

Living Media India Ltd. and Another

Vs

Union of India and Others

Writ Petitions (C) No. 1103 of 1989 with Nos. 931 of 1989

(K. Venkataswami, S.R. Babu JJ)

28.10.1998

JUDGMENT

K. VENKATASWAMI, J. -

1. In all these writ petitions under Article 32 of the Constitution of India, the petitioners have challenged the constitutional validity of Notification No. 49/89-Customs dated 1-3-1989. The said notification was issued by exercising the powers under Section 25(1) of the Customs Act, 1962. Under the impugned notification, the respondents have levied customs duty at 30% ad valorem on imported "glazed newsprint" which is used for the publication of news magazines.

2. In view of certain subsequent events, we are relieved of going into the constitutional validity of the impugned notification. While these writ petitions were pending, this Court by an order dated 12-12-1996 passed the following order :

"We have heard the opening arguments of Mr. R. F. Nariman, learned counsel for the writ petitioners. Having regard to what has been stated, it seems to be an appropriate case where the Union Government should consider the matter itself. Mr. Nariman states that an appropriate representation shall be made and Mr. Joseph Vellapally, learned counsel for the respondents, states that a supporting recommendation to consider the same shall also be made. Adjourned for 8 weeks."

3. Pursuant to the above order, the respondents came forward with an affidavit on 15-1-1998 expressing their willingness to settle the matter in the following manner :

"3. (a) The basic customs duty on the glazed newsprint imported/cleared by the petitioners during the period 1-3-1989 to 24-1-1990 be charged @ 15% ad valorem instead of 30% ad valorem otherwise leviable during this period.

(b) On the above basis, the petitioners pay the balance duty in case the duty paid by them was assessed/collected on the basis of a rate of basic customs duty lower than 15% ad valorem.

(c) In case a refund of the duty already paid by the petitioners arises in terms of sub-para (a) above, the payment of such refund shall be subject to the provisions of the Customs Act, 1962 as they exist at present.

(d) The above-mentioned proposals would be applicable to the goods imported by the

petitioners only."

4. In the light of the interim orders of this Court dated 12-12-1996 and in the light of the affidavit filed on behalf of the respondents on 15-1-1998, the petitioner in WP No. 1103 of 1989 has filed an affidavit, inter alia, stating as follows :

"I state that the contention of the Government of India that any refund would be governed by the provisions of Chapter V or otherwise under the Customs Act as at present, is misconceived. It is submitted that the petitioner has challenged the constitutional validity of the said imposts at the immediate earlier. This Hon'ble Court after hearing the parties directed the Government of India to reconsider the above matter keeping in perspective Article 19(1)(a) of the Constitution of India. The Government has on that basis reduced the burden of duty on glazed newsprint. The entire basis of reduction of customs duty, therefore, is to reduced the economic burden on the newspaper industry. In these circumstances, there is no question of any denial of refund on any ground whatsoever. Secondly, in any event, it is stated that the duty pertains to import of glazed newsprint. This glazed newsprint is consumed in the printing and publishing of news magazines. It is a well-known fact that the cost of production of each copy of a news magazine exceeds its retail sale price. The economic survival of the newspapers and news magazines, for this reason, depends not only upon the price realised on the sale of each issue of the newspaper/news magazine but by other income generated by way of advertisements which has no bearing on the refund of duty. It is, therefore, submitted that the cost of newsprint comprises of raw material used for the printing of the news magazine and however the burden of duty thereon has never been recovered from the subscribers/customers. Therefore, on these bases, the refund of duty cannot be denied to the petitioners as suggested in the affidavit filed by the Union of India."

5. In the light of the above terms of settlement submitted by the respondents and also the affidavit filed by the petitioner in WP No. 1103 of 1989, these writ petitions were again taken up for disposal when this Court passed the following order on 26-2-1998 [Living Media India Ltd. v. Union of India] after hearing the arguments of the counsel appearing on both sides :

"WP (C) No. 1103 of 1989

An affidavit of Anil Mehra has been filed on behalf of the petitioners in response to the proposal made on behalf of the Government of India in the affidavit of Ms. Ranjana Jha. Under-Secretary, Ministry of Finance, Department of Revenue dated 14-1-1998 wherein it has been stated that the said petitioners are agreeable to the offer of the Government of India and seek refund of 50% of the customs duty paid by them on the imports of glazed newsprint effected when the said notification was in full force and that the said acceptance is without prejudice to the contention of the petitioners that the said levy is unconstitutional.

Shri Kailash Vasdev, the learned counsel appearing for the petitioners in WP(C) No. 284 of 1990, states that the petitioners in this case are also prepared to accept the said offer in the same terms.

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Dr. V. Gauri Shankar, the learned Senior Counsel appearing for the petitioners' state that the petitioners are agreeable to the offer but he submits that the petitioners should also be paid the interest on the excess amount which is to be refunded to them on the basis of the said offer.

The learned counsel for the petitioners stated that they are not agreeable to the condition laid down by the Government of India that refund would be subject to the provisions of the Customs Act as it exists at present.

Shri Bajpai, the learned counsel appearing for the Union of India, prays for six weeks' time for the Government of India to consider the said proposals submitted on behalf of the petitioners. Time prayed for is allowed. If the Union of India is not agreeable to the said proposal, the Government should file counter-affidavits before that date so that the matters may be heard on merits.

List all the writ petitions after six weeks."

6. It must be noticed that in the light of the above affidavit filed on behalf of the petitioners in WP No. 1103 of 1989, this Court gave an opportunity to the respondents to file a counter to the said affidavit. The learned counsel appearing for the respondents expressly stated that no counter-affidavit was required to be filed on behalf of the respondents. Thereafter, this Court on 1-9-1998 passed the following order :

"Shri Bajpai, learned counsel appearing for the Union of India, states that the Union of India is not prepared to accept the offer made by the petitioners as recorded in the order dated 26-2-1998 regarding refund of 50% of the customs duty in view of the law laid down by this Court in *Mafatlal Industries Ltd. v. Union of India* ((1997) 5 SCC 536). Shri Bajpai also states that no counter-affidavit is required to be filed on behalf of the Union of India since there is already an affidavit of Ms. Ranjana Jha dated 14-1-1998. He further states that the offer contained in the affidavit of Ms. Ranjana Jha dated 14-1-1998 is also applicable to the petitioners in other cases including WP (C) No. 272 of 1990. Shri K. V. Mohan, learned counsel appearing for the petitioners in the said petition prays for two weeks' time to indicate the response of the petitioners to the said offer contained in the affidavit.

Put up after four weeks."

These matters ultimately came up for final disposal on 15-10-1998.

7. Dr. Gauri Shankar, learned Senior Counsel appearing for the petitioner in WP No. 931 of 1989, reiterated his contention that the petitioner in WP No. 931 of 1989 is entitled to get interest on the refund to be made pursuant to the concession made in the affidavit dated 14-1-1998 and filed on behalf of the respondents on 15-1-1998.

8. Mr. Salve, learned Senior Counsel appearing for the petitioners in WPs Nos. 284 of 1990 and 1103 of 1989 after inviting our attention to the affidavit of the petitioners filed in WP No. 1103 of 1989, submitted that in the absence of any counter to the petitioners' affidavit the statement made in para 9 of the affidavit must be taken as uncontroverted. In view of that uncontroverted statement, the question of invoking the law laid down in *Mafatlal Industries v. Union of India* ((1997) 5 SCC 536) in the matter of refund vis-a-vis the question of unjust enrichment, will not at all arise on the

facts of the case and, therefore, the petitioners are entitled to unconditional refund of the amount of the customs duty paid in excess of 15% of the customs duty. Other learned counsel appearing for the petitioners, while adopting the argument of Mr. Salve, submitted that the writ petitioners are entitled to get unconditionally refund of the excess customs duty in view of the affidavit filed on behalf of the respondents.

9. Mr. K. V. Mohan, learned counsel appearing for the petitioner is WP No. 272 of 1990, submitted that the petitioner in that case has furnished a bank guarantee so far as the customs duty over and above 15% for clearing the imported glazed newsprint is concerned. In the light of the affidavit filed on behalf of the respondents, the bank guarantee filed pursuant to the orders of this Court must be released.

10. Mr. Bajpai and Mr. A. Subba Rao, learned counsel appearing for the respondents, submitted that even in the absence of any counter-affidavit on behalf of the respondents the refund to be made by the respondents will be subject to the ratio laid down by this Court in *Mafatlal Industries case* ((1997) 5 SCC 536).

11. We have carefully considered the rival submissions and gone through the affidavits filed on behalf of the petitioner in WP No. 1103 of 1989 and that of the respondents through Ms. Ranjana Jha, Under-Secretary, Ministry of Finance. It is an admitted fact that the impugned levy remained in force only for a period from 1-3-1989 to 24-1-1990, and from 25-1-1990, the respondents restored the duty of customs of Rs. 550 per metric tonne which was the duty prevailing earlier to the rate prescribed under the impugned notification. It is, therefore, clear that before the impugned notification and after 25-1-1990, the customs duty on glazed newsprint was Rs. 550 per metric tonne. It is also clear from the affidavit of the petitioners in WP No. 1103 of 1989 that the cost of the raw material for bringing out the news magazines exceeded its retail sale price. It is only by way of advertisement which has no bearing on the refund of duty, the loss was compensated and profit earned. As noticed earlier, in spite of opportunity given, this statement of fact remains uncontroverted thereby accepted by the respondents. Therefore, on the facts of this case, we do not find any difficulty in directing the respondents to refund the basic customs duty on the glazed newsprint imported/cleared by the petitioners during the period of 1-3-1989 to 24-1-1990, over and above 15% ad valorem in cases where customs duty on glazed newsprint was levied and collected over and above 15% without demanding any affidavit from the petitioners. In other words, clause (c) of the affidavit of Ms. Ranjana Jha will not be a condition precedent for refund of excess customs duty paid by the petitioners over and above 15% ad valorem for the period 1-3-1989 to 24-1-1990.

12. Now coming to the question of interest, we are not impressed by the argument of learned Senior Counsel, Dr Gauri Shankar. The matter of refund of excess amount paid in these matters arises out of a settlement between the parties. Therefore, the provisions of the Interest Act, 1978 or Section 27-A of the Customs Act, 1962, relied on by the learned Senior Counsel, will not have any role to play. We, therefore, reject the claim of interest on the refund to be made by the respondents pursuant to this order.

13. The bank guarantee, if any, furnished by the petitioner in WP No. 272 of 1990, as stated by the learned counsel, to secure that recovery of the customs duty over and above 15% ad valorem, in the event of the petitioner not succeeding in his case, shall stand discharged in view of the conclusions reached above.

14. In the result, the writ petitions are disposed of by holding that the respondents are entitled to levy and recover only to the extent of 15% ad valorem on the glazed newsprint imported/cleared by the petitioners during the period 1-3-1989 to 24-1-1990 and in cases where the respondents have recovered over and above 15% ad valorem, that part of the excess customs duty should be refunded to the petitioners in each case within a period of three months from today without insisting on any affidavit from the petitioners on the basis of "unjust enrichment principle". The bank guarantee, if any, furnished in WP No. 272 of 1990 shall stand discharged. However, there will be no order as to costs.