SUPREME COURT OF INDIA

Union of India

Versus

M/s. Ganesh Das Bhojraj

(B.N. Kirpal, M.B. Shah and R.C. Lahoti, JJ.)

Civil Appeal No. 6071 of 1999.

22.02.2000.

JUDGMENT

M.B. Shah, J.

Two Judges Bench of this Court by order dated 15th October, 1999 has referred this matter to a larger Bench by observing thus :-

> "It appears that there is a conflict in the ratio of the decisions of this Court in ***M/s Pankaj Jain Agencies v. Union of India and others, 1994(5) SCC 198, Collector of Central Excise v. New Tabacco Co. and others, 1998(8) SCC 250*** and ***L.T.C. Limited v. Collector of Central Excise, Bombay, 1996(5) SCC 538*** is also relevant. In our view it is appropriate that this appeal is to be heard by a larger Bench."

Before referring to the said decisions, we would narrate few facts involved in the matter.

2. Respondent admittedly imported a consignment of Green Beans (Pulses) weighing 505-505 M.T. vide Invoice No. 14/099 dated 31.12.1986. They have filed bill of entry for the same on 5.2.1987. The importer claimed clearance of the said goods free of duty on the basis of Exemption Notification No. 129/76-Cus dated 2.8.1976. However, it was pointed out that on 4.2.1987 the said notification was amended vide Notification No. 40/87-Cus, whereby basic duty @ 25% was levied. As the duty was levied @ 25%, importer filed Writ Petition No. 535 of 1987 in the High Court of Bombay contending *inter alia* that the said notification was not duly published and that it was not in force on the date. A Division Bench of the High Court of Bombay accepting the said contention on the basis of Full Bench decision of the said Court in the case of ***Apar (P) Ltd. v. Union of India and others, 1985(22) ELT 644*** allowed the writ petition. Hence the present appeal by the State.

3. At the outset, we may state that in appeal filed before this Court the judgment of the Full Bench of the High Court of Bombay in Apar (P) Ltd's case (supra) was set aside Re: ***Union of India v. Apar (P) Ltd., 1999(6) SCC 117.***

4. A copy of Original Extraordinary Gazette of India dated February 4, 1987 [Part-II-Section 3-Sub-section (i)] is produced for our perusal. The said notification reads as under :-

> "Ministry of Finance
>
> (Department of Revenue)

New Delhi, the 4th February, 1987

Notification

No. 40/87-CUSTOMS

G.S.R. 81(E). - In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) the Central Government, being satisfied that it is necessary in the public interest so to do, hereby makes the following amendment in the notification of the Government of India in the Department of Revenue and Banking No. 129/76-Customs, dated 2nd August, 1976, namely :-

In the said notification, for the words "from the whole of the duty of customs leviable thereon which is specified in the said First Schedule" the words "from payment of so much of that portion of the duty of customs, which is specified in the said First Schedule as is in excess of twenty five per cent ad valorem" shall be substituted."

5. The contention is - the aforesaid Notification was not made available to public at large and, therefore, on the basis of the said Notification customs duty cannot be levied. The learned counsel for the appellant relied upon the decision in ***M/s Pankaj Jain Agencies v. Union of India and others, 1994(5) SCC 198*** and the learned counsel for the respondent-importer has relied upon the decision in ***Collector of Central Excise v. New Tabacco Co. and others, 1998(8) SCC 250*** in support of their respective contentions.

6. In Pankaj Jain Agencies (supra), this Court considered similar contention with regard to the Exemption Notification issued under Section 25 of the Customs Act, 1962 and held that there was no substance in the contention that notwithstanding the publication of the notification in the Official Gazette there was yet a failure to make law known and that, therefore, the notification did not acquire the elements of operativeness and enforceability. For this purpose Court referred to Section 25(1) of the Customs Act, which reads 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."

7. On the basis of the aforesaid Section, the Court negatived the contention that until the notification was available in Bombay - and shown to be so available - the statutory rules or instrument would not become operative. The Court relied on three Judges Bench decision in ***State of Maharashtra v. Mayer Hans George, 1965(1) SCR 123.*** and also referred to the decision in ***B.K. Srinivasan and others v. State of Karnataka and others, 1987(1) SCC 658, 672*** and held thus :-

"In the present case indisputably the mode of publication prescribed by SEction 25(1) was complied with. The notification was published in the Official Gazette on the 13.2.1986. As to the effect of the publication in the Official Gazette, this Court held [Srinivasan case AIR at p. 1067 : SCC pp.672-73, para 15]:

"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.

(emphasis supplied)"

8. As against this learned counsel for the respondent referred to the decision in ***Collector of Central Excise v. New Tabacco Co. and others, Ibid at 2 para 11 & 12*** and emphasized 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 :-

"Our attention was also drawn to the decisions of this Court in ***Pankaj Jain Agencies v. Union of India, ibid at 1*** and ***I.T.C. Ltd. v. CCE, 1996(5) SCC 538*** but they are not helpful in deciding the question that arises in these cases.

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. v. Collector of Customs & Central Excise, Pune, 1998(8) SCC 282 : 1998(100) ELT 321 (SC)*** 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 the 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.

10. It has been submitted by the learned counsel for the appellant that the aforesaid observations in the case of New Tobacco Co. are directly in conflict with the law laid down by this Court in Pankaj Jain Agencies and in I.T.C. Ltd. (supra). We agree with the said submission.

11. In our view, as noted above, in Pankaj Jain Agencies case, the Court directly dealt with a similar contention and after relying upon the decision in the case of Mayer Hans George (supra) rejected the same. That decision is followed in I.T.C. Ltd. (supra) and other matters. Hence, it is difficult to agree that the decision in Pankaj Jain Agencies's case was not helpful in deciding the question dealt with by the Court. Section 25 of the Customs Act empowers the Central Government to exempt either absolutely or subject to such conditions, from the whole or any part of the duty of customs leviable thereon by a notification in Official Gazette. The said notification can be modified or cancelled. The method and mode provided for grant of exemption or withdrawal of exemption is issuance of notification in the Official Gazette. For bringing Notification into operation, the only requirement of the section is its publication in the Official Gazette and no further publication is

contemplated. Additional requirement is that under Section 159 such notification is required to be laid before each House of Parliament for a period of thirty days as prescribed therein. Hence, in our view Mayer Hans George (supra) which is followed in the Pankaj Jain Agencies' case represents the correct exposition of law and the Notification under Section 25 of the Customs Act would come into operation a soon as it is published in the Gazette of India i.e. the date of publication of the Gazette. Apart from prescribed requirement under Section 25, usual mode of bringing into operation such notification followed since years in this country is its publication in the Official Gazette and there is no reason to depart from the same by laying down additional requirement.

12. In the case of Mayer Hans George, it was contended that the Notification under Section 8 of the Foreign Exchange Regulation Act, 1947 of the Reserve Bank of India could not be deemed to have been in force and operation merely from the date of issue or publication in Gazette. It would have effect only from the date on which the person against whom it is sought to be enforced had knowledge of its making. A contention was raised as regards the precise point of time when a piece of delegated legislation like exemption notification by the Reserved bank would in law take effect. In support of that contention reliance was placed on the decision of Privy Council in ***Lim Chin Aik v. The Queen, 1963 A.C. 160.*** the Court negatived the said contention by holding that in the first place the order of Minister dealt with by the Privy Council was never "published" since admittedly it was transmitted to the Immigration official who kept it with himself. The Court observed :-

> "....But in the case on hand, the notification by the Reserve Bank varying the scope of the exemption, was admittedly "published" in the Official Gazette - the usual mode of publication in India, and it was so published long before the respondent landed in Bombay. The question, therefore, is not whether it was published or not, for in truth it was published, but whether it is necessary that the publication should be proved to have been brought to the knowledge of the accused. Lastly, the order made by the Minister in the Singapore case, was one with respect to a single individual not a general order, whereas what we have before us is a general rule applicable to every person who passes through India. In the first case, it would be reasonable to expect that the proper method of acquainting a person with an order which he is directed to obey is to serve it on him or so publish it that he would certainly know of it, but there would be no question of individual service of a general notification on every member of the public, and all that the subordinate law-making body can or need do, would be to publish it in such a manner that persons can, if they are interested, acquaint themselves with its contents."

13. The Court further referred to the judgment of Bailhache, J. in ***Johnson v. Sargant & Sons, 1918 1 KB 101*** and did not approve the observation made therein to the effect that the order was not known until the morning of May 17 but it came into operation before it was made known. On the contrary, Court held that there was great force in learned author's (Prof. C.K. Allen) following comment on reasoning in Sargant's case :

> "This was a bold example of judge made law. There was no precedent for it, and indeed a decision, ***Jones v. Robson, 1901(1) QB 673***, which, though not on all fours, militated strongly against the judge's conclusion , was not cited; nor did the judge attempt to define how and when delegated legislation `became known'. Both arguments and judgment are very brief. The decision has always been regarded *as very doubtful*, but it never came under review by a higher court."

The Court also held that :

"It is obvious that for an Indian law to operate and be effective in the territory where it operates viz., the territory of India it is not necessary that it should either by published or be made known outside the country. Even if, therefore, the view enunciated by Bailhache, J. is taken to be correct, it would be apparent 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 the 24th November and the ignorance of it by the respondent who is a foreigner is, in our opinion wholly irrelevant.

The Court further observed :-

".... but where there is no statutory requirement we conceive the rule to be that it is necessary that it should be published in the usual form i.e. by publication within the country in such media as generally adopted to notify to all the persons concerned in the making of rules. In most of the Indian statutes, including the Act now under consideration, there is provision for the rules made being published in the Official Gazette. It therefore stands to reason that publication in the Official Gazette viz., the Gazette of India is the ordinary method of bringing a rule or subordinate legislation to the notice of the persons concerned."

14. From the aforesaid judgment it can be stated that it is establish practice that the publication in the official gazette, that is, Gazette of India ordinary method of bringing a rule or subordinate legislation to the notice the persons concerned. Individual service of a general notification on every member of the public is not required and the interested person can acquire himself with the contents of the notification published in the gazette. It is the usual mode followed since years and there is no other mode prescribed under the present statute except by the amendment in the year 1998 by Bill No. 21 of 1998.

15. Further, in New Toabacco Co.'s case (supra) the Court referred to the decision in ***Harla v. State of Rajasthan, 1952 SCR 110.*** In Harla's case the Court referred to Section 3 of Jaipur Laws Act, 1923 which *inter alia* provided that the Court of Jaipur State shall administer the law passed from time to time by the State and published in the official gazette. In that case, it was admitted that Jaipur Opium Act was never published in the Gazette and, therefore, the Court held that in the absence of some specific law or custom to the contrary, a mere resolution of a Council of Ministers in the Jaipur State without further publication or promulgation would not be sufficient to make a law operative. The Court also observed :-

"... We take it that if these Proclamations are not published strictly in accordance with the rules so drawn up, they will not be valid law ..... The mode of publication can vary; what is a good method in one country may not necessarily be the best in another. But reasonable publication of some sort there must be."

16. Further, in the case of New Tabacco Co. (supra), the Court relied on the decision in B.K. Srinivasan (supra). In that case (in para 15) after considering various contentions, the Court specifically held that 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.

17. From the aforesaid observations, it is plain and clear that the decision in B.K. Srivasan (supra) 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 (supra) and hold that notification under Section 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 (supra) represents the correct exposition of law on the subject. The decision rendered in New Tobacco Co. followed in Garware Nylons Ltd. (supra) does not lay down the correct law.

18. The learned counsel for the respondent, however, submitted that there is nothing on record to establish that notification dated 4.2.1987 withdrawing full exemption from the levy of customs duty was published on the same day. For this purpose, original copy of the Notification dated 4.2.1987 published in the Extra-ordinary Gazette on the said that has been produced before us. The Gazette is admissible being 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 Evidence Act, unless contrary is proved. Hence, there is no substance in the contention that notification dated 4.2.1987 was not published in the Gazette on the same day. In our view, said notification came into force on the same date.

19. Lastly, at this stage, we would mention that Parliament has added sub-sections (4) and (5) to Section 25 of the Customs Act by Act No. 21 of 1998 w.e.f. 1.6.1998 which prescribe the method and mode of publication of the Notification and the date on which it comes into force. Newly inserted sub-sections (4) and (5) to Section 25 are as under :-

> *"(4) Every notification issued under sub-section (1) 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."

20. In the result, the appeal is allowed. The impugned judgment and order passed by the High Court is set aside and quashed. The respondent is held liable to pay customs duty @ 25% under Notification No. 40/87-Cus dated 4.2.1987. There shall be no order as to costs.

R.C. Lahoti, J. :

21. I have gone through the judgment proposed by my learned brother M.B. Shah, J. I entirely agree with the reasoning given and the ultimate conclusion arrived at by my learned brother. However, I would like to place on record my opinion that the view so taken needs to be confined in its application to civil liability only and cannot be made a rule of universal application.

22. Cases of M/s Pankaj Jain Agencies 1994(5) SCC 198, and ***B.K. Srinivasan v. State of Karnataka, 1987(1) SCC 658*** both are the cases where civil liability was sought to be imposed on the person proceeded against. There may be cases where on account of breach of a rule made or notification issued in exercise of delegated power to legislature, a person may incur criminal

liability. Such cases can again be divided into two classes : (i) where *mens rea* is an essential (sic) of the offence; (ii) where expressly or by necessary implication *mens rea* is ruled out as an ingredient of the offence.

23. ***State of Maharasthra v. Mayer Hans George, 1965(1) SCR 123*** is a case of criminal liability incurred by the accused-respondent. In that case by virtue of a notification dated 25.8.1948 the bringing of gold bullion into India was prohibited except with the permission of Reserve Bank of India. On the same date Reserve Bank of India issued a notification exempting from operation of the Central Government notification gold in through-transit from a place outside India to a place outside India which was not removed from the aircraft except of the purpose of trans-shipment. On 8th November, 1962 the Reserve Bank of India amended its earlier notification by prescribing the additional condition for exemption, viz., that the gold must be declared in the manifest of the aircraft as same bottom cargo or trans-shipment cargo. This notification was published in Govt. Gazette on 24th November, 1962. The accused-respondent was a passenger from Zurich to Manila in a Swiss plane which left Zurich on 27th November, 1962. The plane landed at airport in Bombay on 28th November. The accused was found sitting in the plane carrying 34 kilos of gold bars on his person which was not declared in the `manifest' for transit. The accused was prosecuted and convicted for importing gold into India in contravention of Section 8(1) of the Foreign Exchange Regulation Act, 1947 read with the notification. One of the pleas raised in the defence was that the accused could not have known of the notification published in the Gazette of India only on 24th November, 1962 whereas he had left Zurich on 27th November, 1962. N. Rajgopala Iyer, J. speaking for the majority held that publication in India so as to bring it to the notice of everyone who intends to pass through India and not a publication outside India was the test to find out effective publication. *Mens rea* was not an essential ingredient of the offence. The knowledge of the existence or contents of a law by an individual was not therefore relevant save on the question of the sentence to be imposed for its violation. Vide para 50, it was held that though the Supreme Court would not interfere with the sentence passed by the courts below unless there be any illegality in it or any question of principle involved but in the unusual features of the case the sentence of imprisonment passed on the accused-respondent was reduced to the period already undergone.

Actus non facit reum, nisi mens sit rea (the intent and act must both concur to constitute the crime). The general rule is that there must be mind at fault before there can be a crime. Whether or not *mens rea* is an essential ingredient of an offence would depend on the object and purpose of a statute and the phraseology employed by the Legislature in defining the offence. The doctrine that *mens rea* is an essential in every offence has three recognised exceptions : (i) cases not criminal in any real sense but which in the public interest are prohibited under a penalty; (ii) public nuisance; and (iii) cases criminal in form but which are really only a summary mode of enforcing a civil right (see ***Sherras v. De Rutzen, 1895(1) QB 918, 922*** also see ***Nathu Lal v. State of M.P., AIR 1966 SC 43*** and observations of K. Subha Rao, J. in his dissenting opinion in ***State of Maharashtra v. Mayer Hans George, AIR 1965 SC 722.*** Vide para 16 K. Subha Rao, J. has given an illustration. An aeroplane in which a person with gold on his body is travelling may have a forced landing in India and yet he would be liable to be punished with a jail term extending to two years.

24. The case at hand is one where through the writ petition filed by the respondent before the High Court the liability to pay customs duty at the rate of 25 per cent of the value of the goods was sought to be avoided and goods were sought to be released from detention of the customs authorities. In such a case the publication of notification in the Government Gazette in the manner contemplated by Section 25(1) of the Customs Act would be enough to import the liability to pay customs duty without regard to the enquiry into the fact whether the notification had actually come

to the knowledge of the importer or not. It is not the respondent's case that the relevant Gazette has been published ante-dated. What will be the impact of publication in the Government Gazette though the Gazette in spite of having been published was not available to be seen by the persons affected when criminal consequences are sought to be inflicted is a question which should in my opinion be left open to be gone into in an appropriate case. Non-availability of Gazette carrying the notification may provide foundation for a defence plea of innocence where *mens rea* is an ingredient of offence committed by breach of notification. Where *mens rea* is not an ingredient, want of circulation of Gazette may still be a reason for leniency in punishment. These are the questions which need to be left open.

With this much reservation I agree with my learned brother M.B. Shah, J. that the appeal has to be allowed.