11.2003, i.e., the date on which the restriction was imposed, and, therefore, the LC was not established before the date of imposition of the restriction. To which Mr. Raval's submission is that the restriction has to be imposed by a notification and that unless such notification is made available to the public by publishing in the gazette and making such notification available by Government Printing Press or any such place of distribution, the restriction does not come into force.

10. On the above issue there is no dispute that the notification dated 25.11.2003 was made available to the public at large on 27.11.2003. It is not the case of the respondent authorities that the notification was made known to the public through any public media such as television broadcast. In view of the above factual aspect, we proceed on the footing that the Government notification dated 25.11.2003 imposing restriction on the import of SKO through State Trading Agencies came to the knowledge of the public at large only on or after 27.11.2003. In such an eventuality, it is obvious that the party which had opened irrevocable LC on 25.11.2003 cannot be made to suffer and that is the object of para 1.3 of the Exim policy itself. We do not go into further details as it is not the case of the respondents that the notification was made known to the public before 27.11.2003.

11. We may at this stage refer to the definition of the term "To publish" and also to refer to a few decisions having a bearing on the controversy at hand.

11.1 In Shorter Oxford English Dictionary, the term "to publish" is defined as -

- to make publicly or generally known;
- to declare openly or publicly;
- to announce in a formal or official manner;
- to give public notice;
- to make generally accessible or available;

to place before or offer to the public.

In Concise Oxford Dictionary, the term "to publish" is defined as -

to make generally accessible or available;

to place before or offer to public;

to bring before the public for sale or distribution.

In Legal Glossary published by the Government of India in the Ministry of Law, Justice & Company Affairs, the term "to publish" is defined as -

to make generally accessible or available;

to place before or offer to public;

to bring before the public for sale or distribution.

11.2 In *Harla Vs. The State of Rajasthan*, the Apex Court observed as under :-

"The thought that a decision reached in the secret recesses of a chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a Resolution without anything more is abhorrent to civilized man. It shocks his conscience. Promulgation or publication of some reasonable sort is essential."

11.3 Even in *State of Maharashtra Vs. Hans George*, although in that case the notification in question had been published and made known in India, the ignorance alleged by the accused coming from abroad was held to be irrelevant. Even there, however, the Court observed as under :-

"..... where there is no statutory requirement we conceive the rule to be that it is necessary that it should be published in the usual form i.e. by publication within the country in such media as generally adopted to notify to all the persons concerned the making of rules. In most of the Indian statutes...there is provision for the rules made being published in the Official Gazette. It, therefore, stands to reason that publication in the Official Gazette viz.; the Gazette of India is the ordinary method of bringing a rule or subordinate legislation to the notice of the persons concerned ...The notification by the Reserve Bank was published in the Gazette of India on November 24, 1962 and hence ... the notification must be deemed to have been published and brought to the notice of the concerned individuals on the 25th of November, 1962."

Even applying the aforesaid principle, in absence of any averments by the respondent authorities about publication of the notification in any other mode, the notification published in the Gazette of India on November 25, 2003 can at the highest be deemed to have been published and brought to the notice of the people at large on November 26, 2003.

11.4 In B.K. Srinivasan and Others Vs. State of Karnataka and Others, the Apex Court dealt with the principle of publication of subordinate legislation and made the following observations :-

"There can be no doubt about the proposition that where a law, whether Parliamentary or subordinate, demands compliance, those that are governed must be notified directly and reliably of the law and all changes and additions made to it by various processes. Whether law is viewed from the standpoint of the "conscientious good man" seeking to abide by the law or from the standpoint of Justice Holmes's "Unconscientious bad mad" seeking to avoid the law, law must be known, that is to say, it must be so made that it can be known."

The Court further observed that unlike Parliamentary legislation which is publicly made, delegated or subordinate legislation is often made unobtrusively in the chambers of a Minister, a Secretary to the government or other official dignitary and it was, therefore, necessary that subordinate legislation in order to take effect must be published or promulgated in some suitable manner whether such publication or promulgation is prescribed by the parent statute or not. It will then take effect from the date of such publication or promulgation.

11.5 Again in D.B. Raju Vs. H.J. Kantharaj and Others, the Apex Court noticed the vital difference between an Act of the legislature and a subordinate legislation and observed as under :-

"The Acts of the legislature are passed by the accredited representatives of the people who in theory can be trusted to see that their constituents know what had been done, and this is done only after debates take place which are open to the public. The matter receives wide publicity through the media. But the case is different with the delegated legislation and, if we may add, also in the case of orders passed by the authorities like that in the present appeal before us. The mode of publication can vary but there must be reasonable publication of some sort."

In the aforesaid decision in DB Raju (Supra), the Apex Court also referred to the criticism of the decision in State of Maharashtra vs. MH George (Supra) and reiterated that the underlined words from the passage quoted hereinabove, laid down the correct law.

11.6 In Universal Cans & Containers Ltd. vs. Union of India 1991 (4) DL 131, a Division Bench of the Delhi High Court (speaking through Hon"ble Mr Justice DP Wadhwa - as His Lordship then was) has considered the relevant provisions of the Official Gazettes Act, 1863 before its repeal by Repealing Act, 1938, Section 293 of the Government of India Act, 1935 and the Official Memorandum dated 2.9.1985 incorporating various instructions regarding printing and distribution of the various parts of the Gazettes of India. After examining all these provisions, the Delhi High Court observed as under :-

"18. Para 3 of the Office Memorandum prescribes the time schedule for

publication of the Weekly and Extraordinary Gazettes. An Extraordinary Gazette which is to be printed in bulk requires 24 hours for publication from the time of the receipt in the press if it is upto two pages of typewritten matter. All these instructions go to show that it is not the date which is printed on the Official Gazette which is relevant, but the date on which the Gazette is made available to the public is that relevant.

19. What is the use of the Official Gazette which is lying in the printing press of the Government of India or any Government Department and is not made known to the public who are to be affected by such a Gazette. We have seen what is meant by the words "notification" and "publication". Principle "ignorance of law" is no excuse" cannot be invoked unless that law is made public. It is, therefore, the date on which the Official Gazette is made available to the public that matters, and not the date on which it is shown to have been printed."

11.7 The aforesaid case law on the subject, therefore, leaves no room for doubt that the delegated legislation or orders must be made known to the public at large or to the persons likely to be affected thereby and that there must be reasonable publication of some sort before such delegated legislation or orders can be said to have come into force.

12. In view of the above factual aspects and the settled legal position, we have no hesitation in holding that that the petitioners' case is covered by para 1.3 of the Exim Policy.

13. Coming to the next question as to whether the petitioners are entitled to import the entire contracted commodity as stipulated in the contract dated 12.11.2003, the submission of Mr. Rawal is that when the contract dated 12.11.2003 was for the entire 25,000 MTS, it was not necessary that the LC should also have been for the payment to cover the entire quantity but a part payment was sufficient for import of the entire contractual quantity as benefit of para 1.3 of the EXIM Policy would be available.

We are afraid, the submission of Mr. Rawal can not be accepted. The object of para 1.3 of the Exim policy is to protect the party which has entered into a contract by opening irrevocable LC and hence the the extent of protection would also be confined to the irrevocable LC opened by the party. Since the petitioners has opened irrevocable LC only for US\$1,339,000.00 plus/minus 10 per cent, the petitioners cannot claim protection of import of the entire contracted quantity as stipulated in the contract dated 12.11.2003 in excess of the quantity covered by irrevocable LC for US\$1,339,000.00.

14. At this stage, Mr. Rawal, learned counsel for the petitioners, submits that the petitioners have been trying to persuade the authorities to permit the petitioners to import SKO on the basis of the aforesaid letter dated 3.12.2003, but in view of the fact that the authorities did not accede to the request of the petitioners, the petitioners have been constrained to approach this Court and therefore time of about one month and 20 days has elapsed and the petitioners are racing against

time limit of 31.1.2004 stipulated in the LC. The petitioners have been pursuing the matter before the authorities. This Court was closed for winter vacation from 27.12.2003 till 11.1.2004 and the petitioners approached this Court at the earliest on 12.1.2004 on reopening of the Court after winter vacation. Hence the petitioners may be granted extension from 3.12.2003 till today and this period may be excluded while directing the authorities to permit the petitioners to import SKO within the date stipulated in the aforesaid irrevocable LC.

Mr. Patel opposes the said request and submits that no such extension may be granted.

15. Having heard the learned counsel for the parties on this aspect, we are of the view that as the petitioners' request was not granted in response to the representation dated 3.12.2003 or thereafter, they ought to have approached this Court as expeditiously as possible. Anyhow the petitioners approached this Court immediately on reopening of the Court on 12.1.2004 after winter vacation and, therefore, we direct that the authorities shall exclude the period from 27.12.2003 (i.e. the date on which the winter vacation of this Court commenced) till today i.e., 23.1.2004, while considering the validity of the irrevocable LC dated 25.11.2003, that is, validity period of the LC dated 25.11.2003 shall be treated as 28.2.2004.

16. In view of the above discussion, the petition is allowed. The respondents are directed to permit the petitioners to import SKO to the extent of US\$1,339,000.00 plus/minus ten per cent as per the irrevocable LC dated 25.11.2003 within the time limit as stipulated in the aforesaid irrevocable LC after excluding the period from 27.12.2003, (i.e. the date on which the winter vacation of this Court commenced) till today i.e. 23.1.2004, for the purpose of shipment of the SKO covered by the said LC. That is, the benefit of para 1.3 of the Exim Policy shall be available to the petitioners only if the shipment of SKO within the aforesaid monetary limit takes place on or before 28.2.2004.

Rule is made absolute to the aforesaid extent with no order as to costs.