(2014) 05 CAL CK 0013

In the Calcutta High Court

Case No : W.P. No. 10759 (W) of 2014

Rashmi Metaliks Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 08-05-2014

Acts Referred:

Customs Act, 1962 — Section 14, 18, 56

Citation : (2015) 316 ELT 455

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Advocate : J.P. Khaitan, Bhaskar Mukherjee, Debjani Ghosh and Deboshica Saha, Advocates for the Appellant; S.B. Saraf and K.K. Maity, Advocates for the Respondent

Judgement

Harish Tandon, J.—The bill of entry submitted by the petitioner for import of coke breeze could not be accepted by the Customs Authority and drew a sample which is sent to the laboratory for testing whether the imported goods pertains to coke breeze or metallurgical coke. According to the Customs Authority, the import of metallurgical coke or the coke breeze is permissible against the export of hot metal/pig iron. The department says that the metallurgical coke or coke breeze are two distinct and separate items and have been put into different categories. Admittedly the report from the laboratory has not been received by the department as yet. Therefore, there is still an uncertainty over the description of the material whether it is metallurgical coke or the coke breeze. The importer applied for provisional assessment and provisional release before the authority under Section 18 of the Customs Act. Subsequent to the filing of the writ petition the authority has provisionally assessed and communicated the same to the petitioner requiring him to deposit the full differential amount as well as a P.D. Bond covering the same.

2. According to the petitioner though the authority is vested with discretion under Section 18 of the Customs Act but such discretion should be exercised

reasonably, rationally and in consonance with the provision regulating such discretion. In particular it is submitted that Regulations 2 and 4 of Customs (Provisional Duty Assessment) Regulation, 2011 provides for the conditions allowing provisional assessment and surety or security by way of a bond. The petitioner says that the authority cannot direct the petitioner to pay the entire duty as provisionally assessed which offends Regulation 2 of the Regulation wherein the importer is obliged to deposit 20% of the differential duty of the goods and the rest amount is to be secured in the manner as provided under Rule 4 of the said Regulations.

3. Mr. Saraf, learned Advocate appearing for the Customs Authority, is very much vocal against the submission of the petitioner in contending that the metallurgical coke and the coke breeze are not one and identical item and the department is sure about the description of the said imported goods to be coke breeze and have proceeded to determine the duty leviable and chargeable thereupon in the provisional assessment.

4. By drawing an inspiration from a division bench judgment of Gujarat High Court in case of Platinum Investment Services Corp. Vs. Union of India (UOI), (Guj.), Mr. Saraf would contend that once the authority has exercised the discretion under sub-section (1) of Section 18 of the said Act, the Court should not interfere by substituting its own discretion in exercise of the power of judicial review.

5. On noticing the said judgment, this Court does not find that any quarrel can be made over the proposition laid down therein. Sub-section (1) of Section 18 of the Customs Act bestowed the power on the authority to provisionally assess the duty on the imported goods and may direct the importer to furnish such security as the said authority deems fit for payment of deficiency between the duty finally assessed and the duty provisionally assessed. Sub-section (2) of Section 18 of the Act provides either for payment of an excess amount of duty or the refund in case the authority found that the duty provisionally assessed is higher than the duty finally assessed.

6. The Customs (Provisional Duty Assessment) Regulation, 2011 is promulgated in exercise of power conferred under Section 56 of the Customs Act read with Section 18 of the said Act. It is a settled proposition of law that the subordinate/ delegated legislation should be in conformity with the substantive provision of the statute, which is a source of its existence. If the provisions of the delegated legislation offends the substantive statutes or is contrary thereto, the same cannot withstand and is liable to be struck down. Where a regulation has been promulgated in exercise of the power conferred under the substantive statute, the endeavour of the Court should be to harmonize the provisions contained in both the substantive statute and regulation. Any interpretation which would render the regulation unworkable, should be avoided.

7. The division bench of the Gujarat High Court in paragraphs 11 and 12 of the

said report held that the order impugned therein passed by the proper officer is in conformity with Section 18 and the said regulations and refused to interfere with the order of the proper officer. The aforesaid observation can aptly be quoted as under:--

"..

11. Once the statute has vested a discretion in the proper officer, the scope of judicial review by a Court is limited to examining as to whether the discretion so vested in the authority has been exercised in accordance with the provisions of the statute. The Court may intervene in a case where the authority refuses to exercise discretion directing such authority to exercise the discretion vested in it. However, while examining as to whether the discretion has been validly exercised or not the Court cannot undertake an exercise of substituting its; own discretion, except in a case where it is found that the so-called exercise of discretion was either mala fide or coloured by collateral consideration.

12. In light of the aforesaid legal position if one examines the communication dated 12-5-2010, which is under challenge in the present petition, it becomes clear that the respondent authority has virtually carried out the process stipulated by Section 18 of the Act read with the Regulations when one considers the following extracts from the said communication:

''Pending production of original commercial invoice, bill of sale, document evidencing payment of purchase price to the sellers and any other document/ information required by the department for proper assessment of duty on the vessel, the E/E shall be provisionally assessed based on the price declared by you in terms of Section 18 read with Customs (Provisional Duty Assessment) Regulations, 1963, subject to your furnishing bond, bank guarantee as narrated hereinafter.

For the purpose of determining differential duty involved on the vessel under reference due to difference between declared value and the value under Section 14, the Customs Duty is worked out in the Annexure attached to this letter, based on the price of US $ 50,00,000/- prevailing at the time of importation of the vessel at Alang Anchorage + Breaking Charges of US $ 70,000 declared in the bill of entry filed which comes to Rs. 3,74,52,611/- and the differential duty thus comes to Rs. 2,03,14,534/- (being difference between estimated duty to be finally assessed and provisional duty as per B/E).

In terms of Regulation 2 of the Customs (Provisional duty assessment) Regulations, 1963, it is hereby directed that you shall execute a bond in Customs Series Form No. 3 in an amount of Rs. 20314534/- being the amount equal to the difference between the duty that may be finally assessed and provisional duty. It is further directed that you shall deposit by way of a challan with the proper officer/the undersigned, the sum of Rs. 40620907/- being 20% of the provisional duty in terms of Regulation 2 ibid.

In terms of Regulation 4 of the said Regulations, it is directed that you shall furnish bank guarantee issued by any nationalised bank for the balance amount of differential duty i.e. Rs. 16251627/- (Rs. 20314534/- Rs. 40629077/- = Rs. 162516627/-) in favour of the President of India through the undersigned.''

13. Regulation 4 of the Regulations reads thus:

"4. Surety or security of the bond.--The proper officer may require that the bond to be executed under these regulations may be with such surety or security, or both, as he deems fit."

Reading the provision of Regulation 4, in the light of the provision of Section 18 of the Act, it is apparent that under the said provision the proper officer may require that the bond executed under the Regulations may be with surety or security or both, as he deems fit. Thus, it is solely within the discretion of the proper officer as he whether he should require execution of the bond with surety or security or both. Bank guarantee also is one of the known modes of security, and if the proper officer has deemed it fit to require the petitioners to furnish security by way of bank guarantee, it cannot be said that the discretion has been exercised improperly, so as to warrant interference."

....

8. The Regulation provides the manner of discretion to be exercised by the proper officer and to be regulated in a particular mode. This Court does not find that such provision offends the substantive power conferred under Sub-section (1) of Section 18 of the said Act. Had it been a case that the power conferred under the statute upon the proper officer have been negated and/or taken away by framing the regulations, the regulation cannot have a paramount impact upon the substantive statute. It would be a different thing where the power is circumscribed to be exercised in the manner to be provided in the subordinate legislation. It is clearly discernible from Regulation 2 thereof that where the provisional assessment made by the proper officer, the importer is required to pay maximum 20% of such provisional duty as assessed together with certain conditions as to the surety and/or security provided under Regulation 4 thereof.

9. This Court cannot accept the submission of Mr. Saraf that the said regulations have its applicability at the pre-stage of provisional assessment and not at the stage of provisional assessment. Such interpretation in my view shall render the entire Regulations unworkable and meaningless. The decision of the authority in directing the petitioner to pay the entire amount of provisional duty so assessed and the surety of equal amount in the absence of P.D. Bond is contrary to the aforesaid Regulations and, therefore, cannot be sustained.

10. This Court, therefore, directs the proper officer i.e. the Respondent No. 3 herein, to consider the matter afresh in the light of the observations made hereinabove within two weeks from the date of communication of this order. With

these observations the writ petition is disposed of. No order as to costs.

