
(1991) 09 BOM CK 0042

In the Bombay High Court

Case No : Appeal No. 302 of 1988 in Writ Petition No. 2413 of 1985

Union of India

APPELLANT

Vs

Gtc Industries Ltd.

RESPONDENT

Date of Decision : 05-09-1991

Acts Referred:

Central Excise Rules, 1944 — Rule 8(1)
Customs Act, 1962 — Section 25, 25(1)

Citation : (1991) 56 ELT 733

Hon'ble Judges : S.P. Bharucha, J; S.M. Jhunjhunwala, J

Bench : Division Bench

Advocate : Mr. H.V. Mehta and Mr. M.J. Sethna, for the Appellant; Mr. I.M. Chagla, Mr. J. Reis and Mr. S. Shankar, for the Respondent

Judgement

S.M. Jhunjhunwala, J.—This Appeal has been preferred by the Union of India and another against the judgment and order of the Learned Single Judge in Writ Petition No. 2413 of 1985, by which the Rule has been partly allowed and the Appellants are ordered to refund the sum of Rs. 35,57,094.74 being the amount of excess recovery made from Respondents for the period from 30th November, 1982 to 7th December 1982 together with interest therein at the rate of 6% per annum from the date of the judgment i.e. 4th November, 1987 until payment.

2. The 1st Respondents are engaged in the manufacture of cigarettes having the factory situated at Vileparle, Bombay. The 1st Respondents are required to pay excise Duty on excisable articles produced or manufactured by the 1st Respondents as per the rates that prevail under The Central Excises and Salt Act, 1944 (now referred to as "the said Act."). In exercise of the powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, 1944 (Now referred as "the said Rules") read with sub-Section (3) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957, the Central Government issued a Notification No. 30/79-C.E., dated 1st March, 1979, exempting Cigarettes of the description specified in Column (1) of the Table annexed thereto and falling

under sub-item II(2) of Item No. 4 of the first schedule to the said Act, from so much of the duty of excise leviable thereon both under the said and the Additional Duties on Excise Act, as is in excess of the duty specified in the corresponding entry in column (2) thereof. The said Notification granted partial exemption to cigarettes. By another Notification No. 284/82-C.E., dated 30th November, 1982 also issued by the Central Government in exercise of powers conferred by the said sub-rule (1) of Rule 8 of the said Rules, read with sub-section (3) of Section 3 of the said Additional Duties of Excise Act, the said Notification No. 30/79-C.E., dated 1st March, 1979 was rescinded. On 14th December, 1982, the Superintendent of Central Excise, Range IX, Bombay D N - KIII addressed a letter to the 1st Respondents inviting attention of the 1st Respondents to the said Notification dated 30th November, 1982 by which the partial exemption granted under the said notification dated 1st March, 1979 was withdrawn. Some correspondence thereafter ensued between the Excise Department and the 1st Respondents. On 3rd January 1983, the 2nd Appellant recovered from the 1st Respondent the sum of Rs. 54,40,642.71 as differential duty in respect of clearances of Cigarettes effected by the 1st Respondents during the period between 30th November, 1982 and 13th December, 1982 on the ground that the 1st Respondents were liable to pay the excise duty at the tariff rates as prescribed by the said Notification dated 30th November, 1982 and not at the concessional rates of duty prescribed under the said Notification dated 1st March, 1979.

3. As averred in the petition, the 1st Respondents learnt about the judgment dated 19th August, 1984 delivered by the Madras High Court in the case of Asia Tobacco Company Ltd. Vs. Union of India and Others, by which, the Madras High Court held that the said Notification dated 30th November, 1982 was placed on sale for public only on 8th December, 1982 and therefore, it was not permissible to enforce the withdrawal of the partial exemption as per the said Notification dated 1st March, 1979 earlier to that date. The rescission of the said Notification dated 1st March, 1979 was held to be effective only from 8th December, 1982. Neither the 1st Respondents not even the Superintendent of Central Excise were aware of the said Notification dated 30th November, 1982 until 14th December, 1982 inasmuch as uptill 13th December, 1982, the Excise Authorities freely permitted the 1st Respondents to clear the Cigarettes manufactured by the 1st Respondents by counter signing the gate passes on the basis of the partial exemption under the said Notification dated 1st March, 1979. On acquiring knowledge about the said Judgment of the Madras High Court, the 1st Respondents realised that the Appellants had erroneously recovered the said sum of Rs. 54,40,642.71 from the 1st Respondents and that the 1st Respondents had paid the said amount under a mistake of law. On 30th October, 1984, the 1st Respondents applied to the 2nd Appellant for refund of the said sum of Rs. 54,40,642.71 being the amount, according to the 1st Respondents, wrongly recovered from the 1st Respondents as differential duty in respect of clearance of Cigarettes between 30th November, 1982 and 13th December, 1982.

4. By an Order dated 22nd July, 1985, the 2nd Appellant rejected the claim of the 1st Respondents for refund of the said sum of Rs. 54,40,642.71 holding that the operation of the said Judgment of the Madras High Court has been stayed in an appeal by the Excise Authorities there against before a Division Bench of the said High Court and that the said Notification dated 30th November, 1982 became effective on publication thereof in the Gazette on 30th November, 1982 itself irrespective of the fact that the same was made available to the public at a later date. This decision of the 2nd Appellant was impugned by the 1st Respondents in the Writ Petition filed by the 1st Respondents.

5. As per the pleadings on record, the following facts do not appear to be in dispute :

(i) by the said Notification dated 1st March, 1979 issued under Rule 8(1) of the said Rules, partial exemption was granted;

(ii) by the said Notification dated 30th November, 1982, the exemption granted by the said notification dated 1st March, 1979 was rescinded;

(iii) though the said Notification dated 30th November, 1982 was published in the Official Gazette on 30th November, 1982 itself, the copies of the Gazette were made available to the public only on 8th December, 1982; and

(iv) the excise department had informed the 1st Respondents in common with other cigarettes manufactures about the withdrawal of the partial exemption granted under the said notification dated 1st March, 1979 on 14th December, 1982.

6. Mr. Mehta, the Learned Counsel appearing for the Appellants has submitted that u/s 38 of the said Act, all rules made and notifications issued thereunder are required to be published in the Official Gazette and the said Notification dated 30th November, 1982 having been published on 30th November, 1982 in the Official Gazette, the same became effective and operative from 30th November, 1982 itself and that the 1st Respondents did become liable to pay full duty with effect from 30th November, 1982 itself. He has further submitted that the operation of the judgment of the Madras High Court in Asia Tobacco Company Ltd. (supra) having been stayed by the Division Bench of the said Court, the said judgment cannot be basis for granting any relief to the 1st Respondents. He has further submitted that M/s. I.T.C. Ltd. Bangalore on whose behalf the cigarettes were manufactured by the said Asia Tobacco Company Limited was made known of the said Notification dated 30th November, 1982. On 2nd December, 1982 as 1st December, 1982 being a holiday of the said Company and as such, the said Notification became effective as from 30th November, 1982 itself.

7. In support of his aforesaid submissions; Mr. Mehta has relied upon in the case of General Fibre Dealers Ltd. and Another Vs. Union of India (UOI) and Others, . In that case, a notification dated 18th April, 1980 was issued u/s 25(1) of the customs Act, 1962 by which the Central Government had exempted Aluminium

Scrap when imported into India from so much of the Customs duty leviable thereon which is specified in the first schedule of the Customs Tariff Act as in excess of 35% ad valorem of Customs duty leviable thereon. By a further Notification dated 1st January, 1981, the said exemption from basic Customs duty and additional duty was extended upto and inclusive of 31st March, 1981. On 30th March, 1981, the Central Government in exercise of its powers u/s 25(1) of the Customs Act had made and published two notifications rescinding the earlier notification dated 1st January, and published two notifications rescinding the earlier notification dated 1st January, 1981 and imposing additional duty at the rate of 24 per cent ad valorem on Aluminium scraps. The said notification dated 30th March, 1981 was impugned and it was submitted on behalf of the Petitioners therein that the same became operative only when the Official Gazette in which it was published was made available to the public and not on the date of its publication. On the facts of that case and limited for the purposes of Section 25 of the Customs Act, it was held by the Calcutta High Court that publication of the said notification dated 30th March, 1981 in the Official Gazette should be deemed to be sufficient to make it operative and its availability to the public cannot be made a condition precedent for the same.

8. Mr. Mehta has also relied upon the case of State of Maharashtra Vs. Hans George, . The fact in that case were that the Government of India in exercise of its power u/s 8 of the Foreign Exchange Regulation Act, 1947 issued on 25th August, 1948, a Notification to the effect that gold or gold articles, among others, should not be brought into India or sent to India except with the general or special permission of the Reserve Bank of India. On the same day, the Reserve Bank of India issued a notification giving a general permission for bringing or sending any such gold provided it was no "through transit" to a place outside India. On 24th November, 1962, the Reserve Bank of India published a Notification dated 8th November 1962, in supersession of its earlier Notification placing further restriction on the transit of such gold to a place outside the territory of India, one of them being that such gold should be declared in the "Manifest" for transit in the "same bottom Cargo" or "transshipment Cargo". Respondent George Left Zurich by a Swiss Air Plane on 27th November, 1962, which touched Santacruz Air port at 6.06 a.m. on the next day morning. The Customs Officers, on the basis of the previous information, searched for the Respondent and found him sitting in the plane. On search of the person of the Respondent George, it was found that he had put on a jacket containing 28 compartments and in 19 of them he was carrying gold slabs weighing 34 kilos approximately and it was found that he was a passenger bound for Manila. He was, therefore, prosecuted for the customs offence. In that context, a contention was urged on behalf of the Respondent George, in that case, that till this notification published on 24th November, 1962, by the Reserve Bank of India was brought to the actual knowledge of the Respondent George, it could not be said to have been legally published and, therefore, he could not be held that the test to find out effective publication would be publication in India, not outside India,

so as to bring it to the notice of everyone who intends to pass through India. It was "Published" and made known in India by publication in the Gazette on 24th November, 1962, and the ignorance of it by the Respondent George who was a foreigner, was wholly irrelevant. It was further held that even on the narrowest view of the law the said notification of Reserve Bank of India must be deemed to have been published in the sense of having been brought to the notice of the relevant public at least by 25th November, 1962 and hence the plea by the Respondent George that he was ignorant of the law cannot afford him any defence in his prosecution. In the instant case, it is not in dispute that the Official Gazette in which the said Notification dated 30th November 1982 was published, was made available to the public only on 8th December, 1982 and as such, it was brought to the notice of the public on 8th December, 1982.

9. Mr. Chagla, the learned Counsel appearing for the 1st Respondents in appeal has submitted that the said Notification dated 30th November, 1982 came into effect when it was made known and not from the date thereof. Since the said Notification was made known and available to the public in general on 8th December, 1982, when Official Gazette in which the same was published, was made available to the public in general, the Appellants were entitled to collect full duty at Tariff rates with effect from 8th December, 1982 and not from 30th November, 1982.

10. In support of his aforesaid submissions, Mr. Chagla has relied upon the case of Harla Vs. The State of Rajasthan, . In that case, the appellant was convicted u/s 7 of the Jaipur Opium Act and fined Rs. 50/-. While emphasising the necessity of promulgation and publication of law, in para 8 of the judgment, it has been held as under :-

"In the absence of any special law or custom, we are of opinion that it would be against the principles of natural justice to permit the subjects of a State to be punished or penalised by laws of which they could not even with the exercise of reasonable diligence have acquired any knowledge. Natural justice required that before a law can become operative it must be promulgated or published. It must be broadcast in some recognisable way so that all men may know what it is; or, at the very least, there must be some special rule or regulation or customary channel by or thorough which such knowledge can be acquired with the exercise of due and reasonable diligence. 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 civilised man. It shocks his conscience. In the absence therefore of any law, rule, regulation or custom, we hold that a law cannot come into being in this way. Promulgation or publication of some reasonable sort is essential."

11. Mr. Chagla has also relied upon the case G. Narayana Reddy and others v. The State of Andhra Pradesh and others reported in (1975) 35 S.T.C. 319. In that

case, in exercise of the powers u/s 40(1) of the Andhra Pradesh General Sales Tax Act, 1957, the Government by a G.O. altered the Third Schedule regarding the rate of tax. Though the G.O. was published in the Gazette bearing date 1st December, 1966, it was found that Gazette was printed and released to the public only on 12th December, 1966. The Petitioner in that case, some of whom were subscribers to the Gazette, filed Writ petition in the High Court and contended that the authorities were not entitled to give effect to the notification with effect from 1st December, 1966, and they were entitled to do so only from 25th December, 1966, when they received the Gazette. In the facts and circumstances of that case, it was held that the respondents therein should be restrained from giving effect to the notification between 1st - December, 1966 and 11th December, 1966 (both days inclusive) as the Gazette was printed and released to the public only on 12th December, 1966. As aforesaid, in the instant case, the Official Gazette was released to the public only on 8th December, 1982.

12. Mr. Chagla has next relied upon the case of B.K. Srinivasan and Others Vs. State of Karnataka and Others, . In that case, the Supreme Court was concerned with the interpretation of some of the provisions of Mysore Town and Country Planning Act which was enacted in 1961. On the question of requirement and/or necessity of publication of delegated or subordinated legislation, in para 15 of the said judgment, the Supreme Court has held as under :

"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 man" seeking to avoid the law, law must be known, that is to say, it must be so made that it can be known. We know that delegated or subordinate legislation is all pervasive and that there is hardly any field of activity where governance by delegated or subordinate legislative powers is not as important if not more important, than governance by Parliamentary legislation. But 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. It is, 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. Where the parent statute prescribes the mode of publication or promulgation that mode must be followed. Where the parent statute is silent, but the subordinate legislation itself prescribes the manner of publication, such a mode of publication may be sufficient, if reasonable. If the subordinate legislation does not prescribe the mode of publication or if the subordinate legislation prescribes a plainly unreasonable mode of publication, it will take effect only when it is published through the customarily recognised official channel, namely, the official gazette

or some other reasonable mode of publication. There may be subordinate legislation which is concerned with a few individuals or is confined to small local areas. In such cases publication or promulgation by other means may be sufficient."

13. Reliance has also been placed on behalf of the 1st Respondents in the case of D.B. Raju Vs. H.J. Kantharaj and Others, . In that case, appeal u/s 116-A of the Representation of the People Act, 1951 was directed against the decision of the Karnataka High Court setting aside the election of the Appellant therein to the State Legislative Council, and directing the recount of the votes. On the question of requirement and necessity of publication or promulgation of subordinate legislation, in paragraph 14 of the said judgment Supreme Court has held as under :

"The vital difference between an Act of a legislature and a subordinate legislation was earlier noted in *Harla v. State of Rajasthan* (supra). 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 has 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."

14. In the instant case, the said Notification dated 30th November, 1982 was issued in exercise of the powers conferred by sub-rule (1) of Rule 8 of the said Rules read with sub-section (3) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957. To be effective, such Notification was required to be made available and made known to the public in general. The publication of the said Notification dated 30th November, 1982 in the Official Gazette containing the notification become available to the public i.e. on 8th December, 1982 although the Superintendent of Central Excise had made it known to the 1st Respondents at a later date vide the aforesaid letter dated 14th December, 1982 addressed to the 1st Respondents. Not the cases cited by Mr. Mehta but those cited by Mr. Chagla and referred to hereinabove have applicability to the fact of the instant case. Section 38 of the said Act makes publication of Notifications mandatory and such publication, in our opinion, does not mean mere printing but making the same available for perusal by the common people including those in the trade. Alleged individual intimation of the said Notification dated 30th November, 1982 by the Excise Authorities to M/s. I.T.C. Ltd., Bangalore on 2nd December, 1982 neither amounted to publication nor knowledge thereof to the Respondents. Admittedly the Official Gazette containing the said Notification was made available for sale to the public on 8th December, 1982. Hence, the ordinary public could not have had access to the Gazette in the said Notification rescinding partial exemption granted under the said earlier notification dated 1st March, 1979 was published prior to 8th

December, 1982. In the circumstances we find no infirmity in the findings and conclusion of the Learned Single Judge.

15. In the facts and circumstances of the case, the 1st Respondents are entitled to the excess amount recovered from them for the period 30th November, 1982 to 7th December, 1982, being the sum of Rs. 35,57,094.74.

16. As regards the claim of the 1st Respondents for interest on the amount ordered to be refunded to the 1st Respondents, the 1st Respondents have filed cross-objections in the Appeal. The Appellants had taken out a Notice of Motion in the Appeal which was made absolute in terms of prayer (a) thereof and it was further ordered that in the event of the Appellants failing in the Appeal, the Appellants would pay the amount to the 1st Respondents with interest thereon at the rate of 12% per annum to be calculated from 4th November, 1987, being the date of the judgment of the Learned Single Judge until payment. Mr. Chagla has submitted that the Appellants be ordered to pay the said amount to the 1st Respondents with interest thereon at the rate of 18% per annum. In our view, though the Learned Judge has allowed refund of the amount along with interest at the rate of 6% per annum to be calculated from 4th November, 1987, the Appellants shall pay the said amount to the 1st Respondents with interest thereon at the rate of 12% per annum from 4th November, 1987, until payment.

17. In the result, the appeal is dismissed. The Cross-Objections of the 1st Respondents are allowed to the extent that the Appellants shall refund the said sum of Rs. 35,57,094.74 to the 1st Respondents together with interest thereon at the rate of 12% per annum to be calculated from 4th November, 1987 until payment. In the facts and circumstances of the case, there shall, however, be no order as to costs.

18. Certified copies of this Order to be furnished to all parties expeditiously.