(2011) 03 BOM CK 0008

In the Bombay High Court

Case No : Writ Petition No. 1365 of 2011

Huawei Technologies Co. Ltd. APPELLANT

Vs

Designated Authority RESPONDENT

Date of Decision : 17-03-2011

Acts Referred:
Customs Tariff Act, 1975 — Section 90, 9C

Citation : (2011) 270 ELT 77

Hon'ble Judges : Roshan Dalvi, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : V. Lakshmikumaran, Prakash Shah, Ms. Charanya Lakshmikumaran, Sagnik Sinha with Mihir Deshmukh instructed by PDS Legal, for the Appellant; D.J. Khambata, ASG, R.K. Abhichandani, Gautam Ankhad, Rohit Pandey instructed by Dhiren H. Shah, Rajesh Sharma instructed by Manoj L. Shirsat and Pradeep S. Jetly, for the Respondent

Judgement

J.P. Devadhar, J.—The Petitioner company incorporated in China has filed this Petition to challenge the final findings recorded by the Designated Authority on 19th October 2010 as also the Customs Notification No. 125/2010 issued on 16th December 2010 pursuant to the above final findings. By the impugned notification dated 16th December 2010 anti-dumping duty @ 266% is imposed on the goods exported by the Petitioner to the consumers in India.

2. The Petitioner is inter alia engaged in the manufacture of Synchronous Digital Hierarchy (SDH) equipments falling under Chapter 85 of the Customs Tariff Act, 1975.

3. Pursuant to an application filed by the Domestic Industry, antidumping proceedings were initiated by a notification dated 21st April 2009 in relation to import of SDH Transmission Equipments originated in or exported from China PR & Israel. The Designated Authority (DA for short) in its preliminary findings published on 7th September 2009 held that the domestic industry had suffered material injury by such imports and recommended imposition of provisional anti-

dumping duty. Accordingly by notification dated 8th December 2009, 50% provisional anti-dumping duty was levied.

4. Validity of the preliminary findings dated 7th September 2009 as also the notification imposing provisional anti-dumping duty dated 8th December 2009 were challenged before the Andhra Pradesh High Court. By its judgment dated 22nd January 2010 the Andhra Pradesh High Court allowed the Petition and quashed the preliminary findings dated 7th September 2009 as well as the notification dated 8th December 2009. The decision of the Andhra Pradesh High Court was challenged before the Apex Court and the Apex Court by; its order, dated 19th March 2010 stayed the operation of the order except in the case of the petitioners who had filed Writ Petition before the Andhra Pradesh High Court and directed that all other importers would have to pay the anti-dumping duty as per the notification dated 8th December 2009. By the said order, the D.A. was directed to proceed with the hearing and pass final order, which would be subject to the result of the Special Leave Petition.

5. Accordingly the D.A. on completion of the investigation, by its final findings published on 19th October 2010 held that the domestic industry has suffered material injury on account of import of SDH transmission equipment originated in or exported from China PR & Israel falling under sub-heading 8517 62 of the Customs Tariff Act & recommended imposition of definitive anti-dumping duty on the imports of SDH transmission equipment, originated in or exported from China PR & Israel. On the basis of the final findings, Customs Notification No. 125/2010 was published on 16th December 2010 and imposing anti-dumping duty. Challenging the aforesaid final findings dated 19th October 2010 and notification dated December 2010 the present Petition is filed.

6. Mr. Khambata, learned Additional Solicitor General and Mr. Abhichandani, learned Counsel for the Respondent No. 3 raised a preliminary objection as to the maintainability of the Writ Petition before this Court in view of the statutory alternate remedy available u/s 9C of the Customs Tariff Act, 1975 against the decisions impugned in the petition.

7. Counsel for the Respondents submit that challenging the very same final findings dated 19th October 2010 as also the Notification No. 125/2010 dated 16th December 2010, some of the Parties had filed Special Leave Petitions before the Apex Court being SLP Nos. 2155-2156 of 2011 and the same were disposed off on 4th February 2011 recording thus :

This Court has heard the learned Counsel for the Petitioners.

The learned Counsel for the Petitioners seek permission to withdraw the special leave petitions to enable the Petitioners to resort to the alternative remedy of appeal as provided under the Custom Tariff Act, 1975. The permission, as prayed for, is granted. The special leave petitions stand disposed of as withdrawn.

8. Mr. Laxmikumaran learned Counsel for the Petitioner submitted that without

going into the merits of the case, the Writ Petition can be disposed off solely on the ground that the final findings published by the D.A. are in gross violation of the principles of Natural Justice, because in the present case, the petitioner who is an aggrieved party, was heard by one DA in the public hearing granted under Rule 6(6) of the Anti-dumping Rules, 1995 and the order in the form of final findings are passed by another DA which is wholly impermissible in law.

9. In support of the above contention reliance is placed on the decision of the Apex Court in the case of Automotive Tyre Manufacturers Association Vs. The Designated Authority and Others, wherein it is inter alia held thus :

59. In light of the aforenoted legal position and the elaborate procedure prescribed in Rule 6 of 1995 Rules, which the DA is obliged to adhere to while conducting investigations, we are convinced that duty to follow the principles of natural justice is implicit in the exercise of power conferred on him under the said Rules. In so far as the instant case is concerned, though it was sought to be pleaded on behalf of the respondents that the incumbent DA had issued a common notice to the Advocates for ATMA and Ningbo Nylon, for oral hearing on 9th March 2005, however, there is no document on record indicating that pursuant to ATMAs letter dated 24th January 2005, notice for oral hearing was issued to them by the incumbent DA. Moreover, the alleged opportunity of oral hearing on 9th March, 2005, being in relation to the price undertaking offer by Ningbo Nylon, cannot be likened to a public hearing contemplated under Rule 6(6) of the 1995 Rules. The procedure prescribed in the 1995 Rules imposes a duty on the DA to afford to all the parties, who have filed objections and adduced evidence, a personal hearing before taking a final decision in the matter. Even written arguments are no substitute for an oral hearing. A personal hearing enables the authority concerned to watch the demeanour of the witnesses etc., and also clear up his doubts during the course of the arguments. Moreover, it was/also observed in Gullapalli (supra), if one person hears and other decides, then personal hearing becomes an empty formality. In the present case, admittedly, the entire material had been collected by the predecessor of the DA; he had allowed the interested parties and/or their representatives to present the relevant information before him in terms of Rule 6(6) but the final findings in the form of an order were recorded by the successor DA, who had no occasion to hear the appellants herein. In our opinion, the final order passed by the new DA offends the basic principle of natural justice. Thus, the impugned notification having been issued on the basis of the final findings of the DA, who failed to follow the principles of natural justice, cannot be sustained. It is quashed accordingly.

10. In the light of the aforesaid judgment of the Apex Court, Counsel for the Petitioner submitted that since the issue is squarely covered by the judgment of the Apex Court in the case of Automotive Tyre (supra), instead of driving the Petitioner to avail the statutory alternate remedy provided u/s 9C of the Customs Tariff Act 1975, this Court must quash and set aside the impugned final findings

and the consequential Notification which are ex facie unsustainable and are non est in the eye of law.

11. In our opinion, the arguments advanced on behalf of the Petitioner appear to be sound. However, the very same arguments were raised in the SLP filed by TATA Teleservices Ltd., and the Apex Court by its order dated 4th February 2011 permitted the Petitioners therein to agitate the above arguments before the Appellate authority. In these circumstances instead of entertaining the present Writ Petition we direct the Petitioner to avail the alternate remedy of appeal-under Section 90 of the Customs Tariff Act, 1975.

12. Counsel for the Petitioner states that the Petitioner would file appeal before the appellate authority on 21st March 2011. Since the Petitioner was bona fide prosecuting his remedy by filing Writ Petition in this Court within the period of limitation, we direct the appellate authority to condone the delay, if the appeal is filed by 21st March 2011 and dispose off the appeal as expeditiously as possible and in any event within a period of three months from 21st March 2011. The Writ Petition is disposed off accordingly with no order as to costs.

