

(1991) 03 GUJ CK 0047

In the Gujarat High Court

Case No : Special Civil Application No. 1638 of 1981

Prabhat Silk and Cotton Mills Co. Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 22-03-1991

Acts Referred:

Customs Act, 1962 — Section 12, 15, 15(1), 2, 3(6)
Customs Tariff Act, 1975 — Section 2, 3, 3(1)
Finance Act, 1978 — Section 35, 35(4)
Sales of Goods Act, 1930 — Section 64A

Citation : (1992) 57 ELT 529

Hon'ble Judges : J.N. Bhatt, J;A.P. Ravani, J

Bench : Division Bench

Advocate : M.H. Joshi and K.S. Nanavati, for the Appellant; B.B. Naik, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Ravani, JJ.—Which point of time is relevant for the purposes of levy and collection of additional duty of customs? Is the rate of duty prevailing at the time when the goods enter territorial waters of India is applicable? Or the rate of duty prevailing at the time of clearance of the goods from the bonded warehouse of the petitioner would be applied? These are the questions which need to be examined and answered in this petition.

Petitioner No. 1 is a mill company and Petitioner No. 2 is a shareholder and Nanager thereof. (Hereinafter both petitioners referred to as "the petitioner"). The petitioner is manufacturing fabrics falling under Tariff Item No. 22 of the First Schedule (as in force at the relevant time) to the Central Excises & Salt Act, 1944. For the purpose of its business, the petitioner imported man-made filament yarn from Japan and other countries. The imported goods were subject to payment of additional duty of customs equal to excise duty, which is also popularly called countervailing duty, under the Customs Tariff Act, 1975. The petitioner is also liable to pay auxiliary duty under the Finance Act, 1978 and

also under the Finance Act of the relevant years in question.

2. It is contended that the additional duty of customs and the auxiliary duty is levied on the imported goods and therefore the taxable event which attracts the duty is importation of the goods into India. The taxable event occurs when the goods enter into the territorial water of India. Therefore, it is submitted that it is only at the point of time when the goods entered into the territorial waters of India, the same can be subjected to tax under the provisions of the Customs Tariff Act, 1975 and under the relevant Finance Act. It is further argued that the rate of duty applicable on the imported goods would be the prevailing rate of duty when the taxable event occurs i.e. when the goods enter into the territorial water of India.

3. The grievance of the petitioner is that the additional duty of customs under the Customs Tariff Act, 1975 and the auxiliary duty under the relevant Finance Act have been levied and collected at the rate in force when the goods have been cleared from the bonded warehouse and not at the rate prevailing at the point of time when the goods entered into the Indian territorial water. The petitioner has annexed a statement showing the difference in the rate of duty prevailing at the time when the goods entered into the territorial water of India and the rate of duty prevailing at the time of clearance of the goods for the home consumption from the bonded warehouse of the petitioner. According to the petitioner, as shown in the statement, from April 1, 1978 onwards, an amount of Rs. 4,07,546/- (Rupees Four lakhs seven thousand five hundred and forty-six only) has been unauthorisedly collected. Therefore, it is prayed that the respondents be directed to refund the said amount to the petitioner. It is also contended that as on June 18, 1980 and as on February 28, 1981, the petitioner had got a large quantity of imported filament yarn lying in the bonded warehouse of the petitioners. (It is not clear from the averments made in the petition as to what is the significance of two dates i.e. June 18, 1980 and February 28, 1981. Probably on these dates some changes might have taken place in the rates of additional customs duty and auxiliary duty). The details of such goods are stated in Annexure "B" to the petition. It is also prayed that the respondents be restrained from levying and collecting additional duty and auxiliary duty from the petitioner in respect of the uncleared goods lying in the bonded warehouse of the petitioner at a rate higher than the rate in force at the time when the goods entered in the Indian territorial water.

4. The contentions be examined. The Customs Tariff Act, 1975 has been enacted with a view to consolidate and amend the law relating to Customs duty. Section 2 of the Act provides that the rates at which the Customs duty shall be levied under the Customs Act, 1962 are specified in the First and Second schedules. Section 3 of the Customs Tariff Act, 1975 provides for levy of additional duty equal to excise duty for the time being leviable on a like article if produced or manufactured in India. This is also called countervailing duty. Section 3(6) provides that the Customs Act, 1962 and the rules and regulations made

thereunder are applicable to the duty chargeable u/s 3 of the Customs Tariff Act, 1975 and they are to be applied accordingly. Thus this is an instance of legislation by reference or citation. Hence the provisions of the Customs Act, 1962 are to be read as if they are written down in the body of the Customs Tariff Act, 1975. The provisions of the Customs Act, 1962 and the provisions of the Customs Tariff Act, 1975 are supplementary to each other. They cannot be applied and implemented without the aid of each other. Similar is the position with regard to Finance Act, 1975. By Section 35 of the Finance Act, 1978, auxiliary duty of customs has been imposed. Section 35(4) also provides that the Customs Act, 1962 and the rules made thereunder shall apply in relation to the levy and collection of the auxiliary duty of customs leviable u/s 35 of the Finance Act. It is also provided that these provisions of the Customs Act, 1962 and the rules shall apply as if the duty of customs of such goods were levied and collected under the provisions of the Customs Act, 1962 and the rules and regulations made thereunder. Thus, this is also an instance of legislation by reference. It is stated at the bar that in the Finance Act of each year similar provision is made and auxiliary duty is levied as per the provisions of the relevant Finance Act in each year.

5. The learned counsel for the petitioner submits that the additional duty under the Customs Tariff Act, 1975 and the auxiliary duty under the relevant Finance Act are separate duties. The source of power of imposition of duty is different and it is not under the Customs Act, 1962. In his submission, the taxable event of additional duty under the Customs Tariff Act, 1975 and the auxiliary duty under the relevant Finance Act occurs when the goods enter into the Indian territorial water. At that point of time whatever be the rate of duty, that alone could be levied and the provisions of the Customs Act, 1962 and the rules and regulations framed thereunder cannot be resorted to for levying the rate of duty prevailing at the time of clearance of the goods from the bonded warehouse. It is submitted that if such a course is adopted, the provisions of the Customs Tariff Act, 1975 and the provisions of the relevant Finance Act would be retrospective. Hence it would be bad because ordinarily an Act is not to be given retrospective operation unless it is so specifically provided in the Act itself, or that it is retrospective by necessary implication.

6. The very basis of the aforesaid argument is that if the additional duty and auxiliary duty is levied and collected at the rate prevailing at the time of the clearance of the goods from the bonded warehouse, it would amount to giving retrospective effect to the Act and this is not permissible. The argument is based on misconception as regards the meaning of the term "retrospective". In CRAIES on Statute Law (Seventh Edition), meaning of the term "retrospective" is stated as follows :-

"A statute is to be deemed to be retrospective, which takes away or impairs any vested right acquired under existing laws or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or

considerations already past. But a statute is not properly called a retrospective statute because a part of the requisities for its action is drawn from a time antecedent to its passing."

7. The aforesaid meaning has been approvingly quoted by the Supreme Court in the case of D.G. Gose and Co. (Agents) Pvt. Ltd. Vs. State of Kerala and Another, In that case, the legality and validity of the Kerala Buildings Tax Act, 1975 (7 of 1975) was challenged. It was inter alia submitted that the Act came into force on April 2, 1975. Even so, the tax was imposed on buildings with retrospective effect from April 1, 1973 and therefore the Act was unconstitutional and hence illegal and void. Repelling the argument, the Supreme Court has approvingly quoted the aforesaid paragraph from CRAIES ON STATUTE LAW and has further stated as follows in para 14 of the reported judgment :-

"It may be that there was no liability to building tax until the promulgation of the Act (earlier the Ordinances) but mere absence of an earlier taxing statute cannot be said to create a "vested right", under any existing law, that it shall not be levied in future with effect from a date anterior to the passing of the Act. Nor can it be said that by imposing the building tax from an earlier date any new obligation or disability has been attached in respect of any earlier transaction or consideration. The Act is not therefore retrospective in the strictly technical sense."

8. Similar view is taken by the Supreme Court in the case of The Union of India Vs. Madan Gopal Kabra, . In para 15 of the reported judgment, the Supreme Court has observed that an enactment cannot, strictly speaking, be said to be retrospective legislation, though its operation may affect acts done in the past. Recently in the case of Mithilesh Kumar and Another Vs. Prem Behari Khare, , in para 21 of the reported judgment, the Supreme Court has observed that a statute is not properly called a retrospective statute because a part of the requisites for its action is drawn from a time antecedent to its passing.

9. Following the aforesaid principles laid down by the Supreme Court, it cannot be said that any "vested right" much less an existing right of the petitioner is affected because no duty liability as regards payment of additional duty of customs was there before passing of the Customs Tariff Act, 1975 and the relevant Finance Act. As held by the Supreme Court, there is no vested right under any existing law that the goods imported into India shall not be subjected to tax in future after the same entered into the territorial waters of India. Nor it can be said that by levying customs duty from an earlier point of time any new obligation or disability arises in respect of any earlier transactions or considerations.

10. Here reference may be made to the provisions of Section 64A of the Sale of Goods Act (3 of 1930). Section 64A has been inserted in the Act by way of amendment in the year 1940. Therein it is provided that increase or decrease in the duty of customs or excise could be added or deducted if the rate of tax

increases or decreases between the date of contract and the actual delivery of the goods in question. In the case of Chhotabhai Jethabhai Patel and Co. Vs. The Union of India and Another, , the Supreme Court observed that the provisions of Section 64A of the Sale of Goods Act, 1930 provides for the recovery by the seller of the amount of increase in duty from the purchaser where the increase takes effect subsequent to the contract. It also provides for the right of the purchaser to recover from the seller the duty in cases where there is a similar decrease. Moreover this right exists both before the delivery is given, taken and price received or paid as the case may be.

11. It may happen that when the importer imports goods in India, there may not be any customs duty leviable when the goods entered the territorial water of India. As indicated hereinabove, the importer has no right to say that simply because at the time when the goods entered into the territorial water of India, the goods were not subjected to tax and therefore they shall not be taxed or subjected to customs duty thereafter. If the Act provides that the duty shall be levied at the rate when the goods are cleared from the bonded warehouse or at the time of presentation of the bill of entry, the tax can be levied on such goods even though the goods may not be liable to any tax at the point of time when the goods entered the territorial water of India. Just as in the case of excise duty, the duty of customs can be assessed and collected at the point of time when it may be found administratively most convenient. The only condition is that the character of the duty that it is customs duty should not be lost. It is not even the case of the petitioner that because the goods are subjected to levy of customs duty at the rate prevailing when the goods are cleared from the bonded warehouse, the character of the duty is changed.

12. The learned counsel for the petitioner has relied upon the following decisions of the Bombay High Court :-

1. In the case of Century Spinning and Manufacturing Co. Ltd. Vs. Union of India, .
2. In the case of Madhusudan Mills Limited Vs. Union of India and others, .
3. In the case of Apar Private Ltd. and others Vs. Union of India and others, (Full Bench decision.).

Relying on the aforesaid decisions, it is submitted that the rate of duty prevailing at the time when the goods entered into the territorial water of India should be charged. The aforesaid decisions of the Bombay High Court do support the view canvassed by the learned counsel for the petitioner. However, it is not possible to agree with the view taken by the Bombay High Court in the aforesaid decisions for the simple reason that the attention of the learned Judges who decided the aforesaid cases does not appear to have been drawn to the decision of the Supreme Court in the case of Prakash Cotton Mills (P) Ltd. Vs. B. Sen and Others, . It also appears that there are at least two reported decisions of the Bombay High Court itself taking the contrary view.

1. Synthetics and Chemicals Ltd. Vs. S.C. Coutinho and others,
2. New Chemi Industries Pvt. Ltd. and another Vs. Union of India and others,

In view of the decisions of the Supreme Court in the case of Prakash Cotton Mills (supra) and in case of Northern Corporation Vs. Union of India and others, , it is not necessary to elaborately discuss the judgments of the Bombay High Court on which reliance is placed by the learned counsel for the petitioner.

13. In the case of Prakash Cotton Mills (supra) the question arose before the Supreme Court as to which is the relevant date for the purpose of determination of the rate of duty. The question arose in the background of the fact that there was an amendment of law. Hence the question as to whether the amended law would be applicable to the consignments which had been received, stored and assessed to duty before the Ordinance amending the law came into force. The Supreme Court held that Section 15 of the Customs Act, 1962 specified the date for determination of the rate of duty and tariff valuation of imported goods. The Supreme Court observed as follows :-

"It is thus, the clear requirement of Clause (b) of Sub-section (1) of Section 15 of the Act that the rate of duty, rate of exchange and tariff valuation applicable to any imported goods shall be the rate and valuation in force on the date on which the warehoused goods are actually removed from the warehouse. A cross reference to Section 49 of the Act shows that an importer may apply to the Assistant Collector of Customs for permission to store the imported goods in a warehouse pending their clearance, and he may be permitted to do so. The other relevant provision is that contained in Section 68 of the Act which provides that the importer of any warehoused goods may clear them for "home consumption" if, inter alia, the import duty leviable on them has been paid. That is why Clause (b) of Sub-section (1) of Section 15 of the Act makes a reference to Section 68. It is therefore quite clear that the rate of duty, rate of exchange and tariff valuation shall be those in force on the date of actual removal of the warehoused goods from the warehouse."

14. The same position of law is reiterated by the Supreme Court in the case of Northern Corporation Vs. Union of India and others, . The Supreme Court has held that the rate of duty and tariff valuation, if any, would be as on the date on which the goods are actually removed from the warehouse. It is further held that even when the goods, after importation could not be immediately cleared due to the prohibitory order of the Income Tax authorities, the rate of customs duty would be as prevalent on the date the goods were actually removed after withdrawal of prohibitory order.

15. In the case of K.M. Mohamad Abdul Khader Firm Vs. State of Tamil Nadu and Others, the provisions of Customs Tariff Act, 1975 came up for consideration. Therein it has been held that Section 3(1) of the Customs Tariff Act is not an independent charging section. It is further held that the additional duty which it speaks of is duty of customs and it does not cease to be customs duty merely

because it is called countervailing duty. After considering the entire scheme of the Customs Tariff Act and the Customs Act, 1962, the Supreme Court held that the scheme embodied in Section 12 of the Customs Act, 1962 is amplified by what is provided in Section 3(1) of the Customs Tariff Act, 1975. The customs duty charged u/s 12 of the Customs Act, 1962 is extended by an additional duty confined to imported articles in the measure set forth in Section 3(1) of the Customs Tariff Act, 1975. In view of this decision of the Supreme Court, the argument that the provisions of the Customs Act, 1962 will not be applicable while determining the rate of duty for additional duty or auxiliary duty has also no merits.

16. No other contention is raised. There is no substance in the petition.

17. In the result, the petition is rejected. Rule discharged.