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(2004) 03 CAL CK 0024

In the Calcutta High Court

Case No : G.A. No. 880 of 2004 and W.P. No. 298 of 2004

ABP Private Ltd. — APPELLANT

Vs

Commissioner of Customs — RESPONDENT

Date of Decision : 18-03-2004

Acts Referred:
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 129E, 25

Citation : (2004) 115 ECR 105 : (2004) 168 ELT 161

Hon'ble Judges : Kalyan Jyoti Sengupta, J

Bench : Single Bench

Advocate : A. Mitra, S. Sarkar and S. Mitra, for the Appellant; S.K. Kapoor, ASG and M.K. Lodh, for the Respondent

Judgement

Kalyan Jyoti Sengupta, J.—This writ application was filed at certain point of time when the machine in question did not arrive in this country nor it was discharged at the port of this country. The Customs Notification No. 164 of 2003 dated 11th November, 2003 is under challenge in this application on various grounds, namely the same is ultra vires Section 25 of the Customs Act so much so that it does not conform to the standard and norms of Article 14 of the Constitution of India, meaning thereby exercise of this power while withdrawing exemption granted earlier from payment of duty for import of the subject is not in public interest and rather whimsical and arbitrary. Furthermore, the petitioner is treated with hostile discrimination, while a section of printing press established has been without any intelligible differentia.

2. When the writ application was moved I did not pass any anticipatory interim order rather I gave direction for filing affidavits to sort out this matter finally. The time limit for filing affidavit expired but respondents did not file any affidavit-in-opposition, they are still very keen to file it to contest the writ petition. So, the learned Additional Solicitor General prays for extension, granting of extension at the present moment in my view is another aspect. By this time the printing

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machine has arrived and Bill of Entry has been presented. Under the Statute the duty has been assessed, and according to Revenue it is to be levied with full Customs duty at the rate of 39.2% contrary to the expectation of the petitioner of the concessional rate of 5% allowed under the withdrawn notification.

3. Obviously, the previous notification has not been applied in view of the impugned notification that has come into force on the date of presentation of the Bill of Entry.

4. The writ petitioner has, therefore, taken out an interlocutory application for release of the goods upon payment of 5% of Customs duty and on any other terms and conditions as this Court may think fit and proper.

5. Mr. Mitra, learned Senior Counsel appearing with Mr. Sarkar learned Senior Advocate and Mr. Mitra, learned Advocate in support of this application contends that considering the balance of convenience and inconvenience the release of the printing machine is an extreme necessity, as this has to be installed with the foreign expertise for this type of machine is not manufactured nor the technical know-how installing the same is available in this country. The time bound programme for installation has been fixed. In the event such things are not done the petitioner apart from losing business will suffer other losses and injury, which may arise in relation to the contract of supply of this machine.

6. Moreover, the petitioner has been incurring detention charges every day. To avoid these difficulties, he contends that pending hearing of this matter finally goods should be released. He further contends had the affidavit-in-opposition been filed by this time, then today itself the writ petition would have been decided finally as the same is appearing in the list for hearing. While placing his prima facie case he has drawn my attention to various paragraphs of the writ petition and submits that machine in question is not dissimilar to that of the machine as notified in the November Notification. Functional ability and utility are also the same with little variation which are insignificant in nature and this variation does not put the machine in different category or dissimilar character. Therefore, there is no intelligible differentia while making a classification for issuing impugned notification. He submits that with the withdrawal of exemptions freedom of press as enshrined in Article 19 has been infringed by arbitrary and whimsical action, purported to have been exercised u/s 25 of the Customs Act, 1962. In support of his contention he has relied on a decision of the Supreme Court, reported in which upon prima facie reading, appears to have laid down the principle of freedom of press and if any action of the Government affects such freedom certainly that can be set right in exercise of power of judicial review.

7. In any view of the matter, this decision can be considered in great details when I will hear this matter finally.

8. Mr. Kapoor, learned Additional Solicitor General, appearing with Mr. Lodh while opposing this application contends that no prima facie case not to speak of strong one, has been made out in this matter. He has drawn my attention to

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Sections 14 and 15 of the said Act and submits that Notification and/or the Rules relating to classification of the goods which are prevalent on the date of presentation of the Bill of Entry will be applicable. The date of the contract or of furnishing letter of credit is irrelevant factor. When the Bill of Entry was presented the impugned November Notification was in vogue, therefore, by necessary implication the earlier concession was withdrawn. In support of his contention he has relied on the decision of the Supreme Court reported in M/s. Shah Devchand and Co. and another Vs. Union of India and another, , Union of India and others Vs. Apar Private Ltd. and Others, and M/s. Pankaj Jain Agencies Vs. Union of India and others, . Therefore, under no circumstances earlier Notification of May 2003 will be applicable in this case.

9. Apparently the two machines are different and he contends the petitioner has not been able to produce any material to establish the similarity of the two machines. Apparent reading of the two machines will suggest that these machines are dissimilar and they are separate in class and character. Functional ability and the pattern must be different and one may be superior to another. He further contends that this is a piece of subordinate legislation and so the legislature''s wisdom should not be substituted by the Court''s wisdom. It is for the legislature in which case the concession should be granted and what should be taxed and in what circumstances. Such wisdom cannot be upset by the Court. Legislature always makes laws keeping in view the hope and aspiration and want of public at large having regard to the problem being faced in practical life. In support of his contention he has relied on a decision of the Supreme Court reported in Dantuluri Ram Raju and Others Vs. State of Andhra Pradesh and Another, and Kerala Hotel and Restaurant Association and others Vs. State of Kerala and others, .

10. Argument of the learned Additional Solicitor General on two counts above are not disputed in principle. The question is whether the same shall be applied in this case or not. Upon prima facie reading of Section 25 vis-a-vis the Notification issued by the authority concerned, it appears to me there is a doubt whether it is a piece of legislation or is an executive act. Act of legislature obviously enjoins absolute freedom within its own filed and this challenge can only be thrown only on two grounds - on the ground of legislative incompetence and unconstitutionality. But in case of executive action the power of judicial review, in my view, is larger than that in case of challenge against the legislative action.

11. In the petition it has been prima facie stated that the machine in question is not different and dissimilar with that of mentioned in the notification impugned and functional pattern and ability are also same, only there is a little variation. Unless these facts are controverted by filing an affidavit by the Revenue showing that the machine in question as mentioned in the impugned notification is dissimilar and different in character, perhaps it is not possible for the court to come to any conclusion on the factual aspect. I thought the affidavit would be forthcoming today but it is not so. So, I will certainly grant extension to file the

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affidavit.

12. Before that, question of release of the goods is to be decided. While considering this aspect the Court has to see the balance of convenience and inconvenience. Mr. Mitra contends that the machine will be in possession of his client and it would not be parted with or sold away. His client is much solvent. So, there is not chance of the revenue remaining un-recovered in the event this court decides against the writ petitioner. In my view the approach of the Court while dealing with the question of granting interim order in case of Revenue matter should be slightly different from that of any ordinary litigation, I find prima facie upon reading Sections 14 and 15 of the Customs Act as well as considering the decisions namely M/s. Shah Devchand and Co. and another Vs. Union of India and another, , Sections 14 and 15, M/s. Pankaj Jain Agencies Vs. Union of India and others, , Union of India and others Vs. Apar Private Ltd. and Others, cited by the learned Additional Solicitor General that the notification which was in vogue on the date of presentation of Bill of Entry will be applicable. Therefore, the Notification being 164/2003, dated 11th November, 2003 prima facie will certainly be applicable but that will be subject to the decision which might be rendered by the Court, on the point whether it stands to the test or scrutiny of Article 14 of the Constitution as well as Section 25 of the said Act or not. Whether the petitioner is solvent or whether there is no chance of the petitioner being run away with the property are not at all germane in this matter, but question of securing the Revenue. Considering the balance of convenience and inconvenience the justice will be sub-served if the petitioner does the following act to get release of the machine.

13. The petitioner shall pay the admitted 5% of the duty so to be levied and so far the differential duty is concerned, the petitioner shall furnish a bank guarantee in any Nationalized Bank with the Commissioner of Customs (Port) and such bank guarantee shall be kept renewed, if necessary, from time to time. The petitioner shall of course pay all other dues, if any, to any other person.

14. Upon the aforesaid things being done the goods shall be released within 48 hours from the time of compliance.

15. Time to file affidavit-in-opposition is extended by one week from date. Reply shall be filed within one week thereafter. Matter shall appear three weeks hence. Therefore, the writ petition stands adjourned for three weeks. The matter shall be heard as usual in terms of the earlier direction in the same status.

16. All parties concerned including the Commissioner of Customs (Port) are to act on xeroxed signed copy of this dictated order on the usual undertaking.

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