IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.701 OF 2015

Spie Capag S.A.)
A company incorporated in accordance with)
the laws in force in France and having its)
principle place of business at 10 Avenue De)
L' Enterprise 95863 Cergy Pontoise) ..Petitioner

V/s.

1. The office of the Commissioner of)
Customs, New Customs House, Ballard)
Estate, Mumbai 400 001)

2. The Deputy Commissioner of Customs)
(import), New Customs House, Ballard)
Estate, Mumbai 400 001) ...Respondents

Mr. Karl Tamboly with Ms Shaheda Madraswala and Ms Kanika Sharma i/b Vashi & Vashi for Petitioner.

Mr. Pradeep S Jetly, Senior Advocate a/w Mr. Jitendra B Mishra for Respondents.

CORAM : K.R. SHRIRAM &
A.S. DOCTOR, JJ
DATED : 21st JULY 2022

ORAL JUDGMENT (PER K. R. SHRIRAM J.) :

1 The petition has been pending admission from 2015 and no reply has been filed. Mr. Jetly stated that since it was against the adjudication order, there was no need to file a reply and he would argue the matter on merits. Therefore, with the consent of the parties taken up for disposal at the admission stage.

2 Rule. Rule made returnable forthwith and heard.

3 Petitioner, a company incorporated under the relevant laws in France, is impugning an order dated 21st June 2013 passed by respondent no.2 directing de-registration of the contracts registered by petitioner and directing that the goods imported by petitioner be assessed on merit without the benefit of Project Import Regulations 1986 under the Heading 98.01 (erstwhile 84.06) of the Customs Tariff Act 1975 (the Tariff Act).

4 The Municipal Corporation of Greater Mumbai had introduced a project called Bombay Water Supply and Sewerage Project (the said project) that was to be administered under the funds released to India by the International Developmental Association and the World Bank. Government of India issued a Notification dated 2nd August 1976 under Notification No.269/76-CUS (the said notification) in terms of Heading No.84.66(1) of the First Schedule to the Tariff Act. As per the notification, any importation for the said project was entitled to the benefit of flat rate of customs duty of 40%. Petitioner, by an application dated 1st October 1984 applied to the Government of India to be issued a specific exemption order whereby equipments required to be brought into the country for the execution of such project were exempted from the payment of customs duty. Petitioner applied for an adhoc order of waiving the entire custom duty payable on the capital goods and equipment payable on importation taking into consideration that everything imported are to be exported after the execution of contracts. Petitioner made this application to Central Board of Direct Excise and Customs (the Board) and requested the Board to treat it as

a special case. In its reply dated 18th October 1984, the Board informed petitioner that the goods are already entitled to the benefit of concessional rate of duty under the said notification wherein project imports of the said project are exempted. Petitioner was told that as and when the goods are proposed to be re-exported, petitioner may avail of the benefit of duty drawback under Section 74 of the Customs Act 1962 at the appropriate rate which is applicable depending on the period of use etc.

5 Petitioner thereafter also requested the Government of India to grant certain waivers from issuance of bonds and guarantees to which, petitioner did not get any response. Petitioner received a show cause notice dated 21st September 1987 from the Assistant Collector of Customs alleging that the goods were provisionally assessed under the provisional project import scheme and stating that *"it is now noticed that the goods covered by the bills of entry were not forming part of the project*". According to petitioner, this show cause notice itself could not have been issued in view of the order dated 18th October 1984 passed by the Board under which petitioner was certified to be entitled to the benefit of the notification. Petitioner took it up with the Government of India and the Board. The Board by letter dated 5th October 1987 addressed to the Collector of Customs brought to the notice of the Collector that petitioner was entitled to the benefits under the notification. The Board also forwarded to the Collector of Customs a copy of its letter dated 18th October 1984. The Assistant Commissioner of Customs, notwithstanding receiving this communication from the Board,

issued another notice dated 28th October 1987 which was identical to the first show cause notice. Unhappy with this development, petitioner approached this court by filing Writ Petition No.116 of 1988 seeking various reliefs including quashing of the second show cause notice issued. Petitioner also sought relief to forbear and desist respondent no.2 from in any manner enforcing the bonds and guarantees that petitioner had executed. Petition came to be disposed by an order dated 12th August 2008, by which Rule was made absolute and all the reliefs prayed for by petitioner were granted. As regards the bank guarantees that had been furnished by petitioner, the court directed that the bank guarantees would be kept alive for a further period of 24 weeks from the date of the order. From the said order, it was quiet clear that, a) the first show cause notice and the second show cause notice had been quashed and set aside, b) respondents have been restrained from enforcing the bonds and bank guarantees, c) respondents had not sought liberty to keep the issue regarding the purported post import obligations open and d) respondents were estopped from raising purported demands with respect to the same.

6 Respondents did not challenge this order and this order attained finality. As per the directions of the court, petitioner extended the validity of the bank guarantees until 27th January 2009. Notwithstanding the specific order of this court to keep the bank guarantees alive only for a period of 24 weeks, respondents called upon petitioner to extend the validity of bank guarantees from time to time. Petitioner succumbed to the

pressure and kept 4 bank guarantees alive, the details of those bank guarantees are mentioned in paragraph 21 of the petition. Petitioner was also made to incorporate self-renewal clause in the bank guarantees, by which the bank undertook to renew the bank guarantees on their own from time to time, until the same was finally decided by the customs department for cancellation. Petitioner thereafter felt that they should not renew the bank guarantees, and therefore, filed Notice of Motion No.149 of 2012 in the disposed Writ Petition No.116 of 1988. Petitioner prayed for the following reliefs:

> *"(a) that this Hon'ble Court be pleased to order and direct Respondent No.2 to forthwith return to the petitioner the original Bank Guarantees which stand extinguished or cancelled by virtue of the Hon'ble Court's order of August 12, 2008; and*
>
> *(b) that this Hon'ble be pleased to direct the Respondent No.2 to cease and desist from calling upon the petitioner from time to time to revive the Bank Guarantees particularly in view of the order of August 12, 2008."*

7 The said Notice of Motion was heard by this court on 10th December 2012 and was disposed after recording the following statement from respondents' counsel:-

> *"1. Mr. Jetly, learned counsel appearing on behalf of the respondents states that the respondents shall return the bank guarantees which have already expired, within two weeks from today. He further states that the respondents will not invoke the remaining bank guarantee and will return the same duly discharged, to the petitioners, upon the expiry or the validity thereof, without insisting for renewal thereof,"*

8 Following this, respondent no.2 addressed a communication dated

19th December 2012 to petitioner stating that out of the 65 bank guarantees that had expired, only 46 could be traced and those 46 duly cancelled and discharged bank guarantees were returned to petitioner. Details of the remaining 19 expired bank guarantees were also provided and respondent no.2 stated that those also stood cancelled and discharged with immediate effect.

9 By a letter date 12th July 2013, respondent no.2 returned copies of the amendments to the remaining 4 bank guarantees, details of which are mentioned in paragraph 21 of the petition. Originals were not returned but only the amendments were returned despite repeated requests. In any event, the originals were also duly cancelled by the bank and in effect there were no bank guarantees in favour of respondents post December 2012.

10 In the meanwhile, in January 2013, petitioner received a demand notice dated 8th January 2013 from respondent no.2. Respondent No.2 informed petitioner that in terms of Project Import Regulations 1984 and the Custom House Public Notice No.8 dated 20th January 1976, the duty benefit of Project Import was subject to certain post importation conditions and petitioner was called upon to furnish the documents mentioned therein. The documents were as follows:

i. Reconciliation statement;

ii. Original Triplicate Bills of Entry and Bank/Customs attested invoice.

Iii. Remittance Certificate issued by the Bank.

iv. Evidence towards utilization of imported goods for the initial setting up or substantial expansion of the project; and

v. Copies of Shipping Bills pertaining to re-export of imported under the contract.

Since the demand notice had been issued in respect of materials that were imported almost 30 years ago petitioner sought some time to respond.

11 By a letter dated 6th February 2013, respondent no.2 informed petitioner that importers availing the benefit of project imports were required to submit the reconciliation statement and the related documents within three weeks from the clearance of the last consignment and respondent no.2 could not proceed with the finalisation of provisional assessment earlier owing to disputes on certain issues which were pending before this court and the Hon'ble Supreme Court. Petitioner was also called upon to appear before the Appraising Officer of the contract cell on 13th February 2013 or within 15 days from the receipt of the said notice. In response, petitioner appeared for personal hearing, made oral arguments, submitted written submissions etc, which were all rejected by the impugned order dated 21st June 2013.

12 It is petitioner's contention that respondents are attempting to reopen the matter that had already been decided by this court in its order dated 12th August 2008 passed in Writ Petition No.116 of 1988 without issuing any show cause notice whatsoever. It is also petitioner's contention that respondents' demand is for petitioner to submit documents that relate to transaction that happened almost 3 to 4 decades ago. Petitioner also

submitted that demand itself is bad because of the gross delay and laches. According to petitioner, notwithstanding these points, respondent no.1 has passed the order and directed deregistration of the contract issued by petitioner and ordered for the assessment of the goods on merits without the benefit of Project Import Regulations 1986 under hearing 98.01 (erstwhile heading 84.66) of the Tariff Act and in terms of Section 18(2)(a) to adjust the duty paid against the duty finally assessed and petitioner will be liable to pay the amount outstanding after appropriation of security deposit / bank guarantee, if any.

13 Mr. Tamboly in fairness submitted that though the order would not affect petitioner in any manner because petitioner is a company incorporated in France with no asset in India and all the bank guarantees have been cancelled and returned, still petitioner wanted a closure to this matter and hence, has approached this court.

14 Mr. Jetly submitted as under:

a) that the benefit of Project Import was subject to fulfillment of certain post importation conditions. The importers have to account for the goods imported by them and submit documentary evidence to prove that the imported goods have been used for setting up or substantial expansion of the same project which was registered with Customs.

(b) that in this case petitioner has not submitted any reconciliation statement indicating the details of the goods imported with necessary documents as proof regarding the goods so imported by them and that it had been used in setting up of the project.

(c) that petitioner has also not submitted any installation certificate or documentary evidence for completion or commissioning of the project.

(d) that the importation requirement have to be complied with within three months from the date of clearance for home consumption of last consignment of the goods or within such extended period as the proper officer may allow in terms of Regulation 7 of the Project Import Regulations 1986.

(e) that even though in the order dated 12th August 2008, this court has relied upon judgment of the Apex Court in ***Union of India Vs. Toyo Engineering Ltd.***[1], that was the case where the construction equipments imported were used in the initial setting of the plant but in this case there is no evidence that the goods imported were used in initial setting up of the project.

(f) that even though the bank guarantees have been returned but would still cast a legal obligation on petitioner to observe the conditions required to be met during the importation. Since petitioner has not satisfied respondent no.2 that the conditions therein have been met, respondent was justified in denying exemption for non observation of the conditions.

Mr. Jetly therefore, justified the order passed by respondent no.2.

15 We have to keep in mind that this was for a project to be implemented in 1984. The goods or equipments that were imported for the project,

1. 2006 (201) ELT 513 (SC)

though the date is not clear, have been re-exported before 1988. This court in its order dated 12th August 2008 had in fact certified that the goods were imported and used in the initial setting up of the project. Paragraphs 11 and 13 of the said judgment read as under:

> *"11. It is also pertinent to note that the CBEC had passed an order dated 18th October 1984, Exhibit-C to the petition and had confirmed that the goods which were being imported into the country on -re-export basis were entitled to the benefit of concessional rate of duty under the Notification No.269/76. The CBEC had also stated that the petitioner could avail the benefit of duty drawback under Section 74 of Customs Act, 1962, in respect of the duty which they would have to pay on a concessional basis.*
>
> *13. Under the aforesaid facts and circumstances, we are clearly of the view that as CBEC being a higher authority than the 2nd Respondent, this order of the CBEC is binding on the 2nd Respondent. The two Show Cause Notices issued by the 2nd Respondent (being Exhibits G at page 40 and J at page 46 to the petition) are thus bad being contrary to the order of a higher authority viz. CBEC. The said Show Cause Notices are contrary to the settled interpretation of Tariff Item 84.66 read with Notification No.269/76. The said Show Cause Notices are thus not binding on the petitioners. As a result, we are clearly of the view that the petitioners are entitled to the benefit of the project import."*

The court has also relied upon the order passed by the Board on 18th October 1984, by which the Board had confirmed that the goods imported by petitioner were entitled to the benefit of concessional rate of duty under the said notification. The Board had also gone to the extent of stating that petitioner could avail the benefit of duty drawback under Section 74 of the Customs Act 1962 in respect of the duty, which they would have to pay on a concessional basis. We would not agree with respondent no.2 in its attempt to distinguish the judgment of *Toyo Engineering* (Supra) because that argument was never raised even before the High Court while the court heard and disposed the Writ Petition No.116 of 1988. Petitioner had extensively relied upon the judgment in *Toyo Engineering* (Supra). Paragraphs 10 and 15 of the judgment dated 12th August 2008 read as under:

> *"10. Mr. Bharucha, the learned Senior Counsel for the petitioner has strongly relied on the judgment of the Hon'ble Supreme Court in the case of Commissioner of Cusoms, Mumbai Vs. Toyo Engineering India Ltd (2006) 7 SCC 592, wherein in paragraph Nos.6, 7, 12 and 14 it is observed as under:*
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> > *6. Heading 98.01 of the Tariff Act reads as under: "98.01 All items of machinery including prime movers, instruments, apparatus and appliances, control gear and transmission equipment, auxiliary equipment (including those required for research and development purposes, testing and quality control), as well as all components (whether finished or not) or raw materials for the manufacture of the aforesaid items and their components, required for the initial setting up of a unit, or the substantial expansion of an existing unit, of a specified:*
> > *(1) Industrial plant, (2) Irrigation project, (3) Power project, (4) Mining project, (5) Project for the exploration for oil or other minerals, and (6) Such other projects as the Central Government may, having regard to the economic development of the country notify in the Official Gazette in this behalf; and spare parts, other raw materials (including semi-finished material), or consumable stores not exceeding 10% of the value of the goods specified above provided that such spare parts, raw materials or consumable stores are essential for the maintenance of the plant or project mentioned in (1) to (6) above."*
> >
> > *7 Heading 98.01 covers all the items of machinery including prime movers, instruments, apparatus and appliances; control gear and transmission equipment, auxiliary equipments besides components and raw materials required for the initial setting up of a unit or the substantial expansion of an existing unit of specified industrial plant. The industrial plant would include fertiliser plant as well, as it is designed to be employed directly in the performance of processes necessary for manufacture of fertiliser. Since the fertiliser plant is covered by the industrial plant specified in Heading 98.01 of the Tariff Act all the "auxiliary equipments" which are required for the initial setting up of the unit could be imported under the Project Import Scheme.*

12 <u>It is not disputed that construction equipments imported by the respondent were used in the initial setting up of the plant.</u> The Assistant Collector and the appellate authority denied the facility of the project import as the ownership of the imported goods would not pass to the project authority and that the machinery imported could be utilized elsewhere in the setting up of any other plant. <u>What is required under heading 98.01 Tariff Act is that the machinery imported should be required "for the initial setting up of a unit, or the substantial expansion of an existing unit".</u> This heading specifically mentions and includes "auxiliary equipment". The "auxiliary equipment" has not been defined under the Tariff Act. As per Dictionary meaning, extracted above, it is an equipment which aids or helps. Any equipment which aids or helps in the setting up of an industrial plant would fall and be covered under heading 98.01 of the Tariff Act. The mere possibility of its being used subsequently for other project would not debar the respondent from availing the facility of project import. <u>If the contention of the Revenue is accepted, then resultant effect as put by the Tribunal would be: "no equipment can be imported for projects like Konkan Railway Project, Road Development Projects of the National Highway Authority of India, etc. specified under Heading 98.01 of CTA.</u>"

14 We do not find any substance in this submission. In that case this Court did not consider the vehicles imported to be an item of auxiliary equipment required for setting up of an initial unit on the ground that it was used only in shifting of the transformers which would not constitute an integral part of the power project. The vehicles imported were required for transportation of the transformers from railway yards to the erection sites and had no relation to power generation or power project. After transporting the specified number of transformers to the site of sub-station the utility of the vehicles would be over at the end of such transport and thereafter the vehicles could certainly be used for other purposes of the assessee. That the vehicles, which are used in the shifting of the transformers, would not constitute integral activity of the project. In the present case goods imported by the respondent are hydle truck cranes, excavator, shovel loader, truck, forklift truck, power generators, diesel welder, welding rectifier, containers tools and tackles instruments, level Nako with tripod, theodlite nako with accessories & tripod besides window air conditioners, electric typewriter and camera with flash (the total cost of last three items is only Rs.70,000/-, which is negligible). <u>In fact, it was not disputed before the Tribunal or before us as well that the construction equipments imported by the respondent were used in the initial setting up of the plant.</u> The goods imported by the respondent such as hydle truck cranes, excavator, shovel

> *loader, truck, forklift truck, power generators, diesel welder, welding rectifier, containers tools and tackles instruments, level Nako with tripod and theodlite nako with accessories & tripod would certainly be auxiliary equipments which would help in the initial setting up of the industrial plant. The facility of the project import was denied to the respondent because the ownership of the imported goods did not pass to the project authority. Since it is not disputed that the construction equipments imported by the respondent were used in the initial setting up of the plant, then, as per the provisions of heading 98.01 of the Tariff Act the respondent could not be denied the benefit of the project import.*

> *15. Under the aforesaid facts and circumstances of the case, specially in the light of the aforesaid judgment of the Hon'ble Supreme Court in Commissioner of Customs, Mumbai Vs. Toyo Engineering India Ltd. (supra), wherein it is clearly mentioned that the petitioner could avail duty drawback under Section 74 in respect of the duty which they would have to pay on the concessional basis with regard to the goods which were imported into the country on re-export basis are fully entitled to the benefit of concessional duty under Notification No.269/76."*
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> *(Emphasis supplied)*

16 If at all respondents had any issue of petitioner not strictly complying with Regulation 7 of the Project Import Regulations 1986, it is respondents' case that petitioner should have submitted the details of goods imported together with necessary documents within three months from the date of clearance for home consumption of last consignment. The three months period appears to have expired sometime in 1984 and in any case before the Writ Petition No.116 of 1988 was filed. Respondents have not raised any such grievance before this court in that writ petition. Respondents had another opportunity to raise this grievance when petitioner filed Notice of Motion No.149 of 2012 for return of bank guarantees. Even at that stage, respondents were silent and in fact respondents made statement to the court

that they shall return the bank guarantees which had expired and they shall not invoke the remaining bank guarantees and within two weeks will return the same duly discharged upon expiry or the validity thereof, without insisting for renewal. Respondents could have told the court that the file has not been closed and these are the problems that petitioner has not fulfilled the requirements of Regulation 7 of the Project Import Regulations 1986 and, therefore, the question of returning any bank guarantee would not arise. Even when petitioner returned the bank guarantees or the remaining 4 bank guarantees, even at that stage, respondents do not raise the issue of the file being open. On 19th December 2012, respondent no.2 addressed a communication to petitioner, as noted earlier that out of the 65 bank guarantees that had expired, only 46 could be traced out and returned those 46 bank guarantees. As regards remaining 19 bank guarantees, respondent no.2 informed petitioner that original bank guarantees could not be traced out / are not available but the same are cancelled and discharged with immediate effect. If petitioner had not complied with the Regulation No.7 of the Project Import Regulations 1986, we fail to understand, why none of these points were ever raised before the court when earlier writ petition was argued or when the notice of motion was heard or even while returning the bank guarantees duly cancelled. But out of the blue, after almost 30 years of the goods being re-exported, respondents have raised this bogey of petitioner not complying with Project Import Regulations 1986. If according to respondents requirements had to be complied with within three months from the date of clearance for home consumption, respondents could have even refused permission to petitioner to re-export the equipments because by then anyway those three months period had expired. It is not respondents' case that the said period had been ever extended by any proper officer.

17 In our view, the order passed by respondent no.2 only amounts to an attempt to over reach and circumvent the orders passed by this court on 12th August 2008 and 10th December 2012. Not having raised any of these points before despite having ample opportunities, respondents cannot after a belated period of almost 30 years, raise the requisition upon petitioner to meet alleged post import requirements. We feel that this has been done by respondent no.2 only to prevent petitioner from insisting on those missing 19 bank guarantees or originals of 4 bank guarantees, which were kept valid by petitioner. We also find that even the issue of post import obligations were covered within the ambit of Writ Petition No.116 of 1988.

18 Though there is no time limit prescribed, that would not mean that the department could commence adjudication proceedings after 20 or 25 or 30 years by calling upon parties to comply with alleged obligations which they had. In our view, that would also amount to violating the principles of natural justice, in as much as, long delay will deprive a party from marshaling the documents or witnesses as there is always a possibility of documents or the witnesses disappearing or ceasing to exist after such a long gap.

19 In the circumstances, we make the Rule absolute. Petition is allowed and accordingly disposed in terms of prayer clauses (a) and (b).

(A. S. DOCTOR, J.) **(K.R. SHRIRAM, J.)**