

(1987) 10 BOM CK 0003
In the Bombay High Court
Case No : Writ Petition No. 697 of 1985

Ashok Traders

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 08-10-1987

Acts Referred:

Customs Act, 1962 — Section 12
Customs Tariff Act, 1975 — Section 3(2)

Citation : (1988) 14 ECR 12

Hon'ble Judges : Pendse, J;Kenia, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Pendse, J.—The petitioner is a proprietary firm carrying on business, inter alia of importing goods. On February 26, 1983 the petitioner imported 51 Metric Tonnes of High Density Polythelene Moulding Powder (HDPE) from Avin Exports Inc. and the c.i.f. value was 670 American Dollars per metric tonne. The goods landed in Bombay Port and the petitioner filed three bills of entries on February 26, 1983. In respect of import of HDPE the basic customs duty payable was 50% while auxiliary duty was 25%. The additional or countervailing duty was at the rate of 42%. The petitioner has no dispute, in respect of the basic rate of Customs duty and auxiliary duty, but the petitioner complains about the rate of countervailing duty and also the manner in which the assessable value of the imported goods is ascertained for the purpose of payment of countervailing duty. The petitioner has raised four contentions filed under Article 226 of the Constitution in this petition and we will set out those contentions at once.

2. The first submission is that the Assistant Collector of Customs is determining the assessable value for the purpose of payment of countervailing duty by loading customs duty on c.i.f. value, and that is not permissible. The second submission is that the countervailing duty cannot be charged at 42% but should be reduced to 27%, because countervailing duty should be in accordance with

exemption Notification No. 302/79 dated December 4, 1979 issued in exercise of powers conferred by Sub-rule (1) of Rule 8 of Central Excise Rules. The third submission is that while ascertaining the c.i.f. value for payment of both, customs duty and the countervailing duty, it is not permissible for the Assistant Collector of Customs to load the c.i.f. value with landing charges levied by the Port Trust. The fourth submission is that Section 3(2) of Customs Tariff Act, 1975 is ultra vires of the fundamental rights guaranteed under the Constitution of India, and therefore, levy of additional duty or countervailing duty is not permissible.

3. Before examining the submission urged by Dr. Kantawala, learned Counsel appearing on behalf of the petitioner, it is necessary to set out some provisions, which deal with payment of customs duty. Section 12 of the Customs Act, 1962 provides that duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 or any other law for the time being in force on goods imported into India. Section 14(1) of the Customs Act deals with the ascertainment of valuation of the goods for the purpose of assessment. Section 14(1)(a) prescribes that the value of the goods shall be deemed to be the price at which such or like goods are ordinarily sold or offered for sale for delivery at the time and place of importation and where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for the sale. Sub-section (2) of Section 14 enables the Central Government to fix the tariff values for any class of imported goods having regard to the trend of value of such or like goods, and where such tariff values are fixed, the duty is charged with reference to such tariff value.

October 8, 1987.

4. The Customs Tariff Act, 1975 was enacted to consolidate and amend the law relating to customs duty, and Section 2 provides that rates at which duties of customs shall be levied under the Customs Act, 1962 are those specified in the First and Second Schedules to the Act. Section 3 provides for levy of additional duty equal to excise duty, and Section 3(1) prescribes that any article which is imported in India shall, in addition, be liable to a duty equal to excise duty for the time- Deing leviable on the like article produced or manufactured in India. Sub-section (2) of Section 3 reads as follows:

(2) For the purpose of calculating under this section the additional duty on any imported article, where such duty is leviable at any percentage of its value, the value of the imported article shall, notwithstanding anything contained in Section 14 of the Customs Act, 1962 (52 of 1962), be the aggregate of-

(i) the value of the imported article determined under Sub-section (1) of the said Section 14 or the tariff value of such article fixed under Sub-section (2) of that section, as the case may be; and

(ii) any duty of customs chargeable on that article u/s 12 of the Customs Act, 1962 (52 of 1962), and any sum chargeable on that article under any law for the

time being in force as an addition to, and in the same manner as, a duty of customs, but not including the duty referred to in Sub-section (1).

Section 6 confers power on the Central Government to levy protective duties in cases where the Government is satisfied upon recommendation made by the Tariff Commission that circumstances exist which render it necessary to take immediate action to provide for the protection of the interests of any industry established in India. These are the relevant provisions in respect of payment of customs duty.

5. the Supreme Court examined the ambit of the provisions of Sections 2 and 3 of the Customs Tariff Act, and the nature and connotation of expression "countervailing duty" in the decision reported in *Khandelwal Metal and Engineering Works and Another Vs. Union of India (UOI) and Others*, . Chief Justice Chandrachud, speaking for the Court, observed that the argument that Section 3(1) of the Tariff Act is an independent charging section or that additional duty which it speaks of is not a duty of customs but is a countervailing duty cannot be accepted. It was further held that the customs duty charged u/s 12 is extended by an additional duty confined to imported articles in the measure set forth in Section 3(1), and thus the additional duty mentioned in Section 3(1) of the Tariff Act is not in the nature of countervailing duty. While examining the true nature of the duty mentioned in Section 3(1) of the Tariff Act, it was observed:

It has to be appreciated at the threshold that the charging section is Section 12 of the Customs Act and not Section 3(1) of the Tariff Act. Section 12, Customs Act, incorporates the different ingredients embodied in the concept of a fiscal imposition. It levies a charge, it indicates the taxable event (The import or export of goods) and it indicates the rate of the levy. The rates are such "as may be specified under the Customs Tariff Act, 1975.

With this background of the relevant provisions, we would proceed to examine the contentions urged by the learned Counsel in support of the petition.

6. Dr. Kantawala, urged that while determining the assessable value of the imported goods for the purpose of payment of countervailing duty, it is not permissible for the respondents to arrive at the assessable value by loading customs duty on c.i.f. value. The learned Counsel urged that the countervailing duty is levied so as to counterbalance the advantage which the imported goods may secure by non-payment of excise duty. The goods manufactured in India are subjected to payment of excise duty, and in case the countervailing duty is not levied on the imported goods, then the imported goods would secure advantage in the market. The learned Counsel argued that Section 6 of the Customs Tariff Act confers power on the Government to levy duty which is protective in nature and this duty is levied so as to offer protection to the local manufacturers from the onslaught of the imported goods. It was urged that the two concepts of counterbalancing and protection are entirely different in nature and

countervailing duty should be restricted so as only to counterbalance the advantage which the imported goods may secure, but such countervailing duty should not be in the nature of a protective duty. The submission is not very accurate, because the two concepts may very well overlap. The imports are not permitted without restriction and are permitted only when the local manufacturers are not able to meet the demand for the goods in the "country. The anxiety of the legislature and the policy of the Government repeatedly declared indicate that the country desires to be self sufficient and import should be discouraged as far as possible. In reaching the goal it is possible that the duty could be required to be levied not only for the purpose of counterbalancing but also to afford protection to the indigenous goods, and it would not be appropriate to keep nature of the duties in water-tight compartments. The first contention of Dr. Kantawala that assessable value cannot be arrived at by loading customs duty on c.i.f. value while determining countervailing duty has two facets. The submission is that the duty, whether basic customs duty or the countervailing duty, is payable on import of goods and the taxable event is the fact of import. The expression "import" as defined u/s 2(23) of the Customs Act with its grammatical variation and cognate expression, means bringing into India from a place outside India, while Section 2(25) defines "imported goods" as any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption. Section 2(27) of the Customs Act provides that "India" includes the territorial waters of India. Referring to these definition Sections, Dr. Kantawala submitted that the Full Bench of this Court in the decision reported in Apar Private Ltd. and others Vs. Union of India and others, has held that the import takes place as soon as the goods enter the territorial waters. The learned Counsel urged that entry of imported goods into territorial waters of India is taxable event and liability to pay duty as provided u/s 14(1) of the Customs Act arises at that point of time. Dr. Kantawala submitted that the value of the goods must be determined at that point of time for the purpose of levy of duty and any charges incurred thereafter, either for the purpose of payment to the Port Trust or for the payment of customs duty, cannot be loaded on c.i.f. value. The second aspect of the submission is that it is not permissible for the respondents to load the customs duty on c.i.f. value while determining the assessable value for the purpose of countervailing duty. The contention that the customs duty cannot be loaded on c.i.f. value while determining assessable value for countervailing duty cannot be accepted in face of the provisions of Sub-section (2) of Section 3 of the Customs Tariff Act. The sub-section opens with the words "For the purpose of calculating u/s 3 of the additional duty on any imported article...". It further recites that the value of the imported article shall be the aggregate of (a) the value of the imported article determined under Sub-section (1) of Section 14, and (b) any duty of Customs chargeable on that article u/s 12 of the Customs Act. In view of the clear statutory provision, it is futile for Dr. Kantawala to submit that the customs duty cannot be loaded on c.i.f. value while determining assessable value for the purpose of additional or countervailing duty. Sub-section (2) of Section 3 clearly

provides that the value of the imported article shall be assessed by taking into consideration the value as prescribed u/s 14(1) of the Customs Act and in addition the duty of customs chargeable on that article u/s 12 of the Customs Act. In face of this statutory provision, it is impossible to accede to the submission of Dr. Kantawala. The contention that the taxable event occurs, in accordance with the decision of the Full Bench, as soon as the imported goods enter the territorial waters of India and thereafter any expenses incurred in respect of those goods before clearance for home consumption cannot be taken into consideration while assessing the value of the goods cannot be accepted. The decision of the Full Bench is binding on us and we proceed on the basis that the taxable event occurs when the imported goods enter the territorial waters of India, but the mere fact that the taxable event occurs at that point of time does not mean that the duty is to be determined with reference to the value of the goods at that point of time. In our judgment, the taxable event continues till the goods are cleared at Customs barrier for home consumption and all the expenses which are required to be incurred in respect of those imported goods form part of the value of those goods and it is not permissible for the importer to suggest that the value of goods should be determined at the point of time of entry into territorial waters and all expenses incurred thereafter are post-import expenses. In our judgment, the first submission of the learned Counsel therefore must fail.

7. Dr. Kantawala then submitted that even assuming that the countervailing duty is payable on the value assessed taking into consideration the c.i.f. value plus customs duty, still the respondents were not justified in recovering the duty at the rate of 42% and the proper course to adopt was to reduce the duty to 27%. The submission was advanced by urging that the rate of countervailing duty should be in accordance with the exemption Notification No. 302/79 dated December 4, 1979 issued by the Central Government in exercise of the powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, 1944. The learned Counsel urged that the object or intention of levy of countervailing duty is principally to counterbalance the advantage which the imported goods may secure and that fact becomes evident by plain reading of Sub-section (1) of Section 3 of the Customs Tariff Act. Sub-section (1) of Section 3 prescribes that articles imported into India shall be liable to a duty equal to the excise duty for the time being leviable on a like article manufactured in India. Dr. Kantawala placed reliance on the decision of Division Bench of this Court reported in *Century Enka Ltd. v. Union of India* 1982 ELT 64 : 1982 ECR 177 where it was held that Section 3 makes it clear that the countervailing duty u/s 3 cannot be levied on the article imported into India if such article manufactured in India is exempted from payment of excise duty. It was further held that the provisions of Section 3 have to be read in conjunction with the provisions of the Central Excise Act. Dr. Kantawala submitted that under Rule 8 of the Central Excise Rules the Central Government published notification dated December 4, 1979 prescribing for exemption of excise duty in respect of artificial or synthetic resins under sub-item (1) of Item No. 15-A of the First Schedule to the Central Excises and Salt

Act, 1944. The perusal of the Notification indicates that in respect of High Density Polythylene the rate of duty prescribed is 27 per cent instead of normal duty of 42 per cent. This partial exemption from payment of duty is prescribed by the Notification provided the two conditions are satisfied, and those conditions are (i) artificial or synthetic resins are manufactured from raw Naphtha or any chemical derived therefrom, and (ii) on which the appropriate amount of duty of excise has already been paid., Relying on this exemption notification under the Excise Act, Dr. Kantawala urged that the imported goods, being high density polythelene is not liable to payment of countervailing duty at the rate of 4,2% but only at the rate of 27%. Shri, Bulchandani, learned Counsel appearing on behalf of the respondents, did not dispute the principal" laid down by the decision of the Division Bench of this Court in the case of Century Enka, but submitted that the advantage of the notification is available to the imported goods provided the conditions set out in the notification are complied with. Shri Bulchandani submitted that though it is not in dispute that the imported goods are manufactured from raw naphtha or any chemical derived therefrom, the other condition that "on which the appropriate amount of duty of excise has been paid" is not satisfied nor indeed can be satisfied in respect of the imported goods, and therefore, the advantage of the notification is not available. We find merit in the submission advanced by Shri Bulchandani. The advantage of the notification dated December 4, 1979 is available provided both the conditions are satisfied, the conditions being that the goods are imported from raw naphtha and on which the appropriate amount of excise duty has already been paid. It is obvious that the imported goods cannot satisfy the second condition, because the payment of excise duly on raw naphtha can never arise in respect of imported goods. Dr. Kantawala had to concede that the second condition of payment of excise duty on raw naphtha is not fulfilled in respect of the imported goods, but urged that the said condition has no application in the case of the imported goods. It is impossible to accede to the submission of the learned Counsel. It is futile to suggest that advantage under the exemption notification should be made available even though the conditions required for securing advantage are not complied with. The suggestion that only those conditions would be satisfied which are possible of satisfaction is only required to be stated to be rejected. A tax-payer, who desires to take advantage of exemption must bring his case within the four corners of the exemption notification. Acceding to the submission of Dr. Kantawala would lead to atrocious results as the importers would get advantage over the local manufacturers, inasmuch as the importers without satisfying the conditions would claim advantage, while the same would be denied to the local manufacturers. It is, therefore, impossible to accept the submission of Dr. Kantawala that even satisfaction of one condition would entitle the importer to take advantage of the exemption notification. Dr. Kantawala urged that in the case of Century Enka the advantage of notification was made available to the importer, but the submission overlooks that the condition prescribed under the said notification concerning that case was satisfied by the importer, the condition being that the entire material imported would be used in

the factory of the petitioners for manufacture of nylon yarn. The Revenue did not dispute in the case of Century Enka that the condition was not satisfied, and therefore, the advantage of notification was given to the importer. Dr. Kantawala then relied upon the decision of one of us (Pendse, J.) reported in Pan Asia Commercial Enterprises and another v. Union of India & Anr. 1986 (9) ECR 36 where notification dated December 4, 1979 and its impact on the payment of countervailing duty in respect of the imported goods came up for consideration. The petitioners relied upon the decision of the Division Bench in the case of Century Enka, and the learned Counsel appearing on behalf of the Department did not dispute that the claim of the petitioners is covered by the decision. It is undoubtedly true that it was contended on behalf of the Department that the second condition of payment of excise duty in respect of the imported goods was not satisfied but the contention was turned down on the ground that there was no material brought on record in the return in support of the submission. We are afraid that the decision of the single Judge is not correct. Even though the material was not brought on record to establish that excise duty was not paid on the raw material in respect of the imported article, that fact could have been assumed without any proof. It is impossible to imagine a case where in respect of raw naphtha used for manufacture of H.D.P. in a foreign country, excise duty payable under the Indian Law could have been levied and paid. It is therefore obvious that the decision of the single Judge in Pan Asia Commercial Enterprises's case is not correct and we overrule the same. In our judgment, as the condition of payment of excise duty on raw naphtha could never be satisfied in the case of imported HDP, the advantage of the exemption Notification dated December 4, 1979 is not available, and therefore, the second contention of Dr. Kantawala deserves to be repelled.

8. The third contention urged by DT. Kantawala is that while determining c.i.f. value for the purpose of payment of basic customs duty, it is not permissible for the respondents to load the c.i.f. value with landing charges recovered by Bombay Port Trust. The landing charges recovered by the Port Trust does not appear in any section of the Scale of Rates charged at the Docks or at the Bunders. The charges levied by the Port Trust in relation to the imported cargo are as under:

A vessel desirous of discharging imported goods is provided terminal facilities, which include a berth in a wet dock and shore cranes and other facilities for smooth operations of receipt of cargoes. These charges are termed as berth hire charges, the crane hire charges and are levied on the Agents of vessels and not on the importer of goods.

After the imported goods are landed on the wharf from the vessel, the same are properly arranged and stored suitably in Port premises till the deliveries are effected. For the purpose of properly arranging the goods in the Port premises, the Port Trust provides for labour and the wharfage recovered from the importer includes charges for handling of cargo on wharf by the labourers provided by the

Port Trust. Besides the wharfage charges, demurrage charges are levied on imported goods when they continue to remain in the Port Trust premises beyond a free period. Dr. Kantawala submitted that the landing charges varies from 0.1% to 0.75%. It was contended by the learned Counsel that the c.i.f. value include freight charges and freight charges include landing charges also. We inquired from the learned Counsel as to the basis on which the submission is advanced, and Dr. Kantawala had to concede that there is nothing in the petition to substantiate the claim. Shri Bulchandani on the other hand submitted that the landing charges are realised by the Port Trust and those charges are not the part of the freight charges which are part of c.i.f. value. In absence of any material on record, it is not possible to accede to the claim of Dr. Kantawala that the c.i.f. value is inclusive of the landing charges. Dr. Kantawala then submitted that as per the decision of the Full Bench in *Apar* case (*supra*), the import takes place as soon as the goods enter the territorial waters and any charges required to be incurred after that time on import cannot be taken into consideration while assessing the value of the imported goods for the purpose of levy of customs duty. It was urged by the learned Counsel that the valuation theory adopted in respect of levy of excise duty should also be made applicable in respect of imported articles. In other words, the submission is that as the post-manufacturing expenses are excluded while assessing the value of goods liable to excise duty u/s 3 of the Excise Act, while determining the value of the goods for assessment u/s 14 of the Customs Act all post-imported charges should be excluded. It is not possible to accept the claim of the learned Counsel, because the submission proceeds on the basis that the landing charges are post-import charges and which submission cannot be acceded to. As observed hereinabove, though in accordance with the dictum laid down by the Full Bench in *Apar*'s case, taxable event or the import takes place as soon as the goods enter the territorial waters, it is not possible to conclude that the taxable event becomes over at that point of time. In our judgment, the taxable event continues till the goods are cleared from the customs barrier for home consumption and any charges required to be incurred by the importer or his agent in respect of these goods form part of the value of the goods and must be taken into consideration while ascertaining the assessable value of the goods for the purpose of levying duty u/s 14 of the Customs Act. It is impossible to suggest that without payment of landing charges the imported goods could have been cleared for home consumption, and therefore, it must be held that charges incurred in respect of the imported goods before clearance are not post-import charges but pre-import charges. The complaint of Dr. Kantawala in respect of loading of landing charges while assessing the c.i.f. value for the purpose of levy of basic customs duty therefore deserves to be turned down.

9. Dr. Kantawala finally submitted that Section 3(2) of the Customs Tariff Act, 1975 is ultra vires, unconstitutional and violative of Articles 14 and 265 of the Constitution, and the averments in respect of this challenge are to be found in paragraph 33 of the petition. The petitioner has not challenged the legislative

competency of the Parliament in enacting the impugned section, but the constitutional validity is impeached only on the ground of violation of fundamental rights under Article 14 of the Constitution. It was contended by Dr. Kantawala that the provisions of Section 3(2) of the Customs Tariff Act are violative of the protection under Article 14 of the Constitution as it discriminates between the local manufacturers and importer in respect of identical goods. // is impossible to accede to the submission of the learned Counsel. The two categories of tax-payers cannot be bracketed in the same class and it would be improper to suggest that the goods locally manufactured and the goods imported form the same class. In our judgment, the two categories of goods are not at all comparable and totally distinct and different. Levy of countervailing duty on the value ascertained by addition of customs duty to c.i.f. value cannot be claimed to be discriminatory and violative of Article 14 of the Constitution. Dr. Kantawala submitted that the same principle adopted in respect of ascertaining the assessable value of an article liable to payment of excise duty is required to be applied in respect of the imported goods and that not having been done Section 3(2) of the Customs Tariff Act suffers from constitutional vice. We are unable to see any merit in the submission. It was then suggested by the learned Counsel that the section leads to discrimination between two classes of importers of identical goods. The submission need not detain us for a moment, because Dr. Kantawala had to concede that there are no averments in the petition on this Court. In absence of any averments, it is impossible to examine the claim of Dr. Kantawala that the impugned section leads to discrimination between two importers of identical goods.

Finally Dr. Kantawala submitted that loading of customs duty and landing charges on c.i.f. value for the purpose of determining the assessable value of the imported goods amounts to double taxation, and therefore, the Section is bad and should be struck down. In the first instance we do not understand how the claims that the Section provides for double taxation is correct. The liability to pay the customs duty includes payment of basic duty, auxiliary duty and countervailing duty. Though all these duties are broadly brought under the title "customs duty", the Legislature has prescribed different modes for arriving at the assessable value for levy of basic duty and countervailing duty. In respect of payment of basic duty, the assessable value is c.i.f. value, while the assessable value for the purpose of countervailing duty is c.i.f. value plus basic duty payable. It is always open for the Legislature to provide different modes for levy of different duties and it is not permissible for the tax-payer to complain that merely because the basic duty paid on the c.i.f. value is added to the c.i.f. value while assessing the value of the imported goods for liability to pay countervailing duty, the Section suffers from the vice of double taxation. There are several statutes where the legislature adopted this method of recovering different kinds of duties and one may usefully refer to the Income Tax, Wealth Tax and Estate Duty Tax. Therefore, it is not possible to hold that Section 3(2) of the Customs Tariff Act provides for double taxation. Secondly, even assuming that the Section

provides for double taxation, in our judgment, it does not automatically become void or unconstitutional. Dr. Kantawala referred to the two decisions of the Supreme Court reported in *Union of India v. Tata Iron & Steel Co. Ltd.* AIR 1976 S.C. : ECR 490 SC and *Alladi Venkateswarlu and Others Vs. Govt. of Andhra Pradesh and Another*, , but we are unable to appreciate how the two decisions would advance the claim of the petitioner. In our judgment, the Section does not suffer from any vice and cannot be struck down.

A faint suggestion was made by Dr. Kantawala that Section 3(2) of the Customs Tariff Act is violative of the protection guaranteed under Article 19(1)(g) of the Constitution. The submission is only required to be stated to be rejected, because it is not even pleaded by the petitioner that he would not be able to carry on his business because of levy of duty u/s 3(2) of the Customs Tariff Act, and even if it is so stated the Section cannot be struck down merely because the petitioner is unable to carry on his business because of his inability to pay the duty. The petitioner is not compelled to import the goods incase the petitioner is not able to pay the duty and the validity of the Section does not depend upon the ability of the petitioner to pay taxes. In our judgment, there is no merit whatsoever in the challenge to the constitutional validity of Section 3(2) of the Customs Tariff Act, 1975.

10. Though the petition raises several other issues, Dr. Kantawala stated that the petitioner is not desirous of pressing any other contention, including the complaint about packing charges being loaded on c.i.f. value while determining the assessable value of the imported goods. As all the contentions raised by the petitioner are turned down, the petitioner is not entitled to any relief.

11. Accordingly, petition fails and the rule is discharged with costs.