

(2012) 01 KAR CK 0129

In the Karnataka High Court

Case No : Writ Petition No. 25290 of 2002 (TAR)

M/s. Ruchi Soya Industries Limited

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 20-01-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 227
Customs Act, 1962 — Section 14 (1) (1A), 14 (2)
Customs Rules, 2007 — Rule 2

Citation : (2012) 281 ELT 406

Hon'ble Judges : Vikramajit Sen, C.J.; B.V. Nagarathna, J

Bench : Division Bench

Advocate : K. Shashikiran Shetty, for the Appellant; Jeevan J. Neeralagi, Central Government Standing Counsel for R-1 to R-3 in W.P. No. 25290/2002 and Advocate for R-2 to R-3 in W.P. No. 25291/2002 and Shri Kalyan Basavaraj, A.S.G., for R-1 in W.P. No. 25291/2002, for the Respondent

Final Decision : Dismissed

Judgement

Vikramajit Sen, C.J.—These writ petitions have been filed under Article 226 and 227 of the Constitution of India, and have been pending for one decade. It contains several prayers, but the ones relevant for our purposes seek the issuance of a mandamus directing that the Notification No. 38/2002 Cus (N.T.) dated 13.06.2002 is not applicable to the imported goods consisting of 1647.414 metric tonnes of crude palmolein covered under Bill of Entry for Home Consumption dated 12.06.2002 (hereafter "subject shipment"); for an order declaring that the petitioner is not liable to pay any additional/differential duty in respect to the said shipment of crude palmolein; and that the subject Notification is effective only from 14.6.2002. On 04.07.2002, by way of interim relief, the Respondents had been directed to release the subject shipment on the basis of the duty already paid by the petitioner and in addition thereto on its furnishing "25% bank guarantee towards differential duty". Learned counsel for the parties have been heard in full detail.

2. The facts, so far as relevant for the purpose of deciding these petitions, are that the "subject shipment" left Malaysia in June 2002. On 12.06.2002 the petitioners filed a Bill of Entry for Home Consumption in respect thereof and in conformity with Notification No. 29/2002-Cus (N.T.) dated 16.5.2002 paid a sum of Rs. 2,16,31,258/- . However, it is not in dispute that the "subject shipment" actually arrived in India only on the following day on 13.6.2002 at 5.50 a.m. The Respondents contended that by that date enhanced tariff became payable by virtue of Notification No. 38/2002-Cus dated 13.6.2002. In paragraph-10 of the petitions it has been averred that the said Notification "was issued/published only some time after 12.00 noon on 13.6.2002. It is categorically submitted that its issue and its printing in the Government Press takes time, the said Notification could have been issued and published in the official gazette only after 12.00 noon on 13.6.2002 and not before that. Further, the said Notification as published in the official gazette was offered for sell and made available to the public and others including the petitioner company on 14.6.2002 and not before that. The said Notification, therefore, has no applicability at all to the aforesaid consignment of crude palmolein imported by the petitioner company."

3. Learned counsel for the petitioners has firstly contended that the relevant date for calculation of the duty is the date of the Bill of Entry, which according to him is 12.6.2002. It was on the following day 13.6.2002, that the tariff/duty stood increased from \$ 372 to \$ 411 per metric tonne. We think that it would not be sanguine to believe that the Petitioner had got wind of the tariff increase and for this reason, petitioner hastened to file the Bill of Entry in anticipation of the arrival of the "subject shipment" into India. It is also not clear whether the ship entered Indian territorial water at 5.50 a.m. or berthed in the dock at 5.50 a.m. on 13.06.2002, but that would not make any difference for liability to pay the new tariff.

4. Reliance has been placed by learned counsel for the petitioners on the Division Bench Judgment reported as Param Industries Limited Vs. Union of India (UOI) and Others, . In that case, the tariff value in respect of RBD Palmolein had been raised to \$ 372 with effect from 03.08.2001. The allegation was that the Notification had not been published in the Official Gazette on 03.08.2001, but on 06.08.2001. The Court noted that 4th and 5th August were Saturday and Sunday; that the publication could only been carried on 06.08.2001 and a copy thereof could have been received by the Customs Authorities in Cochin only on 07.08.2001. It was in those circumstances that the Division Bench concluded that the new Notification would not be attracted. While so concluding to fortify their conclusion, a reference was made to the decision of the Apex Court in the case of Union of India and Others Vs. M/s. Ganesh Das Bhojraj, . The Three Judge Bench of the Apex Court in Bhojraj had analyzed several Judgments of the Apex Court including Union of India and others Vs. Apar Private Ltd. and Others, ; I.T.C. Limited Vs. Collector of Central Excise, Bombay, ; M/s. Pankaj Jain Agencies Vs. Union of India and others, ; and State of Maharashtra Vs. Hans George, . Their Lordships enunciated the law in these words. "It is an established

practice that the publication in the Official Gazette... 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." In doing so, the provisions of subsection (4) and (5) of Section-25, which were introduced into the Customs Act, 1962 with effect from 01.06.1998, were specifically noticed. The provisions of Section-25 of the Customs Act, 1962 read as under:

25. Power to grant exemption from duty -

(1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by Notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the Notification goods of any specified description from the whole or any part of duty of customs leviable thereon.

(2) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from the payment of duty, under circumstances of an exceptional nature to be stated in such order, any goods on which duty is leviable.

(2A) the Central Government may, if it considers it necessary or expedient so to do for the purpose of clarifying the scope or applicability of any Notification issued under sub-section (1) or order issued under sub-section (2), insert an explanation in such Notification or order, as the case may be, by Notification in the Official Gazette at any time within one year of issue of the Notification under sub-section (1) or order under sub-section (2), and every such explanation shall have effect as if it had always been the part of the first such Notification or order, as the case may be.

(3) An exemption under sub-section (1) or sub-section (2) in respect of any goods from any part of the duty of customs leviable thereon (the duty of customs leviable thereon being hereinafter referred to as the statutory duty) may be granted by providing for the levy of a duty on such goods at a rate expressed in a form or method different from the form or method in which the statutory duty is leviable and any exemption granted in relation to any goods in the manner provided in this sub-section shall have effect subject to the condition that the duty of customs chargeable on such goods shall in no case exceed the statutory duty.

Explanation:- "Form or method", in relation to a rate of duty of customs, means the basis, namely, valuation, weight, number, length, area, volume or other measure with reference to which the duty is leviable.

(4) Every Notification issued under sub-section (1) or sub-section (2A) shall -

(a) unless otherwise provided, come into force on the date of its issue by the Central Government for publication in the Official Gazette.

(b) also be published and offered for sale on the date of its issue by the Directorate of Publicity and Public Relations of the Board, New Delhi.

(5) Notwithstanding anything contained in sub-section (4), where a Notification comes into force on a date later than the date of its issue, the same shall be published and offered for sale by the said Directorate of Publicity and Public Relations on a date on or before the date on which the said Notification comes into force.

(6) Notwithstanding anything contained in this Act, no duty shall be collected if the amount of duty leviable is equal to, or less than, one hundred rupees

5. Our attention has also been drawn to the provisions of Section 15 of the Customs Act, 1962 which is reproduced below for ease of reference.

15. Date for determination of rate of duty and tariff valuation of imported goods-

(1) The rate of duty and tariff valuation, if any, applicable to any imported goods, shall be the rate and valuation in force-

(a) in the case of goods entered for home consumption u/s 46, on the date on which a bill of entry in respect of such goods is presented under that section;

(b) in the case of goods cleared from a warehouse u/s 68, on the date on which the goods are actually removed from the warehouse;

(c) in the case of any other goods, on the date of payment of duty:

PROVIDED that if a bill of entry has been presented before the date of entry inwards of the vessel or the arrival of the aircraft by which the goods are imported, the bill of entry shall be deemed to have been presented on the date of such entry inwards or the arrival, as the case may be.

(2) The provisions of this section shall not apply to baggage and goods imported by post

The proviso to sub-section (1) was introduced by Act 33 of 1996 and conclusively ends the debate on this question. The petition itself pleads that the subject shipment arrived at 5.50 a.m. on 13.6.2002. Accordingly, the Bill of Entry shall be deemed to have been presented only at that time, and at no point anterior thereto. The Notification having been gazetted on 13.06.2002, the subject shipment would be liable to levies prescribed therein, and not in accordance with the fiscal regime attaining on the previous day.

6. The next argument proffered by the learned counsel for the petitioners is predicated squarely on the ratio of the Division Bench in Param Industries Limited. It will be recalled that our learned and esteemed Brothers were also concerned with importation of RBD Palmolein. Section 14(2) was the provision in focus, which we shall extract for facility of reference as under:

Sec. 14(2): Notwithstanding anything contained in sub-section (1) 14 or sub-section (1A), if the Central Government is satisfied that it is necessary or

expedient so to do it may, by Notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value.

Explanation- For the purposes of this section-

(a) "rate of exchange" means the rate of exchange-

(i) determined by the Central Government, or

(ii) ascertained in such manner as the Central Government may direct,

for the conversion of Indian currency into foreign currency or foreign currency into Indian currency.

(b) "foreign currency" and "Indian currency" have the meanings respectively assigned to them in clause (m) and clause (q) of Sec. 2 of the Foreign Exchange Management Act, 1999 (42 of 1999).

The Division Bench opined that since that Notification dealt with the trend values only in respect of some of the goods in contradistinction to the class of goods, it was discriminatory in nature. It was for that reason alone that the Notification was not applied. While referring to Section 14(2), the Division Bench observed as follows:-

A reading of the above section makes it clear that tariff values can be fixed only for any class of goods. The Customs Tariff Act, 1975 specifies the class of goods for the purpose of levy of duty. Under the impugned Notification No. 36/2001-CUS (N.T.), dated 3/8/2011, the trend values have been fixed only in respect of some of the goods viz., Crude Palm Oil, RBD Palmolein classified under Chapter Sub-Heading 15.11 constituting only a part of the class of goods being vegetable oils under Chapter Heading 15 of the Tariff Act. Clearly a large number of other vegetable oils such as sunflower, safflower, cottonseed, soyabean, all of which form part of the same class of goods as the goods notified vide impugned Notification No. 36/2001 -CUS (N.T.), dated 3/8/2011, have been left out. Such a discriminatory fixation of trend value for only part of class of goods is not authorised by statute and in the absence of any reasonable explanation and materials placed on record to satisfy the Court justifying that the same has been issued after due application of mind and objective satisfaction, the notification is not sustainable.

This decision is binding on us and had we found ourselves in the unenviable position of disagreeing altogether with it, we would have recommended that it be placed before a larger Bench. However, the position is that the Customs Valuation (Determination of Value of Imported Goods) Rules, 1988 was not brought to the notice of the Division Bench, though what has now been brought to our notice is the 2007 Rules which are identical to the 1988 Rules insofar as the definition under consideration is concerned and which have superseded 1988

Rules. Hence, the principle of stare decisis stands diluted on account of there being no reference to the 1988 Rules by the Division Bench which decided Param Industries. Rule-2 of the 1988 Rules which are applicable to these cases reads as under:

Definitions: (1) In these rules, unless the context otherwise requires,-

....

(b) "goods of the same class or kind", means imported goods that are within a group or range of imported goods produced by a particular industry or industrial sector and includes identical goods or similar goods;

(c) "identical goods" means imported goods-

(i) which are same in all respects, including physical characteristics, quality and reputation as the goods being valued except for minor differences in appearance that do not affect the value of the goods,

(ii) produced in the country in which the goods being valued were produced; and

(iii) produced by the same person who produced the goods, or where no such goods are available, goods produced by a different person,

but shall not include imported goods where engineering, development work, art work, design work, plan or sketch undertaken in India were completed directly or indirectly by the buyer on these imported goods free of charge or at a reduced cost for use in connection with the production and sale for export of these imported goods;

(e) "similar goods" means imported goods -

(i) which although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable with the goods being valued having regard to the quality, reputation and the existence of trade mark;

(ii) produced in the country in which the goods being valued were produced; and

(iii) produced by the same person who produced the goods being valued, or where no such goods are available, goods produced by a different person,

but shall not include imported goods where engineering, development work, art work, design work, plan or sketch undertaken in India were completed directly or indirectly by the buyer on these imported goods free of charge or at a reduced cost for use in connection with the production and sale for export of these imported goods."

(emphasis has been added by us)

Had these Rules been brought to the attention of our esteemed Brothers in Param Industries Limited it would have become manifestly patent that all the

commodities dealt with in Chapter-15 of Section-III are not required to be dealt with identically.

7. We shall now consider the provisions of Chapter-15 found Section-III of the Customs Tariff Act 1975. They read thus:

Section III Customs Tariff Act, 1975: Chapter-15 Animal or vegetable fats and oils and their cleavage products; prepared edible fats; animal or vegetable waxes.

Heading No.

Sub-Heading No.

Description of article

Rate of duty

Standard

Preferential areas

(1)

(2)

(3)

(4)

(5)

15.01

1501.00

LARD: OTHER PIG FAT AND POULTRY FAT, RENDERED, WHETHER OR NOT PRESSED OR SOLVENT-EXTRACTED

85%

-

15.02

1502.00

FATS OF BOVINE ANIMALS, SHEEP OR GOATS, RAW OR RENDERED, WHETHER OR NOT PRESSED OR SOLVENT -EXTRACTED

85%

-

15.03

1503.00

LARD STEARIN, LARD OIL, OLEOSTEARIN, OLEO-OIL AND TALLOW OIL, NOT EMULSIFIED OR MIXED OR OTHERWISE PREPARED

85%

-

15.04

FATS AND OILS AND THEIR FRACTIONS, OF FISH OR MARINE MAMMALS, WHETHER OR NOT REFINED, BUT NOT CHEMICALLY MODIFIED

1504.10

-Fish-liver oils and their fractions

85%

-

1504.20

-Fats and oils and their fractions, of fish, other than liver oils

85%

-

1504.30

-Fats and oils and their fractions, of marine mammals

85%

-

15.05

WOOL GREASE AND FATTY SUBSTANCES DERIVED THEREFROM (INCLUDING LANOLIN)

1505.10

-Wool grease, crude

85%

-

1505.90

-Other

85%

-

15.06

1506.00

OTHER ANIMAL FATS AND OILS AND THEIR FRACTIONS, WHETHER OR NOT REFINED, BUT NOT CHEMICALLY MODIFIED

85%

15.07

SOYA-BEAN OIL AND ITS FRACTIONS, WHETHER OR NOT REFINED, BUT NOT CHEMICALLY MODIFIED

1507.10

-Crude oil, whether or not degummed

85%

75%

1507.90

-Other

85%

75%

15.08

GROUND-NUT OIL AND ITS FRACTIONS, WHETHER OR NOT REFINED, BUT NOT CHEMICALLY MODIFIED

1508.10

-Crude oil

85%

75%

1508.90

-Other

85%

75%

15.09

OLIVE OIL AND ITS FRACTIONS, WHETHER OR NOT REFINED, BUT NOT CHEMICALLY MODIFIED

1509.10

-Virgin

85%

75%

1509.90

-Other

85%

75%

15.10

1510.00

OTHER OILS AND THEIR FRACTIONS, OBTAINED SOLELY FROM OLIVES, WHETHER OR NOT REFINED, BUT NOT CHEMICALLY MODIFIED, INCLUDING BLENDS OF THESE OILS OR FRACTIONS WITH OILS OR FRACTIONS OF HEADING NO. 15.09

85%

75%

15.11

PALM OIL AND ITS FRACTIONS, WHETHER OR NOT REFINED, BUT NOT CHEMICALLY MODIFIED

1511.00

-Crude oil

85%

75%

1511.90

-Other

85%

75%

15.12

SUNFLOWER-SEED, SAFFLOWER OR COTTON-SEED OIL AND (FRACTIONS THEREOF) WHETHER OR NOT REFINED, BUT NOT CHEMICALLY MODIFIED

-Sunflower-seed or safflower oil and fractions thereof:

1512.11

-Crude oil

85%

75%

1512.19

-Other

85%

75%

-Cotton-seed oil and its fractions

1512.21

-Crude oil, whether or not gossypol been removed

85%

75%

1512.29

-Other

85%

75%

15.13

COCONUT (COPRA), PALM

KERNEL OR BABASSU OIL AND (FRACTIONS THEREOF), WHETHER OR NOT
REFINED, BUT NOT CHEMICALLY MODIFIED

1513.11

-Crude oil

85%

75%

1513.19

-Other

85%

75%

-Palm kernel or babassu oil and (fractions thereof)

1513.21

-Crude oil

85%

75%

1513.29

-Other

85%

75%

15.14

RAPE, COLZA OR MUSTARD OIL AND (FRACTIONS THEREOF), WHETHER OR NOT REFINED, BUT NOT CHEMICALLY MODIFIED

1514.10

-Crude oil

85%

75%

1514.90

-Other

85%

75%

15.15

OTHER FIXED VEGETABLE FATS AND OILS (INCLUDING JOJOBA OIL) AND THEIR FRACTIONS, WHETHER OR NOT REFINED, BUT NOT CHEMICALLY MODIFIED

-Linseed oil and its fractions

1515.11

-Crude oil

85%

75%

1515.19

-Other

85%

75%

-Maize (com) oil and its fractions:

1515.21

-Crude oil

85%

75%

1515.29

-Other

85%

75%

1515.30

-Castor oil and its fractions

85%

75%

1515.40

-Tung oil and its fractions

85%

75%

1515.50

-Sesame oil and its fractions

85%

75%

1515.60

-Jojoba oil and its fractions

85%

75%

1515.90

-Other

85%

75%

These commodities/products are palpably not identical or similar and therefore do not constitute a homogeneous or composite character making them to

correspond to "any class of imported goods" with the contemplation of Section 14(2) of the Customs Act read with Rule-2 of the 2007 Rules.

8. We find ourselves totally unmoved and unpersuaded by the argument advanced by the learned counsel for the petitioner that the entire Chapter-15 deals with one single class of goods. Instead, we are of the unequivocal opinion that each of the subject heads defined in Chapter-15 i.e., 15.01 to 15.22 deals with distinct "class of goods", and the sub-divisions of commodities/products entitled as "cleavage products" with which we are presently concerned. The tariff on goods is imposed to regulate the importation of different commodities so as to bring about a balance in prices in domestic markets. The demand of items such as Lard and animal fats is not similar to that of natural oils. Lard or pig fat will not be consumed by certain sections of the society and they may also not be palatable to persons belonging to different communities of our society. The reality is that there are also fluctuating preferences even of natural oils as cooking mediums, the consumption is susceptible to dietary research as well as the publicity and advertising blitz, and accordingly demand would increase or decrease. It is for this reason, it seems to us, to be inescapable that each of the subject headings contained in Chapter-15 of Section-III comprises a different class of goods in themselves. This being so, it is open to the Legislature to prescribe and modify from time to time different tariff rates in respect of each of them and such action of the instrumentalities or functionaries could not be termed as violative of Article-14 of the Constitution of India. Section 14 (2) which was amended by the Finance Act, 2007, specifically contemplates the actual price of the commodities at any given point of time. Therefore, Chapter-15 of the Customs Tariff Act 1975 cannot be dealt with as one composite subject, and each of the entries mentioning a class of goods and their cleavages or fragments or divisions can be dealt with separately and distinctly. We think it proper to reiterate that the definition contained in the Customs Valuation Rules, 1988 was not brought to the notice of the Division Bench which decided *Param Industries*, as is manifestly evident from a perusal thereof.

9. In view of this analysis, we find no merit in the second argument advanced by learned counsel for the petitioner that the trend value of the goods cannot be prescribed separately for each of the several subject headings contained in Section-III, Chapter-15 of the Customs Tariffs Act 1975. Accordingly, we hold that prescribing different tariffs only for Palmolein or Palm oil covered by Heading No. 15.11 is not violative of Article-14 of the Constitution of India. The position stands amply clarified by the definition in Rule 2 of the Customs Valuation Rules.

10. In *Hind Plastics and Another Vs. Collector of Customs, Bombay and Another*, their Lordships have clarified the position in these words - "What should be the tax is a matter not to be decided by the Courts but by the appropriate instrumentalities or functionaries". Viewed from any angle, the writ petitions are devoid of merits and they are liable to be dismissed.

11. We conclude that the Bill of Entry must be is deemed to have been presented

on 13.06.2002 and not on 12.06.2002. Secondly, Notification dated 13.06.2002 would apply to the subject shipment since it was published in the Official Gazette on that date and accordingly it was efficacious from the commencement of that date itself. Thirdly, the Parliament itself is empowered to prescribe and modify from time to time, the different tariffs for each class of goods dealt with in the sundry headings 15.01 to 15.22 of Chapter-15 of Section-III of the Customs Tariff Act 1975.

We are mindful of the recent decision of the Apex Court in Indian Council for Indian Council for Enviro-Legal Action Vs. Union of India (UOI) and Others, wherein compound interest has been ordered. Their Lordships pithily pointed out that:

The other aspect which has been dealt with in great detail is to neutralize any unjust enrichment and undeserved gain made by the litigants. While adjudicating, the Courts must keep the following principles in view:

- (1) It is the bounden duty and obligation of the Court to neutralize any unjust enrichment and undeserved gain made by any party by invoking the jurisdiction of the Court.
- (2) When a party applies and gets a stay or injunction from the Court, it is always at the risk and responsibility of the party applying. An order of stay cannot be presumed to be conferment of additional right upon the litigating party.
- (3) Unscrupulous litigants be prevented from taking undue advantage by invoking jurisdiction of the Court.
- (4) A person in wrongful possession should not only be removed from that place as early as possible but be compelled to pay for wrongful use of that premises fine, penalty and costs. Any leniency would seriously affect the credibility of the judicial system.
- (5) No litigant can derive benefit from the mere pendency of a case in a Court of law.
- (6) A party cannot be allowed to take any benefit of his own wrongs.
- (7) Litigation should not be permitted to turn into a fruitful industry so that the unscrupulous litigants are encouraged to invoke the jurisdiction of the Court.
- (8) The institution of litigation cannot be permitted to confer any advantage on a party by delayed action of Courts.

Accordingly, the writ petitions are dismissed with costs of Rs. 25,000/- on each petition. The interim orders are recalled. The shortfall of the duty paid as against the duty demanded/leviable under the subject Notification dated 13.06.2002 together with interest thereon at the rate of 12% per annum be deposited by the petitioners within sixty days from today.