

(2002) 09 KAR CK 0012

In the Karnataka High Court

Case No : Writ Appeal No's. 6030 and 6031 to 6034 of 2001, Writ petition No's. 34775 and 34757 to 34760 of 2001 and Contempt of Court Case No. 3074 of 2001

Param Industries Limited

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 03-09-2002

Acts Referred:

Constitution of India, 1950 — Article 14
Customs Act, 1962 — Section 14 (2), 25 (4), 25 (5)
Evidence Act, 1872 — Section 35, 38, 81

Citation : (2003) 86 ECC 415 : (2002) 150 ELT 3 : (2002) ILR (Kar) 4523 :
(2003) 1 KarLJ 213 : (2002) 4 KCCR 359 SN

Hon'ble Judges : N.K. Jain, C.J.;V.G. Sabhahit, J

Bench : Division Bench

Advocate : Raval and K. Sashikiran Shetty, for the Appellant; Ashok Harnahalli, Central Government Standing Counsel in W.A. Nos. 6030 and 6031 to 6034 of 2001 and C.C.C. No. 3074 of 2001 and K. Sarojini Muthanna, Additional Central Government Standing Counsel in W.P. Nos. 34755 and 34757 to 34760 of 2001, for the Respondent

Judgement

N.K. Jain, J. 1. These writ petitions and writ appeals are disposed of by this common order since they involve common questions of law and facts. The parties would be referred to with reference to their rank in the writ petitions.

2. The petitioners in these writ petitions are engaged in the import and export of various edible oils. They have been importing edible oils in bulk from various ports throughout the country. It is stated that the petitioners had imported RBD Palmolein which had arrived at port of destination and the same were cleared after payment of import duty of 85% of its value pursuant to the notification which was in existence on the said date. Major quantity of goods under the aforesaid consignment was removed from the warehouse, but removal of the balance quantity was denied. However, subsequently they received notice stating that in view of the notification u/s 14(2) of the Customs Act, 1962, which came

into effect from 3-8-2001, the tariff value in respect of RBD Palmolein had been raised to 372 US \$ per metric ton and therefore the petitioners were liable to pay the difference in the tariff as they had paid the tariff as per the earlier notification. Being aggrieved by the said demand and the alleged notification, the writ petitions were filed challenging the same alleging that the said notification was not published in the Gazette on 3-8-2001 and the RBD Palmolein which had been imported by the petitioners had been subjected to duty as per the prevalent tariff rate and the alleged Gazette notification must have been published on 6-8-2001. It is stated that the notification received at Cochin Custom Authorities was notification which was required to be published in the Official Gazette and the same was received on 3-8-2001 at 11.44 p.m. and therefore the publication in the Gazette was not made on 3-8-2001 and the change in the rate of tariff was not brought to the notice of the petitioners and even the Customs Authorities were not aware of the said change and since 4th and 5th August were Saturday and Sunday which were public holidays, the publication must have been made after 6-8-2001 and the copy of the Gazette notification is received by the Customs Authorities only on 7-8-2001. Further, it is stated that the notification dated 3-8-2001 is null and void as it is contrary to the provisions of the Act as tariff value has been raised only in respect of some of the goods, that is, RBD Palmolein, RBD Palm Oil and Crude Palm Oil whereas a large number of other goods such as sunflower, safflower or cottonseed oil, rapeseed oil and soyabean oil have been left out, which amounts to discrimination and therefore the notification is violative of the provisions of Article 14 of the Constitution of India. It is also stated that the petitioners have imported the RBD Palmolein in bulk on the basis of the tariff value which was in existence and imposition of the revised tariff value without bringing to the notice of the petitioners would amount to violation of the rights of the petitioners as enshrined in Article 19(1)(g) of the Constitution of India and therefore null and void.

3. In the said writ petitions the petitioners sought for an interim order of stay of the letter demanding differential tariff amount pursuant to the notification dated 3-8-2001. The learned Single Judge by his order dated 18-9-2001 rejected the prayer for interim order.

4. Being aggrieved by the same, the petitioners preferred W.A. Nos. 6030 to 6034 of 2001. The said appeals were admitted by this Court on 6-10-2001 and interim order was granted for ten weeks and it was ordered that the goods shall be released on the appellant furnishing solvent security for the differential duty as per the notification dated 3-8-2001 to the satisfaction of respondent 2-Commissioner of Customs, Mangalore. Learned Counsel for the appellants has moved an Application, I.A. No. II as respondents have not accepted the solvency certificate. On 6-11-2001, it was ordered that the appellants are free to file solvent security as per order dated 6-10-2001. On 22-11-2001, learned Counsel for the appellants submitted that the order had been partly complied with, but the authority had not accepted the solvent security and asked for Bank Guarantee in spite of the orders dated 6-10-2001 and 6-11-2001. A contempt

petition has been filed and notice has been issued. However, on 31-1-2002, learned Counsel for the appellants submitted that respondents had already released goods in three cases and they are now insisting on payment being made, of 25% of the value of the goods to be released as Bank Guarantee in remaining cases and for that he submitted that as goods are going to perish, in the circumstances, the appellants agreed to furnish 25% of the value of the goods to be released as Bank Guarantee. It was ordered to release the goods without prejudice to the pending contempt petition and to post the matter in March 2002. Thereafter, on 18-4-2002 it was prayed that as per the orders, the appellants may be permitted to re-export the balance of imported goods on the ground that since appeals are pending the respondents are not considering the applications though granted in other cases. However, learned Central Government Standing Counsel has agreed that they will consider the applications as per law and this Court clarified that the pendency of the appeals will not preclude the Authority to consider and grant permission for re-exporting the goods, if permissible in law. Permission was granted. In contempt case however, as agreed by the parties, writ petitions, contempt petition as well as writ appeals were directed to be heard together at an early date.

5. The respondents have filed objection statement to the writ petition stating that the notification dated 3-8-2001 was published in the Official Gazette on 3-8-2001 itself and the duty for RBD Palmoelin was raised to 372 US \$ per metric ton and the said change came into effect on 3-8-2001, the date of publication in the Official Gazette and therefore though the bills were cleared by charging duty as per the existing tariff, in view of the enhancement of the tariff value at 372 US \$ per metric ton, the respondents have demanded the petitioners to pay the differential duty and they are bound to pay the same. It is also stated that the petitioners should exhaust remedy u/s 128 of the Customs Act by filing appeal before the Commissioner and therefore there is no merit in the writ petitions and the same is liable to be dismissed.

6. With the consent of the parties, the writ petitions with writ appeals and contempt case are taken up for final hearing.

7. We have heard Sri Raval, Senior Advocate for Sri K. Shashikiran Shetty, appearing for the petitioners and Sri Ashok Harnahalli and Smt. K. Sarojini Muthanna, learned Central Government Standing Counsels appearing for the respondents and perused the materials on record and the case-law cited.

8. So far as the decision in Union of India and Ors. v. Ganesh Das Bhojraj, is concerned, the Supreme Court while considering the notification issued u/s 25 of the Customs Act, 1962 observed that the notification would come into operation as soon as it is published in the Gazette of India i.e., the date of publication in the Gazette, unless the contrary is proved. In that case for want of availability of notification, the question that what will be the impact of the notification in the Gazette on the person affected when criminal consequences were sought to be inflicted, was left open to be gone into in an appropriate case. However, the legal

position is not in dispute. It is settled that alternative remedy will not be a bar if on the face of it, the issuance of notification is bad and ultra vires. It is also settled that the aggrieved person has no right to get the reasons communicated. What is necessary is, there should be reasons available on the record. At the same time reasons cannot be supplemented or added by filing an affidavit. However, this Court can always look into the reasons by calling records.

9. Learned Counsel for the petitioners submits that the alleged notification was sent to be published in the Gazette and was available on the internet site www.cbec.gov.in of the respondent-department, but the same was not available upto 4-8-2001 and notification is also bad as it does not include other classes of goods and only palmolein oil is singled out for additional tariff and trend of value of goods is not taken into account.

10. The learned Counsel for the respondents submitted that the notification dated 3-8-2001 was published in the Gazette on 3-8-2001 itself and therefore in view of the provisions of Section 14 the goods imported by the petitioners were liable to duty as per notification dated 3-8-2001 which has come into effect on the same day and therefore the petitioners are liable to pay differential duty as demanded by the respondents and there is no merit in the contention of the learned Counsel for the petitioners that the notification was not published on 3-8-2001 and that it was published only after 6-8-2001 and therefore the writ petitions are liable to be dismissed.

11. In the instant case, the point for determination is as to whether the Notification No. 36/2001-CUS (N.T.), dated 3-8-2001 was published in the Official Gazette on 3-8-2001 itself, as contended by the Revenue Authorities or was it notified on 6-8-2001 or thereafter, as stated by the petitioners and further whether the notification has been issued within the terms and after meeting the requirements of Section 14(2) of the Customs Act.

12. In the facts of the given case, it is clearly averred in the petitions that notification dated 3-8-2001 was not gazetted on the same day. 4th and 5th were public holidays and hence notification must have been published in the Gazette only after 6-8-2001 and petitioners' Counsels have also produced copy of fax message received at Cochin Excise Office which was received at 11:44 p.m. on 3-8-2001 and at that time notification was yet to be published in the Gazette as copy contains endorsement "to be published in Gazette". In the statement of objections filed by respondents it is stated that notification was issued on 3-8-2001 and published on the same day in Gazette of India and displayed on notice board of Department of Publication as admitted in the petition. The petitioners have not admitted publication of notification in Gazette on 3-8-2001 and it is specifically averred that publication in the Gazette was subsequent to 6-8-2001. Further, the petitioners have produced copy of letter dated 1-2-1990 written by Government of India, Ministry of Finance, Department of Revenue (Annexure-E in W.P. No. 34758 of 2001) addressed to the Director, Directorate of Publication, Government of India which shows that as per directions issued by

earlier letter dated 12-8-1985, it was meant to restrict issuing of letters to the private parties intimating them about the date of actual publication in the Gazette as it was causing practical difficulties and was giving rise to disputes regarding validity of notification from the date of issue. Hence, petitioners are unable to produce documents showing exact date of publication and it is stated that it is for the respondents to show by producing relevant records that notification was published in the Gazette on 3-8-2001 itself. It is also to be seen that in response to a clarification sought by the petitioners, the Assistant Controller (Business), Government of India, Department of Publication, Delhi vide his letter dated 10-9-2001 has informed the petitioners that Issue No. 548 of the Official Gazette was made available for public sale on 6-8-2001 as per the records of the department. The issue number of the Customs Notification No. 36/2001-CUS (N.T.), dated 3-8-2001 being 549, it is clearly established that the said notification was made available for public sale on or after 6-8-2001, and therefore, the question of publication of the notification dated 3-8-2001 on the same day does not arise. It is also to be seen that on the basis of bill of entry for home consumption assessment was completed. Under the circumstances, no inference can be drawn that the notification dated 3-8-2001 was gazetted on the same day itself. It is also to be seen that the Parliament has added Sub-sections (4) and (5) to Section 25 of the Customs Act by Act 25 of 1998 with effect from 1-6-1998, prescribing that unless otherwise provided, every notification issued u/s 25(1) comes into force on the date of its issue by the Central Government for publication in Official Gazette with the further stipulation that such notification shall 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. This clearly shows the intention of the legislature that a notification is to be effective from the date when it is issued by the Central Government for publication in the Official Gazette. The same analogy will apply to the instant case. As per the intention of the legislature and the order of the Supreme Court a notification can be said to be made on the same day only if it is published and offered for sale on the date of its issue by the Directorate of Publicity and Public Relations of the Board, New Delhi. Failure to do so could not make a notification effective from the date of its issue for publication. This provision added with effect from 1-6-1998 also shows that the date of publication in the Official Gazette and the date of its issue for publication in the Official Gazette can be different. In the present case the said notification was published in the Official Gazette on 6-8-2001 and not before 6-8-2001 and was offered for sale not before 6-8-2001. Therefore, even as per the judgment of the Hon'ble Supreme Court, the said notification is to be effective with effect from 6-8-2001. The learned Central Government Standing Counsel has not been able to show that it was published on 3-8-2001 and they also offered this notification for sale on the date of its issue by the Directorate of Publicity and Public Relations of the Board, New Delhi as per the Amendment. For our satisfaction, we granted time to the Central Government Standing Counsel to place the records. It is true that Gazette notification is admissible being the official record evidencing public affairs and

the Court is required to presume its contents as genuine under Sections 35 and 38 read with Section 81 of the Indian Evidence Act unless contrary is proved. Despite directions the respondents have not chosen to produce the records to show that averment made in the writ petitions is false and that notification was published on 3-8-2001 itself. It is clear from the averments made in the affidavit dated 30-8-2002 and Annexure-R1 produced along with the affidavit that Annexure-R1 is not the Gazette notification, it is only a letter addressed to the Manager, Government of India Press, Mayapuri, New Delhi to publish the notification dated 3-8-2001 and no records have been produced to show the exact date on which notification was published in the Gazette. Annexure-R1 would only reveal that the notification was forwarded to the Manager, Government of India Press to publish the same in the Official Gazette and there is no record further to show that pursuant to the said letter Gazette notification was published on 3-8-2001 itself. But on a perusal, it is clear from Annexure-R1 that the date 6-8-2001 has been overwritten as 3-8-2001 and that apart in the letter sent to the Government of India Press on 3-8-2001 the said overwriting has not been attested or explained in the affidavit. Be that as it may. What is produced is the Xerox copy of the letter and therefore the said letter is not helpful to show that it was published in the Gazette on 3-8-2001 itself in the Gazette on the same day and on the other hand it would help the petitioners' contention.

13. It is also to be seen that once on the basis of bill of entry for home consumption, the assessment has been made as per the earlier notification dated 1-3-2001, the rate as per the new notification i.e., notification dated 3-8-2001 is not attracted. Merely on the basis of notifying in website and showing a letter addressed to the Manager, Government of India Press on 3-8-2001, without actual publication of the notification in the Gazette, it cannot be presumed that there was proper publication as stated. So far as the order of the Madras High Court in W.Misc.P. Nos. 22829 to 22831 of 2001 and connected matters is concerned, it is not helpful as it is an interim order. Further, in that case the learned Single Judge *prima facie* came to the conclusion that "the relevant date for the assessment of the duty was only on 5-8-2001, when admittedly the date on which the entry inwards of the vessel was 5-8-2001". However, in other cases interim order was granted with some conditions. So the notification is liable to be set aside. We are constrained to hold that contrary is proved and presumption of publication on 3-8-2001 is not available to the respondents in this case and notification dated 3-8-2001 did not acquire the elements of operative ness and enforceability on 3-8-2001 and hence additional duty imposed by notification could not be levied on 3-8-2001 and hence petitioners are entitled to succeed on this ground.

14. The next argument is that the notification is not sustainable, being discriminatory in fixation of trend value for only a part of class of goods, which is not authorised by Statute. The law is well-settled, that it is within the dominion of the Government to change tariff and it should be effective from the date of

publication unless made retrospective. Once tariff is changed, the appellants are liable to pay as per the changed tariff.

15. To consider this argument, it will be appropriate to quote Section 14(2) of the Act, which reads as follows:

"14(2) Notwithstanding anything contained in Sub-section (1) {or Sub-section (1-A)}, 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".

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 3-8-2001, 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 the impugned Notification No. 36/2001-CUS (N.T.), dated 3-8-2001, 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.

16. In view of the above, writ petitions are allowed. The petitioners would be entitled to cancellation of security and Bank Guarantee furnished as per the conditions of the interim order and for the reasons stated above. The impugned notification is set aside and the demand in consequence of the said notification is also set aside. Writ appeals pertain to interim order in the writ petitions. As the writ petitions are allowed no further order is necessary in the writ appeals. Accordingly, they are disposed of. So far as the contempt petition is concerned, since the writ petitions have been allowed, it is not necessary to pass any order therein and the same is disposed of and notice is discharged. Costs are made easy.