(2016) 09 GUJ CK 0060

In the Gujarat High Court

Case No : Special Civil Application Nos. 12236-12242 of 2016

Kadri Enterprises	APPELLANT
Vs	
Union of India	RESPONDENT

Date of Decision : 30-09-2016

Acts Referred:

Citation : (2017) 347 ELT 240

Hon'ble Judges : S.R. Brahmbhatt and A.Y. Kogje, JJ.

Bench : Division Bench

Advocate : Shri Deven Parikh with S.N. Thakkar, Advocates, for the Petitioner; Ms. Avani S. Mehta, Advocate and Ms. Trusha K. Patel, Standing Counsel, for the Respondent

Final Decision : Disposed Off

Judgement

S.R. Brahmbhatt, J. (Oral) -

Heard learned counsels appearing for the parties.

2. Initially, when the Court heard the matter on 21st July, 2016 and perused the Annexures and the decision rendered by this Court in Civil Application No. 9587 of 2015 in Special Civil Application No. 8492 of 2015, dated 6-11-2015 [2016 (331) E.L.T. 358 (Guj.)], was of the prima facie view that the entire issue was in a narrow compass and hence the following order was passed :

"Learned Counsel for the petitioners placed reliance upon decision rendered by this Court in SCA No. 9581 of 2615 and allied matters and invited attention of the Court that the same would cover the present controversy also.

Hence, we are inclined to issue NOTICE for final disposal returnable on 1-8-2016.

It is expected of the other side to be ready with the matter with reply, if any, as the Court may decide the matter even in absence of the other side.

Direct service is permitted."

The matter was thereafter time and again heard, but was required to be adjourned for want of representation on the part of the respondent No. 2, as though served no one was appearing, and only there was a representation on behalf of respondent Nos. 1 and 3.

3. Learned counsel appearing for the respondent Nos. 1 and 3 urged the Court that let the matter may not be disposed of finally in absence of any representation on behalf of respondent No. 2, as the instructions and directions of respondent No. 2 in respect of imported goods are binding upon the Custom Authorities. Hence, the matter was required to be adjourned.

4. Learned counsel appearing for the petitioner contended that the goods are lying at the Indian Port since May, 2016 and non-clearance thereof saddle the petitioner with huge demurrage and damages. In case, if the other side are not ready now for final disposal of the matter, let the matter be at least heard, so far as the interim relief is concerned, as the petitioner is incurring huge demurrage and tosses on account of clearance of the goods, which have arrived at in the month of May, 2016 itself.

5. Ms. Trusha K. Patel, learned advocate appearing for the respondent No. 2, submitted that she has received instructions to appear on behalf of the respondent No. 2, today only. Though, she had appeared in the proceedings of Civil Application No. 9587 of 2015 in Special Civil Application No. 8492 of 2015 on behalf of respondent No. 2. So far as these matters are concerned, she will have to file appropriate reply and hence despite there being a submission on the part of the petitioner''s counsel that the petition is identical with the facts and contentions of the said matter, Court may not decide the matter finally and submission be treated for resisting the interim relief only and the Court may adjourn the matter to any other date for final disposal so that respondent No. 2 may place on record the stand of the respondent No. 2.

6. In view of the aforesaid, though the Court had heard the matter at length on earlier occasions in view of the order passed by this Court on 21-7-2016, the Court called upon the counsels to make submissions qua the prayer of interim relief.

7. Learned counsel for the petitioner invited Court''s attention to the order passed by this Court in similar matter, which is produced at Page No. 26 in this compilation being order in Civil Application No. 9587 of 2015 in Special Civil Application No. 8492 of 2015, dated 6-11-2015 and submitted that there is absolute similarity between the facts of the two cases, so far as the question of law and the contentions are concerned.

8. Learned counsel appearing for the petitioner invited Court''s attention to the fact that in these matters and the facts which have been narrated in the matter in which the order was passed by this Court, copy whereof is produced at Page 26, and submitted that on principle and contention the matter is similar and therefore, the Court may appreciate the aspect that, that order has attained

finality, as it has not been challenged in any other forum.

9. Learned counsel for the petitioner submitted that on earlier occasion when the respondent No. 3 vide order dated 22-4-2015 refused clearance of the said consignment on the purported ground that as per the Ministry of Environment and Forest''s Office Memorandum dated 24-11-2014, it is mentioned that the import of old and used tyres should be treated as "Prohibited Goods" instead of "Restricted Goods". The said order was subject matter of challenge in Special Civil Application No. 8492 of 2015 and Civil Application therein came to be filed being Civil Application No. 9587 of 2015, in which the Court has extensively dealt with the contention of the respondents based upon the Office Memorandum of the Environment and Forest Department dated 24-11-2014 and has clearly held that the said O.M. not pursuant to any power conferred by the concerned Act or the Rules framed thereunder including the Hazardous Waste (Management, Handling and Transboundary Movement) Rules, 2008. The following para-graphs from that order need to be set out as under :

"14. As regards the impugned office memorandum, the same does not appear to be relatable to any power conferred by the Act or the rules framed thereunder, including the Hazardous Waste (Management, Handling and Transboundary Movement) Rules, 2008.

15. On behalf of the respondents, reliance has been placed on Rule 23 read with Schedule VII to the rules. In the opinion of this Court, Rule 23 of the rules merely provides for duties of various authorities and Schedule VII enumerates the duties cast upon the authorities mentioned therein. It cannot be gainsaid that duty is not synonymous with power.

16. In the absence of any power conferred upon the Ministry of Environment and Forests, to specify any additional category of hazardous wastes being traceable to any provisions of the Act or the Rules, the impugned memorandum, as rightly submitted by the learned counsel for the applicant, is merely in the nature of administrative instructions and has no enforceability in law. Under the circumstances, the prohibition contained in the impugned office memorandum not being backed by any statutory provisions, prima facie, cannot be relied upon for the purpose of refusing to process the bills of entry submitted by the applicant.

17. In the aforesaid premises, the Court is of the view that the applicant has made out a prima facie case for grant of interim relief. The balance of convenience also lies in favour of the applicant, inasmuch as, the import in question, prima facie, does not appear to be governed by the rules. Irreparable injury is writ large on the face of the record, inasmuch as, the applicant is suffering from severe losses on account of the demurrage, etc.

18. For the foregoing reasons, the application succeeds and is, accordingly, allowed. The respondents are directed to forthwith permit assessment and clearance of the goods imported by the applicant-petitioner under Bills of Entry

Nos. 17 and 18, dated 16-3-2015 in accordance with the provisions of the Customs Act, 1962, subject to the following conditions :

(i) The Customs authorities shall depute a surveyor to check whether the tyres are reusable with or without retreading.

(ii) The petitioner shall not clear any goods which are not reusable.

(iii) The responsible person concerned will file an undertaking to the effect that they will sell the imported goods in a manner that they will be reused."

10. The petitioner''s counsel invited Court''s attention to the notification dated 4-4-2016 and submitted that the said notification is not substantively change the entry, which was under consideration before the learned Single Judge in the earlier matter. He submitted that Entry No. B3140 is having in the extant Rules, only additional words that "and other tyres", but that in itself would change the provision of law, as even by that amended or new additions of the words in the entry, it cannot be said that the tyres for direct reused can ever be said to be waste so as to attract the prohibition, arrest or restrictions.

11. Learned counsel appearing for the petitioner submitted that in fact as per the provisions in the Customs Tariff Act, the import of used tyres is permissible under Entry No. 4012 and as per the bill of entry the classification is not disputed by anyone. However, unfortunately, the Customs Authority - respondent No. 3 has placed unfortunate reliance upon the Notification dated 4-4-2016 and passed an order on 2-6-2016 treating the goods to be prohibited goods not to be permitted without there being license permission from DGFT and MOEF. This is contrary to the provision of law and, therefore, the same cannot be sustained as the petitioner is incurring huge demurrage and damages on account of non-clearance of the goods for no rhyme or reason on the part of the authorities.

12. Learned counsel appearing for the respondent Nos. 1 and 3 invited Court''s attention to the old entry being Entry No. B3140, which was under consideration before this Court when the order at Page 26, being Civil Application No. 9587 of 2015 in Special Civil Application No. 8492 of 2015, dated 6-11-2015, came to be passed and the same entry with additional words in the notification dated 4-4-2016, and submitted that the entries are not now identical so as to give benefit of the said order to the petitioner.

13. Learned counsel appearing for the respondent Nos. 1 and 3 further submitted that Office Memorandum dated 24-11-2014 issued by the respondent No. 2 being self-explanatory needs no further submission, which could be seen from Paragraph No. 3, which is reproduced herein below :

"3. Taking into account the above observations and related recommendations of the Committee, it is to inform that import of second hand tyre in the country for direct re-use is not permitted."

14. Learned counsel for the respondent Nos. 1 and 3, however, fairly submitted

that even Office Memorandum was also before the Court when the Court passed the order at Page 26, Annexure-C and made observations. However, the said Office Memorandum now reading in juxtaposition with the entry with additional words being Entry No. 3140, may persuade this Court not to grant any interim relief, as the goods are brought without there being any license and/or permission from either DGFT or MOEF.

15. Ms. Trusha K. Patel, learned counsel appearing for the respondent No. 2 contended that Office Memorandum dated 24-11-2014 contains specific prohibition on import of second hand tyres in the country for direct use and, therefore, the same may be proceeded in its proper perspective. Though, she could not dispute the fact that the very same Office Memorandum was heavily relied upon by her in the earlier matter. Therefore, it is appropriate to extract the same hereunder :

"Para 7 Vehemently opposing the application, Ms. Trusha Patel, learned standing counsel for the respondents No. 1 and 2 submitted that the used tyres for reuse fall under Schedule III Part-B (B-3140) of the rules and hence, are regulated for the purpose of import/export. Accordingly, the applicant has to apply to the Ministry of Environment and Forests for import of used tyres for any purpose including reuse thereof. Therefore, they are hazardous substances in relation to the import of which, permission is required to be obtained under Rule 16 of the rules. It was submitted that the impugned office memorandum has been issued pursuant to the discussion and conclusions of the 33rd Technical Review Committee meeting constituted under the rules held on 28-10-2014 which was acceded to by the Ministry of Environment and Forests. Referring to Schedule III (Part B) of the rules, it was pointed out that as per Rule 14(2) read with the note given below the Table, all other wastes listed in this Schedule 3 (Part-B having no star/s (*...) can only be imported into the country with the permission of MoEF. Thus, the applicant is statutorily required to obtain prior permission of the Ministry of Environment and Forests for import of all such waste without star/s which include waste pneumatic tyres, excluding those which do not lead to resource recovery, recycling or direct reuse as listed at B-3140 of Schedule III Part-B. It was submitted that under Rule 17 of the rules, the export and import of hazardous wastes from and into India shall be deemed illegal if it is without the permission of the Central Government in accordance with law. The applicant, in contravention of the rules, has imported second hand tyres without obtaining the prior approval prescribed under the rules and therefore, in view of the provisions of Rule 17(2), it is required to re-export the imported wastes at its own cost. As regards the validity of the impugned office memorandum, the attention of the Court was invited to Rule 23 of the rules, to point out that the same provides that the authority specified in column 2 of Schedule VII shall perform the duties as specified in column 3 of the Schedule, subject to the provisions of the rules. Referring to Schedule VII, the learned counsel pointed out the duties of the Ministry of Environment and Forests. It was submitted that one of the duties cast upon the Ministry of Environment and Forests, is identification of hazardous wastes and therefore, the Ministry is duly empowered to identify as to which goods are hazardous in nature and prohibit import thereof. It was, accordingly, urged that the goods imported by the petitioner being waste pneumatic tyres, the import of which is prohibited by the impugned office memorandum, the applicant is not entitled to the grant of any relief, as prayed for in the application, which deserves to be rejected."

16. This Court has heard learned counsels for the parties and perused the Annexures. First of all it needs to be borne in mind unequivocally that the role of Ministry of Environment, Forest and Climate Change is essentially for regulating, controlling and managing the Hazardous Wastes and its effect upon the environment in our country. The hazardous wastes presupposes the wastes and, therefore, it has required to be wastes and that to hazardous wastes. The Rules and Notification dated 4-4-2016 contains definition of waste being Rule 3(38), which read as under :

"waste" means materials that are not products or by-products, for which the generator has no further use for purposes of production, transformation or consumption.

Explanation. - for the purposes of this clause,

(i) waste includes the materials that may be generated during, the extraction of raw materials, the processing of raw materials into intermediates and final products, the consumption of final products, and through other human activities and excludes residuals recycled or reused at the place of generation; and

(ii) by-product means a material that is not intended to be produced but gets produced in the production process of intended product and is used as such;"

17. We are of the prima facie view that the aforesaid definition would not include the goods in question to be called waste, much less, hazardous waste, as hazardous waste is also defined under Rule 3(17), which read as under :

"hazardous waste" means any waste which by reason of characteristics such as physical, chemical, biological, reactive, toxic, flammable, explosive or corrosive, causes danger or is likely to cause danger to health or environment, whether alone or in contact with other wastes or substances, and shall include -

(i) waste specified under column (3) of Schedule I;

(ii) waste having equal to or more than the concentration limits specified for the constituents in class A and class B of Schedule II or any of the characteristics as specified in class C of Schedule II; and

(iii) wastes specified in Part A of Schedule III in respect of import or export of such wastes or the wastes not specified in Part A but exhibit hazardous characteristics specified in Part C of Schedule III;"

18. In light of the aforesaid two definitions, now let us examine the Entry No.

B3140, as it originally stood, when this Court passed an order at Page 26, Annexure-C dated 6-11-2015 and the entry with additional words as part of notification dated 4-4-2016. Both the entries are required to be reproduced as under :

"Old Entry B3140 - Waste pneumatic tyres, excluding those which do not lead to resource, recovery, recycling, reclamation or direct reuse.

New Entry B314Q - Waste pneumatic and other tyres, excluding those which do not lead to resource recover, recycling, reclamation but not for direct reuse."

(emphasis supplied)

Thus, the bold portion is an addition in the old entry, which was considered by the Court. Ms. Patel, endavoured to persuade the Court to read this as waste pneumatic tyres to include other tyres which are not waste pneumatic tyres and if we read along with her in the same way, then according to her submission these imported goods awaiting clearance, would be treated as prohibited goods in light of the Office Memorandum dated 24-11-2014.

19. We are prima facie of the view that if such an interpretation is required to be attached to the words "and other tyres", then it would lead to an absurd situation where even new tyres would get included, which can never be the purport of Rule making authorities, as essentially the Rules, i.e. Hazardous Waste (Management, Handling and Transboundary Movement) Rules, 2008 are meant for regulating and managing hazardous and other wastes only. We are prima facie incline to accept the submission of learned counsel for the petitioner that the tyres in question cannot be said to be waste tyres, as the certificates of Government is attached in innocuous terms that the said are not waste tyres and they have a life of 50% remaining. The plain and simple reading of Entry No. B3140 under the Rules of 2016, would not cover the tyres which are to be reused directly.

20. We need not delve much upon the contentions of the counsels of the parties, as the matter is being considered only for granting interim relief, which were conscious, could be amounting to allowing this petition, at this stage, but if we do not grant the interim relief, then it would also be amounting to rejecting the petition, at this stage. Therefore, we do not propose to foreclose the rival contentions'' scope, at this stage, and we say that our aforesaid observations are purely prima facie and only with a view to consider the question of granting of interim relief only.

21. The Court has also taken into consideration the fact that petitioner with goods were landed at Indian Port in the month of June, 2016 and since then they are awaiting the clearance from Customs Department. The bill of entry was filed on 30-5-2016 and the classification of the goods under Entry No. 4012 of Customs Tariff Act is also not disputed. The Court is of the considered view that as the Customs Authorities have not disputed the classification of goods under

the Customs Tariff Act and the classification is not a question of any dispute, the appropriate interim relief, if not granted, then the petitioner will suffer irreparable loss and injury, despite there being a prima facie case and finding in favour of the petitioner. We are also mindful of the fact that petitioner has stated on oath in Paragraph No. 2.7 that the Government approved valuer has issued certificate on 2-6-2016, as the certificate is also indicating that the tyres have residual average life at 50%. The inspection report is produced at Annexure-F.

22 In view of the aforesaid facts, we are of the prima facie view that the goods in question cannot be said to be a waste in any manner, much less, any hazardous waste so as to attract the provision and attract the prohibition under the Rules. Moreover, the prima facie reading of the Entry No. B3140 also clearly goes to say that the tyres meant for direct re-use cannot be exempted from the prior consent, as could be seen from the Schedule III, Part-B, captioned, which read as under :

"List of other wastes applicable for import and export and not requiring Prior Informed Consent [Annex IX of the Basel Convention*]"

23. This entry, in its plain reading, is falling under the said schedule and is based upon the Basel Convention on the Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016. Therefore, looking to the balance of convenience and adopting doctrine on least plausible entry principle, we propose to pass following order :

Rule, returnable on 21-11-2016.

24. By way of interim relief it is directed as under :

(i) The Customs authorities shall forthwith depute a Surveyor to check whether the tyres are reusable with or without retreading and permit clearance to those tyres only which are directly reusable.

(ii) After the aforesaid exercise is over, the respondent No. 3 is hereby directed to provisionally forthwith assess the bill of entry for home consumption being Bill of Entry No. 10, dated 30-5-2016 produced at Annexure-E to this petition in accordance with the Exim Policy, 2016-17 and forthwith to permit clearance of the said goods without insisting upon any permission from the MOEF or licence from the DGFT.

(iii) The petitioner shall not clear any goods which are not reusable.

(iv) The responsible person concerned will file an undertaking to the effect that they will sell the imported goods in a manner that they will be reused.

25. Direct service permitted.