(2012) 08 CAL CK 0027

Calcutta High Court

Case No: F.M.A. No. 55 of 2012 with M.A.T. No. 1960 of 2011

State of Gujarat Fertilizers and Chemicals Limited		APPELLANT
	Vs	
The Additional Secretary and Designated Authority, Directorate General of Anti Dumping and Allied Duties, Department of Commerce, Government of India and Others		RESPONDENT

Date of Decision: Aug. 7, 2012

Acts Referred:

- Central Sales Tax Act, 1956 - Section 2(d)
- Customs Act, 1962 - Section 2(2b)
- Customs Tariff Act, 1975 - Section 2, 3(1)(2), 5, 6, 8(3)(b)

Citation: (2012) 4 CALLT 103 : (2012) 5 CHN 601

Hon'ble Judges: Kalyan Jyoti Sengupta, J; Asim Kumar Mondal, J

Bench: Division Bench

Advocate: R.N. Bajoria, Mr. J.P. Khaitan, Mr. P.K. Jhunjhunwala and Ms. Alpana Chaudhuri, for the Appellant; Somenath Bose and Mr. Bhaskar Prasad Banerjee for the U.O.I. and Dr. Samir Chakraborty and Mr. Abhijit Biswas for the Respondent Nos. 4 and 5, for the Respondent

Final Decision: Allowed

Judgement

K. J. Sengupta, J.

By this appeal the appellant above-named has impugned the judgment and order of the learned Single Judge dated 19th August, 2011 passed in the Writ Petition No. 3183 (W) of 2011 whereby and whereunder the learned Trial Judge has granted relief as prayed for in the writ petition. The short fact leading to filing the writ petition and preferring instant appeal is as follows:--

The appellant herein claiming to be producer of a product what is called Melamine in the month of September. 2010 filed an application before the Additional Secretary and Designated Authority. Directorate General of Anti Dumping and Allied Duty. Department of Commerce and Ministry of Commerce and Industries. Government of India being the first respondent herein for imposition of anti dumping duty on imported Melamine. It is alleged in the said application that the said product is largely imported to this country from European Union. Indonesia. Iran and Japan. The writ petitioner herein being one of the exclusive importers having learnt about the filing of the said application made a representation against the said application contending that the appellant herein was ineligible to file said application as per Rule 2(b) of the Customs Tariff (Identification. Assessment and Collection of Anti Dumping Duty on Dumped Articles and for Determination of Injury) Rules. 1995 (hereinafter referred to as the said Rules'') which were framed by the Central Government in exercise of powers conferred under sections (6) and 9B(2) of the Customs Tariff Act. 1975 (hereinafter referred to as CTA) intending to oppose to the initiation of investigation aiming at to levy of anti dumping duty on the said product from the countries mentioned above. However Directorate General of Anti Dumping and Allied Duties, Department of Commerce, Ministry of Commerce and Industry, Government of India issued a notification dated 7th December, 2010 and a copy of the same was supplied to the writ petitioner respondent informing that the respondent had initiated investigation into the existence, degree and effect of alleged dumping by import of Melamine in India from the said countries. The writ petitioner being the respondent No. 4 herein thereafter filed the above writ petition contending in substance that going by the statement made in the application filed by the appellant herein the said authority had no jurisdiction to issue notification mentioned above intending to initiate investigation. The said writ petition was opposed not only by the appellant but by the respondent abovenamed also. The learned Trial Judge however held that the appellant herein going by the admitted fact that it is also importer of the said material from same countries, is ineligible to make application, for the purpose above in other words the said authority had no jurisdiction to initiate investigation based on the complaint made by the appellant.

2. At the threshold the notification was passed.

3. Mr. Bajoria, learned Senior Counsel appearing for the appellant submits that the learned Trial Judge has fallen in error to hold the appellant is an importer within the definition in Rule 2(b) of 1995 Rules on the fact mentioned in the complaint. The chemical product, Melamine is not available to meet the demand in this country. Admittedly his client is almost sole producer of the same. However at one point of time because of disruption of production and to meet the demand of the customer the appellant had to import a small quantity of Melamine which constituted insignificant portion of total production. According to him this casual import by his client does not render his client disentitled to make the said application. He submits that while interpreting the expression "import'' in the said Rule the Court has to

examine the real object and context, and not literally mentioned in the section. His client is not an importer as intended in the said Rule and indeed it has not imported technically as some other person filed the bill of entry however it purchased the product imported by the said person. According to him expression importer in Rule 2(b) of 1995 Rules refers to "importer" traders not the imports made dehors such character.

4. It is an admitted position so also held by the learned Trial Judge that his client is the monopoly producer of this product. In support of his submission as regard nature of the business being carried on by his client has produced Memorandum of Association. He has drawn our attention to the object clause and it appears therefrom that the principal business carried on by his client is manufacturing of amongst other fertilizers, heavy chemicals, cement, coke and their by-products and also storing, packing, distributing etc. Therefore the Melamine is one of manufacturing product. This product is tasteless, odorless and non-toxic substance. Melamine formaldehyde resin is used for laminating as it offers good hardness, resistance to scratch, stain, water and heat. Laminates are used in some electrical appliances that possess high mechanical strength, good heat resistance and good electrical insulating properties. Asbestos filled Melamine resins possess very high dielectric strength and high resistance. Beside the best dimensional stability. Melamine Formaldehyde moulding powder gives clear and bright colors easily mouldable. According to him at present it is very difficult to meet the entire demand of the country with indigenous production and sometimes some quantity of import becomes inevitable. The law relating to anti dumping duty in essence is a tool for adopting protective measure for domestic industry facing unfair trade competition. It will be very clear from Article VI of GATT (General Agreement on Tariffs and Trade, 1994).

5. He therefore contends that learned Trial Judge has fallen in error not reading the expression of importers in the context and object of the Act and the intention has been made clear in the definition of said Customs Tariff (Identification, Assessment and Collection of Anti Dumping Duty on Dumped Articles and for Determination of Injury) Rules. 1995 (hereinafter referred to as the ''said Rules''). Rule 2 of the definition starts with the words ''unless the context otherwise requires''. It is settled law that Supreme Court frequently and consistently explained the aforesaid meaning of the words unless the context otherwise requires''. He has referred decisions of the Supreme Court in case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, and in case of Printers (Mysore) Ltd. and Another Vs. Asstt. Commercial Tax Officer and Others, . He placing reliance on Supreme Court decision in case of Reliance Industries Ltd. Vs. Designated Authority and Others, contends the object of the framing of the aforesaid rules. He urges that the findings recorded by the Designated Authority have not been challenged as perverse. As such there was no occasion for the learned Trial Judge to hold so. There are enough materials to support such finding or conclusion as to nature and

character of the appellant as domestic industry.

6. Mr. Bose, learned counsel appearing for the respondent-authority supports the argument of Mr. Bajoria, in addition thereto he has contended that the learned Trial Judge ought not to have entertained the writ petition at all as it was absolutely premature. It is not disputed that authority concerned has no jurisdiction to issue notification to start investigation and In this investigative exercise no one is prejudiced unless the report of the investigation results in affectation of any particular importer if recommended for the imposition of Anti Dumping Duty. If any such order is passed efficacious remedy was available, under law. The learned Trial Judge should have looked into this aspect of the matter.

7. Dr. Chakraborty appearing for the writ petitioner-respondent supports the judgment of the learned Trial Judge and contends when it is an admitted position that the appellant is an importer of the same product and from the same countries and it falls within the exception clause of the definition of Domestic Industries being Rule 2(b) the authority concerned ought not to have entertained the complaint at all and further issued the notification. According to him the interpretation of any word in any fiscal statute has to be made strictly and what is meant for apparently and not to find out any liberal construction. The importer in Rule 2(b) will have the same meaning as defined in section 2(2b) of Customs Act 1962. The duties under sections 2, 3(1)(2). 5, 6 and 9A of CTA. 1975 are all Customs duties. Contextually the definition in all the provisions of CTA providing for various types of Customs duties including antidumping duty have to be the same. There cannot be different meaning given to the same words import or importer for antidumping duty, safeguard duty, additional duty etc. There is no contrary intention. The volume of the import made by his client actually does not affect at all in the market and in fact volume of indigenous production is so insignificant that without importation the demand cannot be met. He has referred to a decision of the Supreme Court in support of his argument reported in S and S. Enterprise Vs. Designated Authority and Others, .

8. After hearing the learned counsel and reading the judgment and order of the learned Trial Judge we find there is no dispute on fact. Singular point that requires decision of this Court is whether the interpretation given by the learned Trial Judge of the word ''importer'' as mentioned in the definition of domestic industries vide Rule 2(b) on the fads and circumstances and in the context of the said rule is correct or not. We set out the definition of ''domestic industry'' employed in Rule 2(b) at the relevant time, as from time to time the same has undergone change from date of introduction.

2(b) "domestic industry" means the domestic producers as a whole engaged in the manufacture of the like article and any activity connected therewith or those whose collective output of the said article constitutes a major proportion of the total domestic production of that article except when such producers are related to the exporters or importers of the alleged dumped article or are themselves importers

thereof [in such case the term ''domestic industry'' may be construed as referring to the rest of the producers only]: Provided that in exceptional circumstances referred to in sub-rule (3) of Rule 11, the domestic industry in relation to the article in question shall be deemed to comprise two or more competitive markets and the producers within each of such market a separate industry, if -

(i) the producers within such a market sell all or almost all of their production of the article in question in that market: and

(ii) the demand in the market is not in any substantial degree supplied by producers of the said article located elsewhere in the territory:

9. The learned Trial Judge viewed that import made at any point of time or even on a single occasion disentitled the applicant to make such application, consequently the respondent authority on receipt of such application cannot assume jurisdiction to issue notification pursuant to such application. How the Court will interpret if any Act or Rules are worded with the expression "unless there is anything repugnant in the subject or context" has been explained by the Hon''ble Supreme Court in case of Printers (Mysore) Ltd. and Another Vs. Asstt. Commercial Tax Officer and Others, . In paragraph 18 at page 445 of the report the Apex Court while accepting the decisions of the same rendered in case of T.M. Kanniyan Vs. Income Tax Officer, Pondicherry and Another, and in case of Commissioner of Income Tax, Bangalore Vs. J.H. Gotla, Yadagiri, held as follows:-

Even apart from the opening words in section 2 referred to above, it is well settled that where the context does not permit or where it would lead to absurd or unintended result, the definition of an expression need not be mechanically applied.''

10. In that case the Supreme Court while finding out the meaning of the definition of "goods" in section 2(d) of Central Sales Tax Act in relation to newspaper, has come to the conclusion that the definition "goods'' employed in the context of the Act cannot be what is meant apparently. It is apposite to quote the words of the Hon''ble Supreme Court:

This shows that wherever the word ''goods'' occurs in the enactment, it is not mandatory that one should mechanically attribute to the said expression the meaning assigned to it in clause (d). Ordinarily, that is so. But where the context does not permit or where the context requires otherwise, the meaning assigned to it In the said definition need not be applied. If we keep the above consideration in mind, it would be evident that the expression ''goods'' occurring in the second half of section 8(3)(b) cannot be taken to exclude newspapers from its purview. The context does not permit it. It could never have been included by Parliament. Before the said amendment, the position was - the State could not levy tax on intra-State sale of newspapers; the Parliament could but it did not and Entry 92-A of List I bars the Parliament from imposing tax on inter-State sale of newspapers...

11. Thereafter the Hon''ble Supreme Court again in case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, of the report while relying on the decision in case of The Vanguard Fire and General Insurance Co. Ltd., Madras Vs. Fraser and Ross and Another, has stated the legal position of interpretation in the expression worded with ''unless there is anything repugnant in the subject or context as follows:-

Now. the principle is that all statutory definitions have to be read subject to the qualification variously expressed in the definition clauses which created them and it may be that even where the definition is exhaustive in as much as the word defined is said to mean a certain thing, it is possible for the word to have a somewhat different meaning in different sections of the Act depending upon the subject or context. That is why all definitions in statutes generally begin with the qualifying words, similar to the words used in the present case, namely ''unless there is anything repugnant in the subject or context''. Thus there may be sections in the Act where the meaning may have to be departed from on account of the subject or context in which the word had been used and that will be giving effect to the opening sentence in the definition section, namely unless there is anything repugnant in the subject or context''. In view of this qualification, the Court has not only to look at the words but also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words ''under those circumstances''.

12. Thus upon reading of the consistent views of the Supreme Court as above it emerges that while ascertaining the meaning or definition of any particular word the subject and context of the Act or Rule has to be understood in rational way avoiding absurdity and keeping in view the real intention and object to be achieved by framing of such Act or Rules. The Superior Court is empowered to do so if for this reason there may be little conflict with the apparent expression of a particular provision.

13. Bearing aforesaid legal position it is incumbent for this Court to see what could be real and rational object for employing the definition of domestic industry'' and this could be gathered upon reading the object of the said Rule. The Supreme Court has explained why the aforesaid rule has been framed by the legislature. In case of Reliance Industries Ltd. Vs. Designated Authority and Others, in paragraph 48 it is clearly mentioned the object of framing this Rule. We cannot do better than to reproduce the paragraph 48 of the said report:-

The anti-dumping law is, therefore, a salutary measure which prevents destruction of our industries which were built up after. independence under the guidance of our patriotic, modern-minded leaders at that time and it is the task of everyone today to see to it that there is further rapid Industrialisation in our country, to make India a modern, powerful, highly industrialised nation.

14. Thus it is very clear that the definition of the importer as mentioned in Rule 2(b) has to be understood in the context of protecting indigenous industry producing same material. Here we notice on fact of course going by the statement made in the complaint of the appellant made to the appropriate authority'' that nearly 15% of its total production is imported by it and that too casually and to meet customer''s demand during the time when the production was disrupted, and this quantity of import is very insignificant portion of the total import from the same exporting countries. According to us realistic and logical meaning should be the person who is carrying on business of import exclusively for trading purpose is the importer under the said Rule. We have examined the object clause of the Memorandum of Association of the appellant and nowhere we find that it carries on business principally, of import of Melamine. It is carrying on business amongst other of manufacturing of heavy chemicals of every description, whether required for civil, commercial or military defence purposes. We record the learned Trial Judge did not decide with examination of object clause of Memorandum of Association. We think this exercise is paramount and without the same the appellant could not be held to be importer in the sense as it is intended by the said Rule.

15. While reading aforesaid we are unable to accept the meaning of the word ''importer'' in the said clause 2(b) given by the learned Trial Judge. It seems to us that the learned Trial Judge has adopted the definition of importer in Customs Act 1962 and has also applied the meaning in common sense and parlance. We think this cannot be done even considering contextually as argued by Dr. Chakraborty. The definition in this Act is of general application of any import, which includes both for regular trader and exclusive consumer. Moreover Anti Dumping Rules have not been framed under the Customs Act. This Rule has been framed u/s 9A of CTA, 1975 which is meant as correctly urged by Mr. Bajoria for imposition of rate of various duties under Act of 1962. In this Act there is no definition of the word import. But the Central Government being subordinate legislature has described importer differently and independently and for specific purpose and it would be absurd to borrow any expression from Act of 1962 by the Court, when by the Rule 2(g) of the said Rules provide no other definition of any unexplained word can be adopted other than in the Tariff Act 1975 therefore the definition given in the Rule has to be accepted in the context of object of the Rule. It appears that the learned Trial Judge as rightly contended by Mr. Bajoria, has given literal and apparent meaning not for what it is intended by the legislature. Dr. Chakraborty has stated if entire matter is taken into consideration it would appear that no Anti Dumping Duty is required to be imposed and we think that this aspect of the matter can be dealt with by the appropriate authority on merit. Therefore the decision cited by him in case of S and S. Enterprise Vs. Designated Authority and Others, would not be any help at this stage. At the moment it has to be seen whether the appropriate authority has assumed jurisdiction basing on statement made in the complaint made by the appellant or not. In the said case cited by Dr. Chakraborty the Supreme Court has

clearly explained the meaning of the word ''dumping'' in the said Rules. In paragraph 4 it is explained so. We think that this would be very appropriate guidance for the appropriate authority while making enquiry as to whether there has been dumping in this particular facts and circumstances of this case or not.

16. In view of the above we think that the notification does not suffer from any infirmity, and investigation has been rightly initiated. Accordingly the judgment and order passed by the learned Trial Judge is not sustainable and the same is set aside.

17. Before we part with this matter we are of the view, in case of this nature the Writ Court should not have entertained as the action is at the threshold and further maintainability is depending upon fact made out in the complaint. Such point could be agitated before the appropriate authority as it requires some more material on fact not the legal provision alone. It is not a case of inherent lack of jurisdiction for which extraordinary jurisdiction of this Court has to be invoked. It is a question of jurisdiction relatable to fact and such fact is required to be examined by the fact-finding authority and when such exercise is called for the Writ Court will not encourage any person to agitate. We are not oblivious that it is trite that power of the Writ Court is vast and no provision of ordinary law can take away the same, but again it is the discretion of the Writ Court bearing self imposed restriction in mind while entertaining the writ petition whenever it is called for. When this matter was decided by the learned Trial Judge on affidavit it shall be presumed that the learned Trial Judge has exercised jurisdiction to entertain hear out the matter despite alternative remedy being available we do not wish to hold that writ petition was not maintainable. In any event Mr. Bajoria is fair enough to say that he is not urging this point though Mr. Bose has argued that matter on this point.

18. Thus the appeal is allowed. We have passed the order at the interim stage to complete the investigation and but not to take any action if it is found adversely. We do not know whether this has been done or not. We direct the respondent-authority to take follow up action if it is not done, must be done within the statutory period without fail. We make it clear that all points on merit are kept open and it would be open for the writ petitioner-respondent if so advised may take action in future against any adverse order if passed.

Asim Kumar Mondal, J.

I agree.