

A LIVING MEDIA INDIA LTD. AND ANR. ETC.

v.

UNION OF INDIA AND ORS.

OCTOBER 28, 1998

B [K. VENKATASWAMI AND S. RAJENDRA BABU, JJ.]

Customs Act, 1962:

C S. 25(1)—*Customs duty—Refund of—Interest on amount refundable—*
'Glazed newsprint'—Used in news magazines—Notification No. 49/89 Customs
dated 1.3.1989—Levying customs duty on 'glazed newsprint' imported/cleared
at 30% ad valorem—Settlement between parties to bring down the levy to
15%—Held, in view of the admitted position that cost of news magazines
exceeds sale price and loss is compensated by earning from advertisements,
D *which has no bearing on refund of duty, petitioners entitled to refund of excess*
duty recovered—However, petitioners not entitled to interest on the refund—
Principle of 'unjust enrichment'.

E Prior to 1.3.1989, customs duty on imported 'glazed newsprint', which
was used in publication of news magazines, was being charged at Rs. 550
per metric tonne. The respondent—Union of India, in exercise of power
under s. 25(1) of the Customs Act, 1962, issued notification No. 49/89
Customs dated 1.3.1989 levying customs duty on the said item at 30% ad
valorem. The notification was challenged in the present writ petitions.
Meanwhile the respondents restored the customs duty at Rs. 550/- per metric
tonne with effect from 25.1.1990. Thus the dispute between the parties
F remained with regard to the imposition of customs duty at 30% from
1.3.1989 till 25.1.1990. When the petition came to be heard by the Court, it
was suggested that the Union Government should itself re-consider the
matter; and the case was adjourned.

G An affidavit was filed on behalf of the respondents giving a proposal
that basic customs duty on the glazed newsprint imported/cleared by the
petitioners during the period 1.3.1989 to 24.1.1990 would be charged at 15%
ad valorem instead of 30% and any claim for refund of the duty already
paid would be subject to the provisions of the Act. The petitioners in Writ
Petition No. 1103/89 filed an affidavit stating that the entire basis of
reduction of customs duty was to reduce the economic burden on the
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newspaper industry; that the imported glazed newsprint was consumed in printing and publishing the news magazines and the cost of news print comprised raw material used for printing of the news magazines, but the burden of duty thereon was never recovered from the subscribers/customers, inasmuch as the cost of production of news magazines exceeded its retail price and economic survival of news magazines depended upon the income generated by way of advertisements; and therefore, refund of duty cannot be denied to the petitioners. The court directed the respondents to file a counter affidavit with regard to the stand taken by the petitioners. But no counter-affidavit was filed and it was contended that the question of refund of 50% of customs duty would be decided in view of *Mafatlal Industries Ltd.**

It was contended for the petitioners that the averment contained in the affidavit filed by the petitioners in Writ Petition No. 1103/89 remained uncontroverted as the respondents did not file any counter affidavit thereto; therefore, question of invoking the law laid down in *Mafatlal Industries Ltd.** would not arise, and as such the petitioners were entitled to unconditional refund. For the petitioners in Writ Petition No. 931/89, it was further contended that they were entitled to interest also.

Disposing of the writ petitions, this Court

HELD : 1.1. The respondents are entitled to levy and recover customs duty to the extent of 15% ad valorem on the glazed newsprint imported/cleared by the petitioners during the period 1.3.89 to 24.1.90. [443-E]

1.2 It is clear from the affidavit of the petitioners in Writ Petition No. 1103/89 that the cost of the raw material for bringing out the news magazines exceeds 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. Further, in spite of the opportunity given, this statement of fact remains uncontroverted and thereby accepted by the respondents. Therefore, on the facts of these cases the petitioners are entitled to the refund in cases where they have paid customs duty more than 15% ad valorem, and the payment of such refund would not be subject to the provisions of the Act. The respondents are directed to refund the excess customs duty to the petitioners without insisting on any affidavit from the petitioners on the basis of unjust enrichment, principle. The bank guarantee, if any, furnished in Writ Petition No. 272/90 shall stand discharged.

[442-G-H; 443-A-B; D-E]

**Mafatlal Industries v. Union of India*, [1997] 5 SCC 536, held not

A applicable.

2. So far as the claim for interest is concerned, the matter of refund of excess amount paid in these cases arises out of a settlement between the parties. Therefore, the provisions of the Interest Act, 1978 or Section 27A of the Customs Act, 1962, will not have any role to play. The claim of interest on the refund to be made by the respondents pursuant to this order is rejected. [443-C-D]

CIVIL ORIGINAL JURISDICTION Writ Petition (C) No. 1103 of 1989 Etc. Etc.

C (Under Article 32 of the Constitution of India.)

D H. N. Salve, Dr. V. Gauri Shankar, Kailash, Vasdev, Sushil Dutt Sagwan, S. Rajappa, Dhruv Mehta, Fazlin Anam, E.M.S. Anam, K.V. Mohan, P.R. Seetharaman, A. Subba Rao, N.K. Bajpai, (Hemant Sharma) for P. Parmeswaran, S.W.A. Quadri, S.K. Dwivedi, D.N. Misra and R.B. Misra, for the appearing parties.

The Judgment of the Court was delivered by

E **VENKATASWAMI, J.** 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 but exercising the powers under Section 25(1) of the Customs Act. 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.

F 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 :-

G "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 respondent, states that a supporting recommendation to consider the same shall also be made. Adjourned for 8 weeks."

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Pursuant to the above order, the respondents came forward with an affidavit on 15.1.98 expressing their willingness to settle the matter in the following manner:- A

Para 3.

“(a) The basic customs duty on the glazed newsprint imported/cleared by the petitioners during the period 1/3/89 to 24/1/90 be charged @ 15% ad valorem instead of 30% ad valorem otherwise leviable during this period. B

(b) On the above basis 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

(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 exit at present. D

(d) The above mentioned proposals would be applicable to the goods imported by petitioners only.”

In the light of the interim orders of this Court dated 12.12.1996 and in the light of affidavit filed on behalf of the respondents on 15.1.1998, the petitioner in W.P. 1103/89 has filed an affidavit, *inter alia*, stating as follows:- E

“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 earliest. 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 reduce 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 newsmagazines. 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 H

A newspapers and newsmagazines, 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 basis, the refund of duty cannot be denied to the petitioners as suggested in the affidavit filed by the Union of India.”

(emphasis supplied)

C In the light of the above terms of settlement submitted by the respondents and also the affidavit filed by the petitioner in W.P. 1103/89, these writ petitions were again taken up for disposal when this Court passed the following order on 26-2-1998 after hearing the arguments of the counsel appearing on both sides :-

D “W.P. (C) No.1103/89 : 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 the 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.

F Shri Kailash Vasdev, the learned counsel appearing for the petitioners in WP (C) No. 284/90 states that the petitioners in this case are also prepared to accept the said offer in the same terms.

G W.P. (C) No. 931/89 : Dr. V. Gauri Shankar, the learned senior counsel appearing for the petitioners states 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.

H The learned counsel for the petitioners states 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. A

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 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. B

List all the writ petitions after six weeks.”

It must be noticed that in the light of the above affidavit filed on behalf of the petitioners in W.P. 1103/89, 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 :- C D

“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 *Mafatal Industries Ltd. v. U.O.I.*, [1997] 5 SCC 536. Shri Bajpai also states that no counter affidavit is required to be filed on behalf of the U.O.I. Since there is already an affidavit of Ms. Ranjana Jha dt. 14.1.1998. He further states that the offer contained in the affidavit of Ms. Ranjana Jha dt. 14.1.1998 is also applicable to the petitioners in other cases including W.P. (C) No. 272/90. 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. E F

Put up after four weeks.”

These matters ultimately came up for final disposal on 15.10.1998. G

Dr. Gauri Shankar, learned senior counsel appearing for the petitioner in W.P. 931/89, reiterated his contention that the petitioner in W.P. 931/89 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. H

A Mr. Salve, learned senior counsel appearing for the petitioners in W.Ps. 284/90 and 1103/89 after inviting our attention to the affidavit of the petitioners filed in W.P. 1103/89, 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 matters 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 all 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.

D Mr. K.V. Mohan, learned counsel appearing for the petitioner in W.P. 272/90, 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. In the light of the affidavit filed on behalf of the respondents, that bank guarantee filed pursuant to the orders of this Court must be released.

E Mr. Bajpai and Mr. 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 (supra).

F We have carefully considered the rival submissions and gone through the affidavits filed on behalf of the petitioner in W.P.1103/89 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 1.3.89. to 24.1.90. and from 25.1.90, the respondents restored the duty of customs to 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 25.1.90. the customs duty on glazed newsprint was Rs. 550 per metric tonnes. It is also clear from the affidavit of the petitioner in W.P. 1103/89 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 these cases 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 1.3.89 to 24.1.90 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 1.3.89 to 24.1.90.

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 27A 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.

The bank guarantee, if any, furnished by the petitioner in W.P. 272/90, as stated by the learned counsel, to secure the recovery of the customs duty over and above ad valorem, in the event of the petitioner not succeeding in his case, shall stand discharged in view of the conclusions reached above.

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 1.3.89. to 24.1.90 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 any affidavit from the petitioners on the basis of unjust enrichment principle. The bank guarantee, if any, furnished in W.P. 272/90 shall stand discharged. However, there will be no order as to costs.

R.P.

Petitions disposed of.