

(2003) 02 MAD CK 0059

In the Madras High Court

Case No : Writ Petition No"s. 13045 and 13046 of 1999 and W.M.P. No"s. 18693 and 18694 of 1999

Tanfac Industries Ltd.

APPELLANT

Vs

Monopolies and Restrictive Trade Practices Commission, Alkali
Manufacturers Association of India and The Assistant
Commissioner of Customs

RESPONDENT

Date of Decision : 05-02-2003

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2003) 155 ELT 251

Hon'ble Judges : E. Padmanabhan, J

Bench : Single Bench

Advocate : Arvind P. Datar, SC, for the Appellant; R. Krishnamurthi, SC for Rangarajan and Prabhakaran for R2 and K. Veeraraghavan, ACGSC for R3, for the Respondent

Judgement

E. Padmanabhan, J.—In W.P. No. 13045/99, the writ petitioner M/s. TANFAC Industries Ltd., has prayed for the issue of a writ of

certiorari to call for and quash the proceedings of the first respondent, Monopolies Restrictive Trade Practices Commission, New Delhi, in RTP

Enquiry 238/98 (Mis. Application) dated 27.5.99 insofar as the petitioner is concerned.

2. In W.P. No. 13046/99, the very same writ petitioner has prayed for the issue of a writ of certiorarified mandamus to call for and quash the

proceedings of the 3rd respondent, Assistant Commissioner of Customs, Tuticorin in C. No. VII/10/139/99 in order in original No. 20/99-AC,

TTN, dated 16.7.99, quash the same and forbear the 3rd respondent from levying duty in any other manner except as provided by the Customs

Act, 1962, and the Valuation Rules, 1988, by issue of a writ of certiorarified mandamus.

3. Heard Mr. Arvind P. Datar, learned senior counsel appearing for the writ petitioner in both the writ petitions, Mr. R. Krishnamurthy, learned

senior counsel appearing for M/s. Rangarajan & Prabhakaran for the 2nd respondent and Mr. K. Veeraraghavan, learned Additional Central

Government Standing Counsel appearing for the 3rd respondent. With the consent of counsel for either side, the writ petition itself is taken up for

final disposal.

4. According to the petitioner, a joint venture company, imported 3030.280 MT of Soda Ash of Chinese origin at CIF price of USD 119.00 per

MT and the exporter being a Singapore based company. The price of soda ash was reduced over the last six years. The import price as on

18.3.99 was USD 119 per MT. The consignment arrived at Tuticorin Port as per the Bill of Entry presented on 7.8.99 and the vessel actually

arrived on 18.8.99. For the purpose of customs duty, the goods are being valued in accordance with Section 14 of The Customs Act read with

The Customs Evaluation (Determination of Price of Imported Goods) Rules, 1988. The Customs Act, 1982 and the rules are a comprehensive

one and for levying customs duty no other method of valuation is permissible.

5. When the consignment of soda ash arrived at Tuticorin, the 3rd respondent stated that he would levy duty only on the value determined at the

rate of USD 150 per MT on the ground that it was bound by the orders of the first respondent, Monopolies and Restrictive Trade Practices

Commission, which passed an order on 27.5.99. The petitioner was not a party to the said order nor it was a party to the said proceedings before

the said Monopolies and Restrictive Trade Practices Commission. The 3rd respondent also has not furnished copy of the order passed by the first

respondent. The said assessment based upon the orders of the first respondent commission, the 3rd respondent issued a show cause notice on

7.7.99, which notice was served on the petitioner on 12.7.99. The 3rd respondent in terms of the said notice, required the petitioner to state his

objections within ten days from the date of receipt of the said notice. Before expiry of ten days, the 3rd respondent, on 18.7.99, without awaiting

for reply, assessed the customs duty payable by the petitioner based upon the

direction issued by the first respondent. Therefore, according to the petitioner, no purpose will be served in preferring an appeal as against the orders of the 3rd respondent. Hence, the present writ petition has been filed.

6. The petitioner is also aggrieved by the directions issued by the first respondent and it is being challenged. These two writ petitions have been moved by the petitioner-company. It is contended that the first respondent commission has no jurisdiction to fix the value at which goods could/cannot be imported into India. The Export/Import of goods is regulated by Export/Import Policy of the Government of India and the evaluation of goods is governed by The Customs Act and the Rules framed thereunder. Once consignment of goods are permitted under OGL, the value could only be done as per the Customs Act and the Rules framed thereunder. It is contended that the first respondent has acted in excess of jurisdiction and it cannot pass an order to bind everyone, who is not a party to the proceedings. The first respondent has no jurisdiction to pass an order or direction of general nature. The first respondent is only concerned with the protection of Monopolies and Restrictive Trade Practices within India and it has no jurisdiction to issue any direction with regard to import or export of goods or home consumption.

7. The impugned order of the first respondent, it is contended, is arbitrary, violative of Article 14, 19(1)(g) as it interferes with the petitioner's right to carry on business. It is also contended that the impugned proceedings of the first respondent Commission offends Article 265 as any fixation of arbitrary value will drastically affect the rate of duty and results in imposition of tax without authority of law. The proceedings of the 3rd respondent is liable to be quashed as it is violative of principles of natural justice and the 3rd respondent has also abdicated itself to the directions issued by the first respondent without deciding the value and as provided in the Customs Act read with the Valuation Rules.

8. According to the petitioner, the customs duty is payable on the import value of the soda ash and not on notional value or any other value as has been ordered by the first respondent, Monopolies and Restrictive Trade Practices Commission. Though it is represented that as against the orders of the Monopolies and Restrictive Trade Practices Commission, at the behest of

second respondent, which is impugned in W.P. No. 13045 of 1999, namely, order in the Miscellaneous Application, a third party has moved the Supreme Court in C.A. No. 3179 of 1998 and the matter is pending before the Supreme Court, the petitioner herein is an intervener in that proceeding, but no orders have been passed till date. Therefore, arguments were advanced by either side on merits. The counsel on either side made their submissions on merits. Hence, the writ petitions are taken up for final disposal.

9. As regards the proceedings of the 3rd respondent, namely, Assistant Collector of Customs, the order is liable to be quashed on the short ground that there is a violation of principles of natural justice and also on the ground that the 3rd respondent has not assessed duty payable on the consignment of soda ash by fixing its value for the purpose of assessment u/s 18 of The Customs Act read with the Valuation Rules. There is force in this contention.

10. Mr. Arvind P. Datar, learned senior counsel for the petitioner pointed out that the 3rd respondent issued a notice on 7.7.99 requiring the petitioner to submit its objection within ten days from the date of receipt of the notice. The notice was actually served on 12.7.99. The learned senior counsel for the petitioner produced the postal cover to substantiate the statement that notice was received by the petitioner only on 12.7.99.

Therefore, the petitioner had time till 22.7.99 to submit its objections. But on 18.7.99 itself the order impugned has been passed by the 3rd respondent. The counter filed by the 3rd respondent is silent in this respect. The learned Additional Central Government Standing Counsel appearing for the 3rd respondent has to fairly state that the 3rd respondent has not denied the said averment and the petitioner has established that before the expiry of ten days time from the date of service, order impugned has been passed. The same has resulted in ignoring the objection filed by the petitioner.

11. In fact, the petitioner's objection dated 16.7.99 was submitted on the date on which the 3rd respondent has passed the impugned order, but there is no reference to the objection submitted by the petitioner before the 3rd respondent. Thus it is clear that the 3rd respondent's proceedings is in violation of principles of natural justice.

12. That apart, the 3rd respondent has passed the impugned orders by abdicating itself by simply adopting the exparte directions issued by the first respondent Commission. It is incumbent on the part of the 3rd respondent to assess the value in terms of Section 14 of The Customs Act, 1962

read with The Customs Evaluation (Determination of Price of Imported Goods) Rules, 1988, which it has miserably failed, as the value could be determined only by applying the said Rules.

13. Though the learned counsel for the petitioner relied upon the pronouncements of the Supreme Court in *Sounds N. Images Vs. Collector of Customs*, : and *M/s. Eicher Tractors Ltd., Haryana Vs. Commissioner of Customs, Mumbai*, it may not be necessary to refer to the same in detail as it is the settled legal position.

14. In *M/s. Eicher Tractors Ltd., Haryana Vs. Commissioner of Customs, Mumbai*, , the Apex Court held thus :-

9. These exceptions are in expansion and explicatory of the special circumstances in Section 14(1) quoted earlier. It follows that unless the price actually paid for the particular transaction falls within the exceptions, the Customs Authorities are bound to assess the duty on the transaction value.

10. The respondent's submission is that the phrase ""the transaction value"" read in conjunction with the word ""payable"" in Rule 4(1) allows determination of the ordinary international value of the goods to be ascertained on the basis of data other than the price actually paid for the goods.

This, according to the respondent, would be in keeping with the overriding effect of Section 14(1). We cannot agree.

11. It is true that the Rules are framed u/s 14(1-A) and are subject to the conditions in Section 14(1). Rule 4 is in fact directly relatable to Section

14(1). Both Sections 14(1) and Rule 4 provide that the price paid by an importer to the vendor in the ordinary course of commerce shall be taken

to be the value in the absence of any of the special circumstances indicated in Section 14(1) and particularised in Rule 4(2).

12. Rule 4(1) speaks of the transaction value. Utilisation of the definite article indicates that what should be accepted as the value for the purpose

of assessment to customs duty is the price actually paid for the particular transaction, unless of course the price is unacceptable for the reasons set

out in Rule 4(2). ""Payable"" in the context of the language of Rule 4(1) must,

therefore, be read as referring to "the particular transaction" and
payability in respect of the transaction envisages a situation where payment of
price may be deferred.

* * * *

14. It is only when the transaction value under Rule 4 is rejected, that under
Rule 3(ii) the value shall be determined by proceeding sequentially

through Rules 5 to 8 of the Rules. Conversely, if the transaction value can be
determined under Rule 4(1) and does not fall under any of the

exceptions in Rule 4(2), there is no question of determining the value under the
subsequent rules.

15. Though the rules prescribe an extensive procedure to be followed, but the
3rd respondent has proceeded based solely on the Monopolies and

Restrictive Trade Practices Commission's orders, as if it squarely applies with
respect to the valuation and binding. The said direction of the

Monopolies and Restrictive Trade Practices Commission alone has been taken into
consideration in arriving at the market value of the

consignment, which is a clear abdication of the powers. The Assistant Collector of
Customs should have valued the consignment in terms of the

statutory provision of the Act and the Rules and it should have proceeded to
assess as per the said statutory provision. Instead it has simply

assessed as per the directions of the Monopolies and Restrictive Trade Practices
Commission. The question whether the Commission's directions

is binding or not is the question, which will be decided in the next writ petition,
but it is clear that the 3rd respondent has abdicated itself and it had

failed to discharge the statutory function in terms of Section 14 of The Customs
Act and Valuation Rules.

16. On this short ground of violation of principles of natural justice and the 3rd
respondent had failed to assess the value of goods/consignment

imported as per statutory provisions, the impugned proceedings of the 3rd
respondent is quashed and the matter is remitted back to the 3rd

respondent for de novo consideration.

17. Taking up the next writ petition, it relates to the jurisdiction of the first
respondent, Monopolies and Restrictive Trade Practices Commission.

The jurisdiction of the Monopolies and Restrictive Trade Practices Commission to
issue a direction, which is being questioned or challenged. In

this respect, the learned senior counsel for the petitioner rightly relied upon the pronouncement of the Apex Court in Haridas Exports Vs. All India

Float Glass Mfrs. Association and Others, : The reliance placed upon the pronouncement of the Supreme Court is well founded and it applies

squarely to the facts of the case.

18. In this case, soda ash has admittedly been imported for consumption in the petitioner's factory. The Apex Court, while sustaining the

contention that the Monopolies and Restrictive Trade Practices Commission has no jurisdiction to entertain and adjudicate upon complaint with

respect to a domestic industry on account of the law imposed upon the foreign manufacturers, which, if at all, the dispute may fall under the Anti-

Dumping law and does not fall within the jurisdiction of the Monopolies and Restrictive Trade Practices Commission.

19. While examining the provisions of the Monopolies and Restrictive Trade Practices Act and the Customs Tariff Act, the scope, vis-a-vis levy or

non-levy on anti-dumping, a three Judges Bench of the Apex Court in Haridas Exports Vs. All India Float Glass Mfrs. Association and Others, :

held thus :-

47. We will now consider whether the anti-dumping provisions will oust the jurisdiction of the Monopolies and Restrictive Trade Practices

Commission, as has been contended by the appellants.

48. The jurisdiction of the Monopolies and Restrictive Trade Practices Commission, in our opinion, is not ousted by the anti-dumping provisions in

the Customs Act. The two Acts operate in different fields and have different purposes. The Import Control Act and the Customs Tariff Act are

concerned with import of goods into India and the duty which could be imposed on the imported items. Import may be allowed on the basis of an

import licence or, depending upon the policy, import may be allowed under OGL - open general licence - where no specific licence for import is

required. Whether to allow import or not and the terms on which an item may be imported is a matter of policy and regulated by law.

49. There is in this case no challenge to the import policy allowing import of float glass and even if such a challenge was to be there it would hardly

succeed. The grievance of the respondents is that import is being made at predatory prices. The challenge is to the actual import. But allowing such

a challenge will amount to giving the Monopolies and Restrictive Trade Practices Commission jurisdiction to adjudicate upon the legal validity of the provisions relating to import, which jurisdiction the Commission does not have. It is not a court with power of judicial review over legislative action. Therefore, it would have no jurisdiction to decide whether the action of the Government in permitting import of float glass even at predatory prices is valid or not. The Commission cannot prohibit import, its jurisdiction commences after import is completed and any restrictive trade practice takes place.

50. Customs duty on import of any goods is levied under the provisions of the Customs Tariff Act. The rate at which the import duty is to be levied is a matter of policy. The rate of duty is determined by the Schedule to the Customs Tariff Act and is subject to such exemption as may be granted under that Act. Thus the rate of import duty which is imposed is a legislative act and is thus not amenable to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission. A party cannot contend before the Monopolies and Restrictive Trade Practices Commission that the rate of duty is too high or too low. In fact, such a challenge is hardly likely to succeed in a court of law and the question of the Monopolies and Restrictive Trade Practices Commission having such a jurisdiction does not arise.

51. Apart from the rate of duty the value of the goods imported has to be determined for the purpose of levy of duty. The Customs Authorities are required to determine whether the value of the goods imported has been correctly declared. In case of wrong valuation, the Customs Authorities can determine the correct value and levy duty thereon. Normally the goods are valued at the price at which they are actually purchased. Then that will be the value at which the duty will be imposed. It is not the case of the respondents that the appellants are guilty of undervaluing the goods imported. It is the low price which has been charged by the Indonesian exporter which is really the object of attack.

* * * *

54. It was submitted that import by the Indian party from Indonesia at predatory prices required the agreement for import to be registered as per Section 33(1)(j) of the Act. On the facts of this case, we are not inclined to agree that such a case is made out. As far as Section 33(1)(j) is

concerned, there must be an agreement between the foreign seller and the Indian importer to sell goods at such prices as would have the effect of eliminating competition of a competitor i.e. here the Indian industry. What seems to have happened here is that the monopolistic Indian undertakings are now having to face competition. The quantum of import in the present case is a small fraction of the total float glass which is manufactured and sold in India. The reduction in prices of the Indian importer is to the benefit of the Indian customer. It is only if there is an agreement between the Indian importer and the foreign seller which has such an effect that the production in India of float glass by an efficient Indian industry would have to stop and such stoppage is considered prejudicial to the public interest, can an order u/s 12-A or Section 37 be passed. It is the case of the petitioners that the Indian manufacturers have formed a cartel of their own and are charging high prices because of lack of competition. It is alleged that the Indian manufacturers are making much profits and despite import of float glass having taken place for the last 5-10 years the Indian industry has not suffered. On the other hand, the volume of sales has increased and the profit of the Indian producers not decreased. Under these circumstances, it was contended, the passing of the injunction was wholly uncalled for.

55. Import of material at prices lower than prevailing in India cannot per se be regarded as being prejudicial to the public interest. If the normal or export price of any goods outside India is lower than the selling price of an indigenously produced item then to say that the import is prejudicial to the public interest would not be correct. The availability of goods outside India at prices lower than those which are indigenously produced would encourage competition amongst the Indian industry and would not per se result in eliminating the competitor, as was sought to be submitted by the respondents.

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74. In the case of import of soda ash, the contention is that the appellant is a cartel in America which was proposing to sell soda ash to India at very low prices with a view to eliminate competition and to adversely affect the Indian industry. Any agreement of sale by the appellant to an Indian purchaser would not attract the provisions of Section 33(1)(d), which refers only

to cartelising agreements and not to agreements of sale and purchase. But the Monopolies and Restrictive Trade Practices Commission will have jurisdiction u/s 37 to pass orders if such a sale was to amount to being a restrictive trade practice. For the Commission to have jurisdiction to pass such an order, whether interim or final, it must come to the conclusion that it is in public interest to do so. It is to be borne in mind that public interest does not necessarily mean interest only of the industry. Unless and until it can be demonstrated that an efficient Indian industry would be forced to shut down or suffer serious loss resulting in closure or unemployment, the Commission ought not to pass an injunction restraining an Indian party from importing goods from a cartel at predatory prices. Importing goods at a price lower than what is available in India is not per se illegal. We have provisions under the Customs Act which enable the Government to impose anti-dumping duties with a view to protect the Indian industry. Nevertheless, the era of protectionism is now coming to an end. The Indian industry has to gear up so as to meet the challenges from abroad. If the cartel is selling goods to India and still making profit then it will not be in the interest of the general body of the consumers in India to prevent the import of such goods. The remedy of the Indian industry, in such an event, is to take recourse to the provisions under the Customs Act in relation to the levy of anti-dumping duties.

75. A cartel is formed, inter alia, with a view that members of the cartel do not wage a price war and they sell at an agreed or uniform price. There may perhaps also be a cartel where members divide the territories to which each of them can export. There is little doubt that the object of an export cartel is to capture a market even if at first, it may result in a loss to the exporter.

76. The competition law in the form of Monopolies and Restrictive Trade Practices as it stands today does not contain any provision, which can give it jurisdiction to interfere merely with cartel formation. Formation of cartel which takes place outside India is outside the territorial jurisdiction of Monopolies and Restrictive Trade Practices. The Indian importer obtaining goods at a low price does not contravene any law. He has obtained a good bargain.

20. In view of the above binding pronouncement, this Court hasten to hold that

the direction issued by the first respondent is without jurisdiction.

Whether anti dumping provisions under the Customs Act applies or not, it need not be examined and it is open to the authorities under the said

provisions to initiate appropriate action, if the facts of the case warrants. However, this Court is not expressing any opinion in that respect.

21. In the circumstances, the order of the first respondent, Monopolies and Restrictive Trade Practices Commission in Miscellaneous Application

instead of being quashed following the decision of the Apex Court in Haridas Exports Vs. All India Float Glass Mfrs. Association and Others, : this

Court directs the third respondent to assess the import value without reference to the said directions of the Monopolies and Restrictive Trade

Practices Commission.

22. It is represented that as per the interim orders, this Court permitted the writ petitioners to clear the caustic soda consignment of 3030.28 MT

on the petitioner remitting Rs.94.18 lakhs with the 3rd respondent and deposit Rs.24.72 lakhs to the credit of the above W.P. No. 13045 &

13046 of 1999.

23. The sum of Rs.24.72 lakhs, lying to the credit of the writ petition is ordered to be refunded to the writ petitioner by the Registry and as and

when the 3rd respondent pass orders of assessment, with respect to levy of customs duty, depending upon the ultimate orders, the petitioner may

have to remit the difference in duty, if any. This direction is issued as the admitted tax on the value of the imported consignment as per declaration

has been paid.

24. Both the writ petitions are allowed and the impugned orders of the third respondent is quashed with the above directions to proceed de novo

and pass orders of assessment without reference to the directions issued by the Monopolies and Restrictive Trade Practices Commission, but in

terms of Section 14 of The Customs Act and The Valuation Rules. Parties shall bear their respective costs. Consequently, connected

miscellaneous petitions are closed.