

(2002) 01 CAL CK 0014

In the Calcutta High Court

Case No : Writ Petition No's. 1778 and 2772 of 2000

Dilip Kumar Jain

APPELLANT

Vs

Commissioner of Customs

RESPONDENT

Date of Decision : 29-01-2002

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 128

Citation : (2002) 142 ELT 549

Hon'ble Judges : Pinaki Chandra Ghose, J

Bench : Single Bench

Advocate : Surendra Chand Ghosh, for the Appellant; Debal Banerjee, Senior Advocate, for the Respondent

Judgement

Pinaki Chandra Ghose, J.—The subject matter of the writ petition is imposition of anti dumping duty imposed upon the petitioner. Under various notifications the Anti Dumping Authority has levied anti dumping duty in respect of the Styrene Butadine Co-polymer Resins KHS-68 (hereinafter referred to as the KHS-68).

2. The petitioner filed a writ application being No. 1778 of 2000 in anticipation of the imposition of the said anti dumping duties on KHS-68. No interim order was passed in that writ petition. Thereafter, the petitioner filed a second writ petition being W.P. 2772 of 2000 inter alia, praying for a writ in the nature of mandamus commanding the Respondents to act and proceed in accordance with law and directing the respondents to rescind, recall, cancel and/or withdraw the anti dumping duty imposed or sought to be imposed and the show cause notice dated 19th July, 2000 and the order dated 29th September, 2000 passed by the authorities and to give any further effect to the said orders and further to issue a writ in the nature of mandamus declaring imposing of anti dumping duties upon the KHS-68 as ultra vires to Sections 9A and 9B of the Customs Tariff Act, 1975 and the Customs Tariff (Identification Assessment and collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995

(hereinafter referred to as the Rules of 1995) and the notification dated 22nd May, 2000. According to the petitioner, the notification dated 22nd May, 2000 has no manner of application in respect of the KHS-68 goods since the same is coming under Chapter 39 under Heading 39.03. According to the petitioner, due to liberalisation of Imports and Exports the Styrene Butadiene Rubber was imported from Korea and other countries at the cheaper rate for which Indian manufacturers of Styrene Butadiene Rubber coming under Chapter 40 of the classification under Customs Tariff and the Indian manufacturers were suffering loss. With the object of protecting the Indian manufacturers of different goods Sections 9A and 9B was inserted in the Customs Tariff Act, 1985 for imposing anti dumping duty on the import of the goods manufactured by Indian manufacturers. The anti dumping duty is imposed under Sections 9A and 9B read with Customs Tariff (Identification, Assessment and collection of anti-dumping duty on dumped articles and for determination of Injury) Rules, 1995 (hereinafter referred to as the said Rules). Under Rule 3 of the said Rules, the Designated authority not below the rank of Joint Secretary to the Government of India is appointed for the purpose of the said Rules of 1995. The learned Counsel appearing on behalf of the petitioner drew my attention to Rule 4 of the said Rules of 1995 and submitted that the duties of the said Designated authority has been specifically mentioned under the said rule. He, further submitted that under Rule 5, the Designated authority shall initiate an investigation to determine the existence, degree and effect of any alleged dumping only upon receipt of written application by or on behalf of the domestic industry and after initiating such investigation under Rule 6, determination of normal value export price and margin of dumping and determination of injury under Rules 10 and 11, a preliminary finding is to be made under the said rules and after such preliminary finding anti dumping duty is provisionally imposed under Rule 13 until such provisional duty remain in force until the final finding under Rule 17 is made. According to the petitioner, these are the conditions precedent for imposition of anti dumping duty.

3. The petitioner further contended that in respect of manufacturer of Styrene Butadiene Rubber (hereinafter referred to as SBR) an application was made by one Synthetic and Chemicals Limited and on the basis of the said application, a public notice on 7th April, 1998 was issued to all concerns and preliminary finding was made on 21st January, 1999 and after the detailed investigation the Designated authority came to the conclusion of preliminary finding and anti dumping duty imposed by the Designated authority. Thereafter following the procedure, the Designated authority on 2nd June, 1999 passed final finding affirming the preliminary finding and imposed anti dumping duty on SBR.

4. One Automotive Tyre manufacturers Association and Rishirup Polymers (P) Limited (hereinafter referred to as RPPL) preferred an appeal before CEGAT, New Delhi against the said order of final finding and the said CEGAT on 2nd February, 2000 after hearing the parties affirmed the final finding of the Designated authority. After the judgment of CEGAT, the Central Government issued a

Notification bearing No. 73 of 2000, dated 22nd May, 2000. The petitioner further stated that two other Companies preferred two appeals before the authorities and the authorities concerned held anti dumping duty would be imposed upon the KHS-68 in view of the Notification dated 22nd May, 2000 and the companies after the order of imposition of anti dumping duty, preferred an appeal before the Commissioner of Appeals and the Commissioner upheld the order of the authorities. Thereafter the said Companies preferred appeal before the CEGAT, New Delhi and by a judgment and order dated 26th April, 2001, the CEGAT came to the conclusion that the goods imported that is SBR-KHS-68 the anti dumping duty could not be imposed and the authority could not levy any duty. In spite of the said order, the Customs authorities, according to the petitioner are regularly imposing anti dumping duty on KHS-68. According to the petitioner, such duty was imposed upon the petitioner on 26th June, 2000. The learned Counsel appearing on behalf of the petitioner submitted that no anti dumping duty could be imposed on KHS-68 and no investigation was made in respect of the said KHS-68 goods. He further contended that in view of the order and judgment delivered by the CEGAT on 26th April, 2001, no anti dumping duty can be imposed on the KHS-68 goods. He, further contended that the Designated authority accepted the judgment dated 2nd February, 2000 delivered by the CEGAT, New Delhi which is not applicable to the said case. Imposition and relaxation of anti dumping duty by the notification dated 22nd May, 2000 on the said case was not the basis of preliminary finding and final finding and accordingly the same is contrary to the provisions under Sections 9A and 9B of the Customs Tariff 1995 Rules and also the notification and hence is ultra vires to the said provision. He, further contended that no anti dumping duty could be imposed on the basis of the notification dated 22nd May, 2000 for mentioning 39.03 in the notification for imposition of anti dumping duty on SBR-KHS-68 goods in terms of the judgment and order dated 2nd February, 2000 hence he submitted that the show cause issued by the authority is without any jurisdiction and the same should be set aside. He, further contended that if an order is without jurisdiction, the petitioner has right to move the writ jurisdiction. In support of his such contention he relied upon the judgment reported in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others,

5. Mr. Banerjee, learned Senior Advocate appearing for the Customs department contended that the case of the petitioner is that the anti dumping duty could only be levied on KHS-68 goods if the goods in question fall under Chapter 40 and not under the Chapter 39. He, further contended that the writ petitioner is guilty of gross suppression of material facts. He, further contended that the learned Advocate for the petitioner did not draw the attention of the Court to the CEGAT order dated 2nd February, 2000 and the Finance Ministry's notification dated 22nd May, 2000 and the corrigendum dated 26th May, 2000. From the order of the CEGAT, the position was clarified in Paragraph 13 which is reproduced herein below :

"From this it is clear that the Designated Authority wanted to impose anti

dumping duty on all grades of Styrene Butadine Rubber irrespective of whether it is put under Heading 3903 or 4002. But which concluding the final findings, anti dumping duty has been imposed on SBR falling under subheading 4002.19 only. This is a clerical omission which is required to be corrected. Thus, we make it clear that anti dumping duty is on all grades of SBR, whether falling under subheading 4002 or 3903. Customs authorities have to impose duty on all types of SBR, irrespective of their classification."

6. He, further contended that the Designated authority has passed an order dated 3rd July, 2000 wherein it has been confirmed that the authority recognises the need for continuation of imposition of definitive anti dumping duty on all imports of SBR falling under Page 40. Customs Head 4002.19 and Page 39 Customs Head 3903.90 originating in or exported from the subject countries as are invited vide Customs Notification No. 73 of 2000, dated 22nd May, 2000. Accordingly, Mr. Banerjee submitted that it is clear that the writ petitioner has tried to give a totally incorrect impression as if the goods are falling under Chapter 39.03 are not covered under the purview of anti dumping duty.

7. He, further contended that the writ petitioner has also suppressed the fact that through advertisements given by the Korean manufacturer the goods in question had been admitted to be in the category of SBR. The said advertisements which have been published in journal of "Rubber India" which was produced before me by Mr. Banerjee from which it appears that, from time to time it would clearly show that KHS-68 has always been treated as SBR right up to June, 2000. After the litigation took place the KHS-68 has now been pushed into a separate category of high styrene resin. He, further submitted that RPPL is the sole indenting agent for the goods in question insofar as the Korean manufacturers are concerned and the writ petitioner is importing the goods under the indent of RPPL. This would be evident from the Bill of lading at Page 56 of the Writ Petition No. 2772 of 2000. He, further contended that the writ petitioner suppressed the fact that the Indenting agent, RPPL have filed a SLP in the Hon"ble Supreme Court of India whereby they specifically challenged the order of CEGAT dated 2nd February, 2000 as also the Notification No. 73 of 2000, dated 22nd May, 2000. In fact the entire issue which is sought to be raised before this Hon"ble Court whether the product falling under Chapter 39.03 of Customs Tariff should be subjected to anti dumping duty specifically in issue before the Hon"ble Supreme Court of India. The learned Counsel further produced before me the said SLP and drew my attention to ground "C" of the said SLP of the RPPL, wherefrom it appears that the ground has been taken before the Hon"ble Supreme Court of India. He, further contended that all these gross suppression of material fact this application must be dismissed. He, further contended that admittedly the order dated 29th September, 2000 is an appealable order and appeal lies before the Commissioner (Appeals) u/s 128 of the Customs Act. He, further contended that the questions be gone into are of highly technical in nature relating to classification. He, further contended that on well settled principles, the writ petitioner should be relegated to the alternative

remedy. He, further contended that the order and judgment of CEGAT, Northern Bench has no manner of application in the facts and circumstances of the case. In any event, the Custom Delhi has already challenged the order of CEGAT before the Hon"ble Supreme Court of India.

8. In that view of the matter, Mr. Banerjee submitted that the writ application is liable to be dismissed.

9. The learned Counsel appearing on behalf of the added respondent also submitted that no relief should be granted to the petitioner in view of the fact that the matter has already been decided by the CEGAT and further the writ Court is not the proper forum for adjudication of classification disputes which necessarily involve factual investigation into disputed question of fact as to the technical, chemical compositions of the goods involved, their uses and how they are commercially sold and dealt with and he relied upon a judgments reported in Todi Industries Ltd. Vs. Union of India (UOI) and Others, , Kerala v. P. Kesavan & Co.; 1997 (92) E.L.T. 19 (S.C.) State of Goa v. Leuko Plast (India) Ltd.; and (1983) 142 ITR 631 . Titagarh Paper Mills Co. Ltd. v. State of Orissa. Accordingly, he submitted that this application must be dismissed.

10. After considering the facts and circumstances of this case, I do not have any hesitation to come to a conclusion that the petitioner did not come with clean hands before this Court of equity. The petitioner has specifically suppressed the material fact before this Court that the petitioner is an Agent of RPPL and the RPPL, the indenting agent for the goods in question insofar as the Korean manufacturers are concerned. It is also admitted fact which has been not in dispute, that the writ petitioner is importing the goods under the indent of RPPL which is also evident from the Bill of Lading annexed to the writ petition at Page 56. The petitioner also suppressed the material fact to the effect that the RPPL have filed a SLP before the Hon"ble Supreme Court of India as also the Notification dated 22nd May, 2000. It is also a fact that the grounds are same as has been stated in this petition. Furthermore, it appears that the order so passed by the authorities is appealable order u/s 128 of the Customs Act. It further appears that the writ Court is not proper forum for adjudication of the disputes between the parties since in my opinion, which need factual investigation into the disputed question of fact as to the technical, chemical compositions of the goods involved.

11. In view of the facts and circumstances, stated hereinabove, in my opinion, I do not like to interfere in the matter and furthermore, the petitioner has an alternative remedy by preferring an appeal so passed by the authorities. Accordingly, it would be proper for me to direct the petitioner to file an appeal u/s 128 of the Customs Act. However, if such appeal is filed by the petitioner against the findings of the authority, within a period of four (4) weeks from the date of communication of this order before the said authorities, the authority will not take any point of limitation if the appeal is so filed within the period mentioned hereinabove. After such appeal is being filed by the petitioner, the

Appellate authority shall proceed with the matter in accordance with law.

12. For the reasons stated hereinabove, the instant writ application is thus disposed of. There will be no order as to costs.

13. Both the writ applications are disposed of accordingly and all applications filed under the said writ applications are also disposed of with the above terms.