(2014) 11 BOM CK 0052

In the Bombay High Court

Case No : Writ Petition (Lodging) No. 2915 of 2014

Kasturi Commodities Pvt. Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 17-11-2014

Acts Referred:

Customs Act, 1962 — Section 12
Customs Tariff Act, 1975 — Section 3(1)

Citation : (2014) 11 BOM CK 0052

Hon'ble Judges : S.C. Dharmadhikari, J;A.R. Joshi, J

Bench : Division Bench

Advocate : Gaurav Joshi, Sr. Adv., Akshay Kolse Patil, Avinav Mukherjee and Crawford Bayley and Co, Advocate for the Appellant; P.S. Jetly and Dhanesh R. Shah, Advocate for the Respondent

Judgement

1. This petition was moved earlier on production of praecipe on 14th November, 2014. On that day we informed the learned senior counsel appearing for the petitioners that if the petitioners desire to prepone the date and also seek urgent ad-interim reliefs, they must bring draft amendment and place the subsequent events on record.

2. Today in the morning, a fresh production praecipe was given pointing out the urgency. In view thereof, we allowed the production of papers at 3:00 p.m.

3. Mr. Joshi, learned senior counsel appearing for the petitioners tenders draft amendment. Copy thereof has been given to the respondent''s counsel Mr. Jetly, in Court. From a perusal thereof, we find that the petitioners seek to place on record the subsequent developments. Since subsequent developments are being placed on record, in order to avoid multiplicity of proceedings, we grant leave to amend. We proceed to consider the merits of the draft amendment as well. Draft amendment is taken on record and marked "X" for identification.

4. The petitioners are a ship breaker and regularly purchase vessels and bring

them to India for being broken. That the petitioners are liable to pay customs duty under Section 12 of the Customs Act, 1962, is not disputed. Meaning thereby there is no dispute with regard to payment of basic duties. However, under the provisions of Customs Tariff Act, 1975 (for short, referred to as Customs Tariff Act or Tariff Act additional duty is prescribed under section 3(1) which is in the nature of a countervailing duty. It is to be paid over and above the basic duty. The respondents have been levying such additional duty pursuant to the Tariff Act in accordance with tariff item No. 8908 of the Central Excise Act read with section 3(1) of the Tariff Act. It is this tariff and the additional duty levied thereunder which is challenged in this writ petition. Mr. Joshi, learned senior counsel submits that the said additional duty cannot be levied and for the reasons which have already been recorded by a Division Bench of the Gujarat High Court. The Division Bench Judgment of the Gujarat High Court, copy of which has been annexed, is delivered, according to Mr. Joshi, in the identical circumstances. By that Division Bench judgment delivered on 11th June, 2014 in a bunch of special civil applications the Gujarat High Court declared that no additional duty is livable on the vessels and other floating structures imported into India for breaking up under section 3(1) of the Customs Tariff Act, 1975, as per the rate prescribed under heading No. 89.08 of the Central Excise Tariff Act, 1985. Therefore, the demand, if any, of such duty under the respective Bills of Entry was quashed and set aside.

5. The grievance of the petitioners is that despite the Division Bench judgment of the Gujarat High Court being pointed out and the Commissionerate at Gujarat not insisting for payment of such countervailing duty, the Mumbai Commissioner has not been accepting this position. Though the Gujarat High Court judgment has not been stayed by any higher Court, yet, the Bill of Entry is being processed and by insisting on levying countervailing duty. That is how the petitioners have approached this Court and are praying for issuance of a writ of mandamus or an appropriate writ, direction or order under section 226 of the Constitution of India declaring the said Tariff Item as unconstitutional and ultra vires the Constitution of India and seeking a direction the respondent not to levy or collect such additional duty.

6. After hearing Mr. Joshi and Mr. Jetly, we are of the opinion that the writ petition can be disposed of because presently the matter is at the stage of lodging of a Bill of Entry and clearing consignment for the purpose of ship breaking within Mumbai Commissionerate. Eventually, the duty would have to be demanded by the Customs and there will be appropriate adjudication. The urgency is because of the clearance and for that purpose it is pointed out that the vessel has come within high tide line of the Port and would shortly be granted beaching facility and before that all the formalities should be complied so that the ship or the vessel could be taken to the ship breaking yard. The petitioners rely upon an identical situation and in the case of a vessel INS Vikrant. That was brought for an identical purpose. In the case of INS Vikrant the Department required furnishing of a bond to the extent of 100 % of the value of

the additional duty and bank guarantee of 25% to be furnished so as to cover the additional duty. Even that facility sought, without prejudice, has been denied, is now the complaint.

7. On that we have enquired with Mr. Jetly and he sought time to take instructions. Upon taking instructions, Mr. Jetly submits that the Department has yet to instruct him but presently it has not accepted the judgment of the Hon''ble Gujarat High Court and intends to take further legal proceedings. Secondly, the instructions are that the petitioners can seek a clearance on securing the demand by giving a bank guarantee to cover the entire additional duty and also 100 percent bond of the amount of vessel or value of the vessel if they desire to seek a clearance on the basis of Bill of Entry which has been lodged.

8. Mr. Joshi submits that the petitioners are not agreeable to such a course and they are contesting the position including the legal provisions as are being relied upon by the Department.

9. After hearing both sides on this point and equally on the urgency we are of the view at this stage any wider question of law need not be considered. Today the petitioners are interested in seeking a clearance and for the purposes of continuing and carrying on their business of ship breaking within Mumbai Commissionerate Zone. In such circumstances, by keeping all contentions on the challenge to the additional duty and based on the judgment of the Gujarat High Court open, we can dispose of this petition.

10. It is, therefore, disposed of by keeping open the contentions of both sides on the merits of the controversy and challenge raised in the writ petition. However, on the petitioners furnishing a bank guarantee to the extent of 25% of the additional duty demanded and giving a bond to the extent of 100% of the value of the vessel, the Bill of Entry lodged by the petitioners may be assessed and the requisite steps taken thereafter in accordance with law so as to enable the petitioners to take the vessel to the ship breaking yard at Reti Bundar, Darukhana, Mumbai. The writ petition is, therefore disposed of with the above directions. We clarify that this order is passed purely because of the facts as are brought on record of the writ petition including the Division Bench of Gujarat Bench judgment in the field. Presently, there is no denial of the fact that on similar directions the INS Vikrant was cleared for ship breaking by the Mumbai Commissionerate. It is on this basis and as an ad hoc arrangement that we have issued the above directions beyond that it shall not be construed that this Court has expressed any opinion on the rival contentions. The writ petition is disposed of. The petitioners have lodged the Bills of Entry and manually. They are not in the electronic form. The petitioners shall be entitled to avail of the benefit of this order on the Bill of Entry as lodged manually.

11. Writ petition is disposed off in the above terms. No order as to costs.

