

(2006) 12 PAT CK 0043
In the Patna High Court
Case No : CWJC No. 7157 of 2006

McDowell and Co. Limited

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 21-12-2006

Acts Referred:

Bihar and Orissa General Clauses Act, 1917 — Section 28, 4(36)
Customs Act, 1962 — Section 25
Evidence Act, 1872 — Section 35, 38, 81
General Clauses Act, 1897 — Section 4(36)

Citation : (2007) 1 PLJR 434

Hon'ble Judges : Samarendra Pratap Singh, J;Aftab Alam, J

Bench : Division Bench

Advocate : Ram Balak Mahto, G.P. Bimal and Satyabir Bharti, for the Appellant;
P.K. Shahi and Vikas Kumar For the State, for the Respondent

Final Decision : Dismissed

Judgement

Aftab Alam, J.—The petitioner is a company incorporated under the Companies Act. It holds different licences under the Excise Act for manufacture and sale of Indian Made Foreign Liquor. In this writ petition, it seeks to challenge the demand of Rs. 47,74,958.10 paise (Annexure 5) as differential amount of duty on different brands of IMFL taken out from its bonded warehouse during the period 15.4.2006 to 5.5.2006 following the increase in the rate of duty effective from 15.4.2006. The facts are plain and simple. Earlier, Excise duty was payable under notification, dated 5.8.2000 (published in the Gazette on 10.8.2000) @ Rs. 100 per LP Litre on Whiskey, Brandy, Rum, Gin etc. and other similar potable alcoholic preparations. By Notification, dated 5.4.2006, the State Government amended Appendix III of Order X and fixed a graded rate of Excise duty. By the amendment, the Excise duty for regular brands of IMFL, the maximum wholesale price of which was upto Rs. 500 per case was fixed at Rs. 100 per LP Litre, for all semi-premium brands of IMFL, the maximum wholesale price of which varied between Rs. 501 to Rs. 800 per case at Rs. 120 per LP Litre and for all Scotch

and premium brands of IMFL, the wholesale price of which was above Rs. 100 per case at Rs. 130 per LP Litre. This notification, dated 5 April, 2006 was published in the Bihar Gazette, Extra-Ordinary, dated 15th April, 2006 (a copy of the Gazette notification is at Annexure 2). A copy of the Gazette notification was sent by the Deputy Commissioner, Excise to all Collectors, Deputy Commissioners, Excise, Assistant Commissioners, Excise and Superintendents, Excise alongwith his forwarding letter, dated 5.5.2006. It was on receipt of the Gazetted notification alongwith the aforesaid forwarding letter that the Excise Superintendent posted at the Company's premises raised the impugned demand with regard to the different brands of IMFL taken out from the petitioner's bonded warehouse on payment of Excise duty at the unrevised rate, during the period 15.04.2006 to 5.5.2006.

2. Mr. Ram Balak Mahto, Senior Advocate appearing for the petitioner submitted that the demand was bad and illegal and it was fit to be struck down. Mr. Mahto submitted that as to when the rules made and notifications issued under the Excise Act would take effect was provided in Section 92 of the Act. Section 92 reads as follows:

92. Publication and effect of rules and notifications.-All rules made, and notifications issued under this Act shall be published in the Official Gazette, and, on such publication shall have effect as if enacted in this Act.

3. Learned Counsel submitted that "publication" did not mean only printing in the Gazette and the act of publication would not be complete until the Gazetted notification is made available to the public or at any rate to the people going to be directly affected by it. With reference to the case in hand, he submitted that the process of publication was completed only when the Gazetted notification was issued with the forwarding letter, dated 5.5.2006 and it came to be known to the Officers engaged in the enforcement of the law. Elaborating the point, Mr. Mahto submitted that as required by law Excise Officials, including an Officer of the rank of Superintendent were posted at the company's premises. The different brands of IMFL were taken out from the petitioner's bonded warehouse during the period 15.4.2006 to 5.5.2006 on payment of excise duty at the unrevised rate under their direct supervision. This plainly showed that not only the petitioner but the Excise Officials themselves were unaware of the revision in the rates of duty and in that circumstance, it cannot be said that publication within the meaning of Section 92 of the Act took place until 5.5.2006 when the Gazette notification was circulated among the concerned Officials and through them, it became known to the petitioner and to the public. In support of the submissions, Mr. Mahto relied upon three decisions of the Court in: (i) The Mahnar Notified area Committee & Others vs. The State of Bihar, 1968 PLJR 582, (ii) Mcdowell and C. Ltd., Etc. Vs. State of Bihar and Others, and (iii) Tripti Alcobrew Limited Vs. The State of Bihar and Others .

4. In Mahnar Notified Area Committee, a Bench of this Court examined the provisions of Sections 388 and 389 of the Bihar & Orissa Municipal Act and

Sections 4(36) and 28 of the Bihar & Orissa General Clauses Act, 1917 and held as follows:

Reading all the provisions aforesaid together and as a matter of construction, it has got to be held that the notification in the Official Gazette cannot mean printing in the Official Gazette only. It must mean its publication in the sense of notifying it to be public by sending copies of it to the various subscribers or to the persons or institutions who are entitled to get such copies or by exposing it for sale to the general public. Mere printing the notification in the Official Gazette and keeping it in the almirahs of the Government Printing Press or the Secretariat cannot mean a notification in the Official Gazette within the meaning of Section 4(36) of the General Clauses Act read with Section 28 of that Act. It must mean publication in the Official Gazette.

5. The decision in Mahnar Notified Area Committee indeed supports Mr. Mahto's submissions. But that judgment was rendered on the provisions of the Municipal Act and under somewhat peculiar facts of the case. Moreover, as we would see presently in more recent times, the Supreme Court has taken a contrary view of the matter. The decision in Mahnar Notified Area Committee, therefore, need not detain us any more.

6. The other two decisions relied upon by Mr. Mahto, however, deserve a closer scrutiny. The decision reported in *McDowell and C. Ltd., Etc. Vs. State of Bihar and Others*, was in a writ petition filed by the present petitioner and it was on identical issue. In para 13 of the decision, a Bench of this Court held as follows:

13. Thus where the notification is required to be published in the Gazette then mere printing in the Gazette is not a publication of the notification. The notification will be treated to have been published only when it is made available to the public. However, the learned counsel appearing for the respondents relying upon the provision of Section 92 of the Act submitted that once the notification is published in the official Gazette, it shall come into force. I am unable to agree with the aforesaid submission. The word "publish" as held by the Supreme Court means when it is made available to the public. Merely printing of the notification in the Official Gazette is not a publication in the Official Gazette.

7. The aforesaid view was taken by the Court in light of two decisions of the Supreme Court in *Collector of Central Excise Vs. New Tobacco Co. Etc. Etc.*, and *Garware Nylons Ltd. Vs. Collector of Customs and Central Excise, Pune*, . It is important to note that both the decisions in *New Tobacco Co.* and *Garware Nylon* were examined in a later decision by the Supreme Court in *Union of India and Others Vs. M/s. Ganesh Das Bhojraj*, and both the earlier decisions were expressly overruled (vide paragraph 17 of the decision of the Bhojraj). Consequently, when the issue again arose before the Court in *Tripti Alcobrew Ltd.*, the same Hon'ble Judge (Nagendra Rai, J.) who had earlier delivered the 2000 decision in *M/s McDowell*, following the later Supreme Court decision in *Bhojraj*, expressed the legal position as follows:

7. When a mode is provided for publication of notification in the official Gazette and the notification has been published in terms of the mode framed under the relevant provision then the official notification is taken to have been published on the date mentioned in the official Gazette. The Apex Court in the case of *Union of India and Others Vs. M/s. Ganesh Das Bhojraj*, held that "it is an established practice that the publication in the* India (sic is an) ordinary method of bringing a rule or subordinate legislation to the notice of the persons concerned. Individual service of a general notification on every member of the public is not required and the interested person can acquaint himself with the contents of the notification published in the Gazette. It was further held that once the notification has been made under the statutory provision, the notification will come into operation as soon as it* further publication is required. It was also held that the Gazette is admissible being the official record evidencing public affairs contents as genuine under Sections 35 and 38 read with Section 81 of the Evidence Act, unless the contrary is proved.

8. However, in fairness to Mr. Mahto, it should, be noted that he relied upon paragraphs 4, 8 and 9 of the decision in *Tripti Alcobrew*. In my opinion, those paragraphs of the decisions relate to the special facts of the case and do not in any way deviate from the legal position as laid down by the Supreme Court in *Bhojraj*. In *Tripti Alcobrew*, the notification was first published in the Gazette on 5.5.2004 but there was some mistake in the notification and for correction of the mistake, a corrigendum was sent for publication on 6.5.2004. Whether or not the corrigendum was published in the Gazette on the following day could never become clear despite the original records being called from the Government Printing Press. In those circumstances, the Court held 21.5.2004 as the date of publication when 500 copies of the notifications were made available to the Department of Excise. As noted, the decision in *Tripti Alcobrew* does not help the petitioner in the present case.

9. Mr. Advocate General appearing on behalf of the State rightly contended that the matter was now concluded by the Supreme Court decision in *Bhojraj*.

10. The case of *Bhojraj* came to be heard before a three-Judges Bench of the Supreme Court on a reference made by a Two-Judges Bench that noticed that there was a conflict in the ratio of the decisions of the Apex Court in *Pankaj Jain Agencies vs. Union of India*, *CCE vs. New Tobacco Co.* and *I.T.C. Ltd. vs. CCE*. The decision in *Bhojraj* examined the two contending views. The view canvassed before us by Mr. Mahto that had found favour in the decisions in *New Tobacco Co.* and *Garware Nylons Ltd.* is referred to in paragraphs 8 and 9 of the decision in *Bhojraj* as follows:

8. As against this, learned counsel for the respondent referred to the decision in *CCE vs. New Tobacco Co.*, paras 11 and 12 and emphasised that in the aforesaid case, the Court has specifically held that if publication is through a Gazette then mere printing of it in the Gazette would not be enough unless the Gazette containing the notification is made available to the public. The Court after

considering the contentions has held as under: (SCC p. 258, paras 11-12)

"11. Our attention was also drawn to the decisions of this Court in Pankaj Jain Agencies vs. Union of India and I.T.C. Ltd. vs. CCE but they are not helpful in deciding the question that arises in these cases.

12. We hold that a Central Excise notification can be said to have been published, except when it is provided otherwise, when it is so issued as to make it known to the public. It would be a proper publication if it is published in such a manner that persons can, if they are so interested, acquaint themselves with its contents. If publication is through a Gazette then mere printing of it in the Gazette would not be enough. Unless the Gazette containing the notification is made available to the public, the notification cannot be said to have been duly published."

9. In Garware Nylons Ltd. vs. Collector of Customs & Central Excise a similar question was considered by this Court. In that case by notification dated 30.9.1985 the customs basic duty was enhanced from 100% to 150% w.e.f. 30.9.1985. The question was whether enhanced rate of duty was applicable in respect of goods which were cleared from warehouse during the period 30.9.1985 till 31.10.1985. The case of the Company was that the notification came into effect only from 1.11.1985 since it was made available to the public for sale on that date. Relying upon the decision in New Tobacco Co. the Court allowed the said appeal by holding that the notification can be said to have been duly "published" when it is made known to the public.

11. In paragraph 17, however, the decision found and held as follows:

17. From the aforesaid observations, it is plain and clear 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 Mayer 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 Co. followed in Garware Nylons Ltd. does not lay down the correct law.

12. Mr. Mahto submitted that the decision in Bhojraj was rendered on Section 25 of the Customs Act, but on the point at issue, I fail to see any material difference between Section 25 of the Customs Act and Section 92 of the Excise Law.

13. In view of the decision in Bhojraj, the legal position is quite clear that the notification would come into operation as soon as it is published in the Official Gazette and no further publication is required. The decision in Bhojraj also impliedly overrules the 2000 decision of this Court in M/s McDowell & Co. Mr. Mahto also submitted that as a matter of fact, the notification was not published in the Gazette on 5.5.2006 but was published later and was antedated. In this

connection, he invited our attention to paragraph 17 of the writ petition where it is stated that the notification was not printed and published on (sic in) the official gazette much less circulated on 15.4.2006. In face of Annexure 2, which is a photostat copy of the Gazette, dated 15.4.2006, I find the averment completely unacceptable.

14. Mr. Mahto next submitted that in any event, the Gazette notification was not sent to the sale counter of the Government Printing Press on 15.4.2006 and prayed before us to call for the original records from the Government Printing Press to find out when the Gazette notification was made available at the sale counter. In the absence of any pleading in this regard, it would not be proper for the Court to indulge into a roving enquiry. Moreover, in light of the Supreme Court decision in Bhojraj, there hardly appears to be any scope for an enquiry of this kind. In light of the discussions made above, I find no substance or merit in this writ petition. It is dismissed but with no order as to costs.

Samarendra Pratap Singh, J.

15. I agree.