(2011) 06 GUJ CK 0049

In the Gujarat High Court

Case No : Special Civil Application No. 134 of 2002

Chaudhary Industries and Another — APPELLANT

Vs

Union of India and Others — RESPONDENT

Date of Decision : 21-06-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 2(34)
Constitution of India, 1950 — Article 14, 226, 227

Citation : (2012) 281 ELT 216 : (2011) 3 GLH 819

Hon'ble Judges : R.M. Chhaya, J;Harsha Devani, J

Bench : Division Bench

Advocate : Rakesh Gupta, for M/s. Trivedi and Gupta for Petitioners 1 - 2, for the Appellant; Amee Yajnik Senior Standing Counsel for Respondents : 1 - 4 and Ds Aff. Not Filed (R) for Respondent 5, for the Respondent

Final Decision : Allowed

Judgement

Mr. R.M. Chhaya, J.—By way of this petition under Articles 226 and 227 of the Constitution of India, the petitioners have challenged communication dated 31.12.2001, whereby the respondent No. 3 herein directed the petitioners to observe customs procedure as prescribed under the law and file Bill of Entry under S. 46 of the Customs Act, 1962 (hereinafter referred to as the Act for the sake of brevity) for the vessel named M.V. GLORIA KOPP which was purchased by the petitioners in auction from respondent No. 5, further informing the petitioners that the customs duty is required to be collected under Chapter CTH 8908.

2. The facts as per the record of this petition are as under:

3. That the petitioner No. 1 is a registered partnership firm engaged in the business of ship breaking and petitioner No. 2 is Managing Partner of petitioner No. 1.

4. Respondent No. 5 Commissioner of Customs, Chennai floated tender for sale

of confiscated vessel/ship named M.V. GLORIA KOPP which stipulated various conditions. As per the said tender notice amongst other, the conditions Nos. 10 and 11 read as under :-

10. TAXES & DUTIES : will be charged extra as per TNGST Act as applicable on date of billing and should be paid along with balance payable amount to the Commissioner of Customs, Custom House, Chennai.

11. NO CUSTOM DUTY ON SALE VALUE : The ship is confiscated and will be sold by tender by the Indian Custom Authorities and hence no custom duty will be charged extra on sale value from the purchaser.

5. The petitioner firm made an offer for purchase of the said vessel for an amount of Rs. 2,36,00,000/-. The said offer made by the petitioner was accepted by respondent No. 5 vide communication dated 21.11.2001. It is the case of the petitioners that the petitioners complied with the conditions of the tender and also paid the sales tax as per the condition of the tender and accordingly the statutory order of bill of sale was issued in favour of the petitioner firm on 5.12.2001.

6. It is the case of the petitioners that the petitioner firm is engaged in the business of ship breaking and hence, intended to bring the ship to Alang port, District Bhavnagar for the purpose of breaking the said vessel. The petitioner firm addressed a letter to respondent No. 3 herein, informing respondent No. 3 that they had purchased the said vessel in an auction held by respondent No. 5 and further intimating respondent No. 3 herein, that as per condition No. 11 no customs duty is payable on the said ship, as the ship was confiscated and is sold by tender by the Customs Authority, Chennai and giving all details and relying upon the legal provisions as well as the relevant Notification dated 1.3.2001 requested respondent No. 3 to grant beaching permission of the vessel, without insisting for formalities and also for filing fresh Bill of Entry. It also transpires from the record that another Company viz. M/s. Swift (GB) Ltd. of Wembley, U.K. who was one of the interested offerers by communication dated 26.9.2001 inquired from respondent No. 5 as to whether the purchaser would be required to pay customs duty on the value of the ship. In response to the said communication of M/s. Swift (GB) Ltd., respondent No. 5 vide communication dated 26.9.2001 clarified that as the vessel in question was a confiscated item and the same was being sold by tender by the custom Authorities no custom duty will be charged on sale from the purchaser as per clause 11 of the condition of sale annexed to the tender notice. Copy of the said communication was sent by respondent No. 5 also to respondent No. 1 as well as respondent No. 3 herein. In response to the letter dated 26.12.2001 addressed to respondent No. 3 herein requesting to permit the petitioner to beach the vessel at Alang the respondent No. 3 herein vide impugned communication dated 31.12.2001 informed the petitioners that circular No. 44/97 would be applicable to those vessels which exclusively carry coastal goods and ply as coastal vessels only and same would not be applicable for vessels which are converted from foreign run to coastal run

and vice versa. The petitioner firm was further informed that the Notifications mentioned therein indicate that the exemption would be available to Ocean going vessels and not to vessels imported for the purpose of breaking and therefore opined that the petitioner is required to pay customs duty under CTH 8908.

7. The petitioner on receipt of the said communication from respondent No. 3 approached respondent No. 5 vide communication dated 3.1.2002 informing him about the stand taken by respondent No. 3, asking the petitioner to pay customs duty and requested for clarification in the said regard. The respondent No. 5 again vide communication dated 7.1.2002 informed the petitioners that as per clause 11 of the tender condition no customs duty is leviable.

8. Being aggrieved by the said communication dated 31.12.2001 the petitioners have filed this petition under Articles 226 and 227 of the Constitution of India. It may be noted that at the time of admission of the matter vide order dated 14.2.2002 this Court (Coram : D.M. Dharmadhakari C.J. And D.A. Mehta, J. as they then were) by an interim relief have passed the following order:

2. Having heard both the sides, we direct the respondents that they shall permit the petitioner-firm to beach the vessel - M.V. GLORIA KOPP at Alang Port, District Bhavnagar, after permitting them to reduce the weight of the vessel by breaking up necessary portion thereon, without insisting for payment of customs duty. It is further directed that the petitioner-firm shall be permitted to undertake the ship breaking activity in relation to the said vessel and shall make payments under the Central Excise Act from time to time as required under the Act. This order shall remain in force until further orders.

9. The petitioners by way of an additional affidavit dated 14.2.2002 have filed an undertaking which is on record as per order dated 14.2.2002.

10. Respondent No. 3 has filed the Affidavit-in-Reply for and on behalf of respondent Nos. 2, 3 and 4 and has contended that after the acceptance of the vessel, the buyer is solely responsible for the said vessel. It is further contended that if the buyer continues to use the said vessel as an Ocean going vessel then he is not required to pay any customs duty and stands exempted. It is further contended in the said affidavit that vide communication dated 26.12.2001 (Annexure F) the petitioner had contended before the department that the vessel is in coastal run and hence no beaching formalities and other formalities like filing of IGM filing of Bill of Entry are required and requested to grant permission for beaching. It is further contended on behalf of the respondents that as the petitioners are desirous of breaking the vessel in question they are required to follow the procedure u/s 46 of the Act. Relying upon the judgment of the Apex Court in the case of Union of India and others Vs. M/s. Jalyan Udyog and another, as well as the judgment of CEGAT, New Delhi in case of M/s, Mustan Taherbhai v. Collector of Customs, 2000 (125) ELT 1001, it is contended that the petitioner firm is required to pay customs duty as per Entry 5908 of Customs Tariff Act, 1975. It is further contended on behalf of the respondent that condition No. 11

attached with the tender notice by respondent No. 5 would not in any manner oust the applicability of law and such a condition would not create an exception or estoppel against the statute. It is further contended that the petitioner therefore cannot take shelter of the said condition for customs duty as the vessel is to be beached for breaking up at Alang port.

11. Heard Mr. Rakesh Gupta for M/ s. Trivedi & Gupta for the petitioners and Ms. Amee Yajnik for respondent Nos. 1 to 4.

12. It is worthwhile to note that Ms. Yajnik appearing for respondent Nos. 1 to 4 has stated before the Court that she has received written communication from respondent No. 5 i.e. Assistant. Commissioner of Customs (Warehouse and Disposal), Chennai reiterating the stand that as per condition No. 11 attached with the tender notice no customs duty is leviable.

13. Mr. Gupta, learned Counsel has submitted that the vessel purchased by the petitioners in response to the tender notice issued by respondent No. 5 was a confiscated vessel as contemplated u/s 126 of the Act and therefore, the same cannot be considered to be an imported goods. The learned Counsel Mr. Gupta further submitted that the petitioners are not the importers as defined u/s 2(34) of the Act as the vessel in question on being confiscated as per Section 126 of the Act was a property of Central Government and, therefore, the transaction between the petitioners and respondent No. 5 cannot be termed as ''Import''. Mr. Gupta therefore submitted that the provisions of Section 46 would not be applicable.

14. Mr. Gupta further submitted that as per condition No. 10 of the tender notice the petitioner firm has already paid sales tax to the Competent Authority at Chennai and the same is indicative of the fact that the vessel in question purchased by them was not an import and that the sales tax having been levied and paid by the petitioners goes to show that it was a transaction of sale between respondent No. 5 and the petitioner. Mr. Gupta further relying upon communication of respondent No. 5 submitted that as per condition No. 11 no customs duty is leviable upon petitioners. Mr. Gupta therefore submitted that the impugned communication dated 31.12.2001 is ex-facie bad, illegal and violative of Article 14 of the Constitution of India. Mr. Gupta, learned Counsel further submitted that the said communication deserves to be quashed and set aside as prayed for in this petition as the same is bad, illegal and dehors the provisions of the Act and, therefore, submitted that this Hon''ble Court would be pleased to quash and set aside impugned communication dated 3,12.2001 as prayed in the petition.

15. As against this Ms. Yajnik, learned Senior Standing Counsel appearing for respondent Nos. 1 to 4 supported the communication dated 31.12.2001. Ms. Yajnik, learned Counsel has heavily relied upon the contents of the Affidavit-in-Reply as narrated hereinabove and submitted that the petitioners have purchased vessel in question from respondent No. 5 as Ocean going vessel. She

further submitted that the vessel in question has been registered at Panama and, therefore, is covered under the definition of word ''goods'' as well as ''import'' as defined under the Act and, therefore, submitted that the petitioners are not entitled to any exemption as claimed for and that they are required to follow the procedure as envisaged u/s 46 of the Act. It was further argued that the petitioners are amenable to jurisdiction of respondent No. 3 and liable to pay customs duty as per Chapter 8908. Ms. Yajnik further reiterated that condition No. 11 is stipulated in contract between respondent Nos. 5 and the petitioners and the same would not absolve the petitioners from liability arising under the Act. It was further submitted that condition existing in a contract would not operate as estoppel against the statute. Ms. Yajnik further submitted that the petition is devoid of any merits and the same deserves to be dismissed.

16. Before dealing with the submissions made by both the sides it would be necessary to refer to the relevant provisions of the Customs Act which are as under:-

(22) ''goods'' includes -

(a) vessels, aircrafts and vehicles;

(b) stores;

(c) baggage;

(d) currency and negotiable instruments; and

(e) any other kind of movable property;

(23) ''import'', with its grammatical variations and cognate expressions, means bringing into India from a place outside India;

(24) xxx

(25) ''imported goods'' means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption;

(26) ''importer'', in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the importer;

(1) The importer of any goods, other than goods intended for transit or transhipment, shall make entry thereof by presenting to the proper officer a bill of entry for home consumption or warehousing in the prescribed form:

Provided that if the importer makes and subscribes to a declaration before the proper officer to the effect that he is unable for want of full information to furnish all the particulars of the goods required under this sub-Section, the proper officer may, pending the production of such information, permit him, previous to the entry thereof (a) to examine the goods in the presence of an officer of customs, or (b) to deposit the goods in a public warehouses appointed u/s 57 without warehousing the same.

(2) Save as otherwise permitted by the proper officer, a bill of entry shall include all the goods mentioned in the bill of lading or other receipt given by the carrier to the consignor.

(3) A bill of entry under sub-Section (1) may be presented at any time after the delivery of the import manifest or import report, as the case may be:--

Provided that the [Commissioner of Customs] may in any special circumstances permit a bill of entry to be presented before the delivery of (such report) :

[Provided further that a bill of entry may be presented even before the delivery of such manifest if the vessel or the aircraft by which the goods have been shipped for importation into India is expected to arrive within thirty days from the date of such presentation.]

(4) The importer while presenting a bill of entry shall at the foot thereof make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, relating to the imported goods.

(5) If the proper officer is satisfied that the interests of revenue are not prejudicially affected and that there was no fraudulent intention, he may permit substitution of a bill of entry for home consumption for a bill of entry for warehousing or vice versa."

126. On confiscation, property to vest in Central Government. - (1) When any goods are confiscated under this Act, such goods shall thereupon vest in the Central Government.

(2) The officer adjudging confiscation shall take and hold possession of the confiscated goods.

17. The short question therefore which arises for consideration in this petition is as to whether the petitioners are required to follow the procedure as prescribed u/s 46 of the Act for the vessel which was confiscated under the provisions of the Act and which had vested in the Central Government and put to auction sale by respondent No. 5 as property of the Central Government.

18. It is an admitted position that the said vessel was confiscated under the provisions of the Act by respondent No. 5 and by tender notice ''Annexure-B'' to this petition the same was put to sale as a confiscated good at Chennai. The word ''import'' as given defined under the Act would mean bringing any goods which includes vessel into India from outside India. Similarly the words ''imported goods'' mean any goods brought into India from a place outside India and similarly word ''importer'' would mean a person who brings any goods by way of import.

19. It is an admitted position that respondent No. 5 Authority had confiscated

the said vessel under the provisions of Section 126 of the Act and as provided u/s 126 on confiscation the said vessel vested in the Central Government and it was sold to the present petitioners as a property of the Central Government.

20. Similarly Section 46 provides for the procedure which an importer is supposed to follow while bringing goods by way of import into the territory of India.

21. In the facts of the present case, the said vessel has not been imported by the present petitioners but as aforesaid has been purchased by the petitioners in an auction held by respondent No. 5, on the said vessel, having been confiscated under S. 126 of the Act therefore, the petitioners are not ''importer'' consequently, the said vessel cannot be treated as imported goods and hence the petitioners were not amenable to the provisions of the Act and were not required to follow the procedure as prescribed u/s 46 of the Act. The reliance placed by the respondents upon the Notification No. 17-2001-Cus dated 1.3.2001 is also not applicable in the instant case. Apart from the fact that by condition No. 11 the respondent No. 5 had stipulated that no customs duty is payable on the said value as the ship was confiscated and is being sold by Indian Authorities. Thus the conclusion arrived at by the Authorities that as the said vessel was brought to port Alang for the purpose of breaking it is amenable to customs duty chargeable under CTH 8908 is erroneous. The respondent Authorities and more particularly respondent No. 4 has overlooked the fact that the said vessel was not imported by the petitioners but was sold by respondent No. 5 as a property of the Central Government within the territory of India and, therefore, the respondent Authority has wrongly come to the conclusion that the petitioners are required to observe the customs procedure as prescribed under law and file bill of entry as contemplated u/s 46 of the Act.

22. In the instant case, the vessel was purchased by the petitioners in an auction as aforesaid and it was neither purchased from a bonded ware house or nor been imported by the petitioners and therefore the ratio laid down by the Apex Court in the case of Union of India and others Vs. M/s. Jalyan Udyog and another, as well as the judgment of CEGAT, New Delhi in case of M/s. Mustan Taherbhai v. Collector of Customs, 2000(125) ELT 1001 would not apply to the present case.

23. In view of the foregoing the petition is allowed. The communication dated 31.12.2001 (Annexure-A) to this petition is hereby quashed and set aside. Rule made absolute. However, in the facts of the present case no order as to costs.

