

(2001) 12 CAL CK 0057
In the Calcutta High Court
Case No : Writ Petition No. 2259 of 2001

Shew Kumar Agarwal

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 21-12-2001

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Tariff Act, 1975 — Section 9C

Citation : (2002) 141 ELT 312

Hon'ble Judges : Amitava Lala, J

Bench : Single Bench

Advocate : Anindya Kumar Mitra, Tapati Ghosh and Abhrajit Mitra, for the Appellant; Debal Banerjee and Jayanta Mitra, S.N. Roy, Asish Chakravarty, Ratnankur Banerjee and Ritabrata Mitra, for the Respondent

Final Decision : Dismissed

Judgement

1. This writ petition is made by a business concern known as M/s. Bharat Marbles and another by a company known as M/s. Kajaria Plus Limited, incorporated under the Indian Companies Act, 1956 by the pen of one Mr. Amit Agarwal claims to be the constituted attorney of the petitioner no. 1 and another Mr. Priyojeet Sen petitioner no. 3 herein claims to be the Area Manager and Principal officer jointly having identical claim or claims.

2. The grievance of the writ petitioners are that the notification No. 37/1/2001/DGAD, dated 6th August, 2001 may be quashed and conscionable justice may be done in connection with levy and anti-dumping duty on imports of vitrified tiles from China and UAE with incidental prayers in connection thereto.

3. This writ petition was initially moved in the Vacation Bench and thereafter placed before this Court on 4th December, 2001. Upon hearing at the interim stage this Court was pleased to refuse granting of any interim order but gave directions to exchange the affidavits in between the parties. Many private parties appeared and wanted to intervene either by making oral application or by

making written application when I have directed all of them to take out formal written applications and move on the returnable date. As and when Court will be satisfied treat them as interveners and then proceed with the main writ petition, Their contention is that on their complaints, authority proceeded against these writ petitions and furnished preliminary findings. Therefore, they are the necessary parties.

4. On 18th December, 2001 the matter appeared before the list under the heading "specially fixed matters". The interested parties applied before this Court and their applications were allowed formally by this court with a direction initially to use their applications as defence to the writ petition. Supplementary affidavits were also directed to file upon service of writ petition. But when gradually arguments advanced this Court felt that the matter can be decided finally in either way without postponing the matter for exchanging further affidavits. The next paragraph will be the narration of the arguments as advanced by the petitioners.

5. Mr. Antndya Kr. Mitra learned Senior Counsel appearing on behalf of the petitioner contended before this Court that no notice under Rule 6(2) of Anti-dumping Duty Rules under Customs Tariff Act, 1975 was served upon them for the purpose of making investigations as to why anti-dumping duties will be imposed by the petitioners on all imports of subject goods originating in or exported from UAE and China is less than the landed value of all the imports and subject goods. Prescribed Rule says that the designated authority shall after it has decided to initiate investigation to determine the existence, degree and effect of any alleged dumping of any article, issue a public notice notifying its decision and such public notice shall inter alia contain adequate information under Rule 6(1) therein. The procedure is that upon getting information from the complainants it is duty incumbent upon the designated authority to investigate the matter from a preliminary finding, recommend the matter to the Central Government for the purpose of issuance of notification to pay the additional anti-dumping duty and proceed finally and determine the same. There are stages in doing so but at the threshold on the basis of information the designated authority will issue a public notice in this regard u/s 6(1) of the aforesaid Rules. There is no dispute in this respect that such public notice had been issued. The dispute, which has been raised by the petitioner, is that following such notification, a copy of the public notice ought to have been forwarded by the designated authority to the known exporters of the article alleged to have been dumped, the Governments of the exporting countries concerned and other interested parties but no such copy in compliance with Sub-rule (2) under Rule 6 has been served upon them. Therefore, there is a clean violation of principles of natural justice. The preliminary report being outcome of such violation has to be declared perverse. Hence writ jurisdiction can be invoked challenging such preliminary finding. In further there is a clear difference in between Rule 6(2) and 6(4). Rule 6(4) is prescribing modus operandi where-under designated authority may issue notice calling for any information about investigation unlike

Rule 6(2) within which the word "shall" has been incorporated for the specific purpose. Therefore, as per Rule 6(2) forwarding a copy of public notice by the designated authority is mandatory. Hence, any preliminary finding cannot have any leg to stand without such service.

6. I have carefully taken note of Sub-rule (2) of Rule 6 which is set out below:

"A copy of the public notice shall be forwarded by the designated authority to the known exporters of the article alleged to have been dumped, the Governments of the exporting countries concerned and other interested parties".

I have gone through the preliminary finding of the designated authority wherefrom I found that the embassies of the subject countries in New Delhi were informed about the initiation of the investigations in accordance with Rule 6(2) with a request to advise the exporters/producers from their country to respond to the questionnaire within the prescribed time. A copy of the letter, petition and questionnaire sent to the exporter was also sent to the Embassies, along with a list of known exporters/producers. I find the names of the two complainants companies in the report calling necessary information in accordance with Rule 6(4). The complainants are added as party respondents today who have, in turn, supported to stand of the Government of India in respect of issuance of notice. The petitioners joined the issue by saying that the embassies were served for the purpose of service to the exporters but no notice was served upon the importers. I am sorry to say that Rule 6(2) is not made for the service of the copy of notice upon the importers but upon the exporters alone. Therefore, the only remaining portion of such sub-rule is whether such copy of notice has been served upon other interested parties or not. It appears from the preliminary findings that not only the notices were served but also the exporters and complainants were taken part in the investigation proceedings. The Government of India as well as the complainants is chorus made submission that even the sister concerns of the petitioners herein have also taken part in the investigation proceedings. Mr. Jayanta Mitra, appearing for one of the complainants categorically stated that at the present moment nobody is prejudiced by such preliminary finding. The prejudicial cause, if any, may only arise when the Central Government in accepting such preliminary findings issue any notification to deposit certain amount being the difference between the landed value already made and the value ought to have been made. The process is not to expeditious that an interim order will be prayed at this stage by keeping the writ petition pending. He also submitted that even in the writ petition there is no whisper about non-service of notice under Rule 6(2) of the prescribed Rules to them.

7. If I proceed on the basis of the preliminary finding I shall not be able to find out that no notice was served upon the petitioners. In fact petitioners themselves annexed copy of the notice dated 6th August 2001. On enquiry I have come to know Gazette notification as regards notice has already been published. This provision is made for supply of copy of public notice. Therefore question of service or non-service of copy of notice upon them is immaterial. The words

"other interested parties" under Rule 6(2) has a very wide connotation. Such parties may be exporters, may be importers, or their sister concerns who might have been affected by raising of any antidumping duty or duties. The exporters were served. The sister concern of the importers were served. The complainants were present. But surprisingly, the petitioners were not present. This cannot give a clean chit to the petitioners particularly when it is not the question of service of notice but service of copy of the notice. Moreover, one cannot be able to find out the people around the country whether he is interested or might have been affected by such report. Therefore, the policy of service through the embassies is good enough for the purpose of service to the all concerns. It is duty of the exporters to intimate importers in the country. When the exporter has already been informed his counterpart i.e. importer in the country cannot take the advantage of the situation in the garb of the words "other interested parties". It is duty of such exporter to intimate his importer. Other interested parties in Rule 6(2) meant other than the persons not being importers under the exporters who were served. Therefore, I cannot hold that the principles of natural justice has been violated by the designated authority in holding enquiry and furnishing preliminary report. That apart, the petitioners themselves annexed the copy of the notice dated 6th August, 2001 and invoked the writ jurisdiction on 9th November, 2001, after more than three months before publication of preliminary finding.

8. However, mere preliminary finding ipso facto cannot create any cause of action with regard to determination of the designated authority unless Government of India accept the recommendation and issue notification prejudicing the right of the affected parties on such preliminary finding. If the party is at all aggrieved by such determination other alternative remedy is available for the same. Similarly alternative remedy is also available disjunctive to such determination as per Section 9C below,

9. Mr. R. Banerjee, learned Counsel appearing on behalf of one of the complainants/intervenors contended when an alternative forum available or the purpose that writ jurisdiction cannot be unnecessarily bothered with the same. I find logic in such submission particularly when the jurisdiction has been invoked at stage of investigation to when normally writ Court does not interfere.

The anti-dumping and countervailing provisions of Customs Tariff Act, 1975 in its Section 9C made provision of appeal as follows :

"9C. (1) An appeal against the order of determination or review thereof regarding the existence, degree and effect of any subsidy or dumping in relation to import of any article shall lie to the Customs, Excise and Gold (Control) Appellate Tribunal constituted u/s 129 of the Customs Act, 1962 (hereafter referred to as the Appellate Tribunal).

(2) Every appeal under this section shall be filed within ninety days of the date of order under appeal:

Provided that the Appellate Tribunal may entertain any appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(3) The Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the order appealed against.

(4) The provisions of Sub-sections (1), (2), (5) and (6) of Section 129C of the Customs Act, 1962 shall apply to the Appellate Tribunal in the discharge of its functions under this Act as they apply to it in the discharge of its functions under the Customs Act, 1962.

(5) Every appeal under Sub-section (1) shall be heard by a Special Bench constituted by the President of the Appellate Tribunal for hearing such appeals and such Bench shall consist of the President and not less than two members and shall include one judicial member and one technical member".

10. Lot of arguments were advanced by Mr. Anindya Kumar Mitra, about the scope of appeal in respect of such preliminary finding of the designated authority. It has been contended that an appeal can only be made from an order of the final determination. According to him, preliminary finding is governed under Rule 12 wherein, final finding is governed under Rule 17 of the prescribed Rules relating to anti-dumping duty under the Customs Tariff Act, 1975. He stated that nomenclature of the particular Rule says that it is preliminary findings not the determination. It can only be construed as estimation. Both the heading of Rule 12 and Rule 17 are speaking about preliminary findings as well as final findings respectively. There is no differentiation. There is also no whisper in Section 9C, whether the same will be applicable in final determination but not in preliminary determination. In the body of both the Rules the words are prescribed as "preliminary determinations" and "determine" respectively. Therefore, there is no scope for the Court to construe otherwise to hamper the reality of the Rules. The interpretation of the statute says that heading will be taken note when the body of the statute is not understandable but when the body of the statute is clear and explicit one cannot go by the nomenclature or heading alone.

11. That apart, the scope and ambit of Section 9C not only restricted for the purpose of appeal from any determination but also for review thereof regarding the existence, degree and effect of any subsidy or dumping in relation to import of any article. The two parts of the section either in connection with the appeal or in connection with review are disjunctive from each other. A question may arise that review is a separate mode which cannot be equated with the appeal, but either appeal or review the scope and ambit of the petitioners is available only before the CEGAT. Apart from that Rule 23 speaks that provisions of Rule 6 i.e. the principles governing the investigations and other Rules i.e. Rules 7 to 11 and Rules 16 to 20 are mutatis mutandis applicable in case of review.

12. According to my reading until and unless law is amended question of

determination arise both from preliminary and final findings under Rule 12 and Rule 17 of the respective Rules. Therefore, when the Court finds that there is an alternative and efficacious mode of justice available at the relevant point of time, it is desirable for the writ Court to interfere with the same. Principle of the alternative remedy may not be bar but such ratio is not presently applicable. In the present case, if I accept the logic of Mr. Mitra that appeal cannot lie from the preliminary finding I have to hold writ cannot lie from the same because cause of action is premature. Yet, if one is interested there is no bar of review before the CEGAT. One cannot be allowed to take double stand one for the Tribunal and one too for the writ Court.

13. Lastly Mr. Mitra raised an additional point by saying that the writ jurisdiction was invoked correctly before publication of the preliminary finding which only was made during the pendency of the writ petition. At the threshold, when the Court entertained this writ petition, now the matter cannot be sent to the CEGAT. Any subsequent event, even in connection with the publication of the preliminary finding, can only be taken by the Writ Court. I think such submission is boomerang to him. If the writ petition was purportedly entertained even at the threshold from the stage of investigation for the purpose of any judicial review and when in the meantime preliminary finding arising out of such investigation came out the writ petition ought to be dismissed, as infructuous at best with liberty to approach appropriate forum. The Writ Court cannot gradually convert into a fact finding Court in the arena of investigation and findings. Therefore, it is right time of refusal order will not prevent the petitioner either to prefer appeal or make a review application.

14. The following principles are laid down hereunder.

- (a) CEGAT is an appropriate forum for appeal against the order of determination or review thereof regarding the existence, degree and effect of any subsidy or dumping in relation to import of any article u/s 129 of the Customs Act, 1962;
- (b) Both the determinations either preliminary or final as per Rule 12 or Rule 17 as above are appealable orders before the CEGAT;
- (c) A finding by the designated authority ipso facto cannot become a ground of appeal unless and until the Central Government accept the same and notified;
- (d) The appeal against an order of determination and review thereof regarding the existence, degree and effect of any subsidy of dumping in relation to import of any article are disjunctive from each other but both lie before the CEGAT;
- (e) There is no vacuum under the law which prescribes to wait till the determination is made by the Central Government in view of the disjunctive part of review u/s 9C of the Customs Tariff (Amendment) Act, 1995;
- (f) The review under Rule 23 is mutatis applicable everywhere in connection with the final finding but not strictly in connection with the preliminary finding and in such case Section 9C of the above Act covers the domain as regards preliminary

finding;

(g) Having such wide alternative forum the writ jurisdiction can only be used sparingly where situation is so prevailing that the Court will have no other alternative but to construe that the finding is bad from the face of it on the plain reading.

15. Upon holding the same I dismiss the writ petition. Interim order, if any, stands vacated. However, no order is passed as to costs. However, this order will not prevent the petitioner either to prefer appeal or to make review before CEGAT [Customs, Excise and Gold (Control) Appellate Tribunal] in accordance with law at the appropriate time if so advised.

16. Xeroxed certified copies of this judgment will be supplied to the parties within seven days from the date of putting requisites for drawing up and completion of the order and certified copy of this judgment.

17. All parties are to Act on a signed copy minute of the operative part of this judgment on the usual undertaking and subject to satisfaction of the Officer of the Court in respect as above.