IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 17.02.2022

CORAM :

THE HONOURABLE MR. JUSTICE R. MAHADEVAN
and
THE HONOURABLE MR. JUSTICE J.SATHYA NARAYANA PRASAD

Writ Appeal No. 1489 of 2018

The Principal Commissioner of Customs
Chennai VII, Commissionerate (Air Cargo)
New Customs House, Meenambakkam,
Chennai - 600 027 .. Appellant

Versus

1.M/s.Huawei Telecommunications (India)
Company Pvt. Ltd.,
Plot No.K-24, SIPCOT Industrial Park,
Chennai 602 105.
Rep by its Authorised Signatory,
Mr.Gaurav Arora.

2.The Development Commissioner
Office of the Development Commissioner,
MEPZ-Special Economic Zone,
NH 45, Administrative Office Building
Tambaram, Chennai 600 045, India.

3.The Specified Officer
Flextronics SEZ Unit
Plot No.3, SIPCOT Industrial Park
Sandavellur Village
Sriperumbudur Taluk
Kanchipuram District 602 106.

4.The Authorized Officer
Flextronics SEZ Unit
Plot No.3, SIPCOT Industrial Park,
Sandavellur Village
Sriperumbudur Taluk
Kanchipuram District 602 106. .. Respondents

Writ Appeal filed under Clause 15 of Letters Patent against the order of this Court dated 06.10.2017 made in W.P.No.22770 of 2017.

Prayer in W.P.No.22770 of 2017 : Writ Petition filed under 226 of the Constitution of India praying for issuance of a writ of certiorarified mandamus calling for the records of the Impugned Show Cause Notice bearing number F. No.S.MISC 01/ 2017- (SEZ-ACC) and dated 15.07.2017 issued by the Respondent No.1 and quash the same insofar as it seeks to levy Anti-Dumping Duty (ADD) for the period from 01.09.2015 to 07.12.2015 and to forbear to the Respondent NO.1 from charging any ADD in terms of Notification No.125/ 2010- ADD for the period from 08.12.2014 to 26.04.2016 post the lapse of such notification w.e.f. 07.12.2014

For Appellant : Mr. R. Sankara Narayanan
Additional Solicitor General
assisted by Mr. A.P. Srinivas
Senior Standing Counsel

For Respondents : Mr. Satish Parasaran, Senior Advocate
for Mr. Karthik Sundaram

JUDGMENT

(Judgment of the court was delivered by R. MAHADEVAN, J)

The first respondent in WP No. 22770 of 2007 has filed this intra-court appeal, challenging the order dated 06.10.2017 passed by the learned Judge allowing the said writ petition in W.P. No. 22770 of 2017.

2. Before the learned single Judge, the first respondent herein has filed two writ petitions namely WP Nos. 22770 and 22771 of 2017. This writ appeal is focused only as against the order dated 06.10.2017 passed in WP No. 22770 of 2017.

3. The first respondent in this writ appeal has filed WP No. 22770 of 2017 praying to issue a writ of Certiorarified Mandamus to call for the records relating to the show Cause Notice bearing number F.No.S.MISC 01/2017-(SEZ-ACC) dated 15.07.2017 issued by the 1st respondent/appellant herein, quash the same insofar as it seeks to levy Anti-Dumping Duty (ADD) for the period from 01.09.2015 to 07.12.2015 and to forbear to the 1st respondent/appellant from charging any ADD in terms of Notification No.125/2010-ADD for the period from 08.12.2014 to 26.04.2016 post the lapse of such notification w.e.f. 07.12.2014.

4. According to the writ petitioner/first respondent herein, they are a company incorporated in the year 2001 under the Companies Act and primarily engaged in manufacture and sale of telecom related equipments in India. During the course of their business, the first respondent/appellant herein issued a show cause notice dated 15.07.2017 seeking to levy Anti-Dumping

Duty (ADD) for various periods. Such show cause notice dated 15.07.2017 was issued by the appellant by placing reliance on the notification dated 16.12.2010 empowering the first respondent/appellant to impose ADD from 8th December 2009 till 07.12.2014 and the subsequent notifications dated 05.01.2015 and 26.04.2016 extending the validity period. The writ petitioner/first respondent herein sent a reply dated 08.08.2017 to the show cause notice dated 15.07.2017 by placing reliance on the orders passed by the Delhi High Court as well as the Honourable Supreme Court in identical case. Immediately after submitting their reply dated 08.08.2017, the writ petitioner/first respondent herein has also filed the writ petition No. 22770 of 2017 before the learned Judge for the aforesaid relief.

5. Before the writ Court, it was contended on behalf of the writ petitioner/first respondent herein that the validity of the notification dated 16.12.2010 was for a period of five years from 08.12.2009 to 07.12.2014. After expiry of the period stipulated in the notification dated 16.12.2010, the subsequent notification dated 05.01.2015 was issued extending the validity of the earlier notification retrospectively from 16.12.2010 to 07.12.2015. Thereafter, the third notification dated 26.04.2016 was issued post sunset review levying ADD from 26.04.2016 for a period of five years till 25.04.2021. In effect, it was contended that the continuation of the powers to impose ADD is not automatic and the subsequent notification dated 05.01.2015 has not been issued before the expiry of the first notification dated 16.12.2010 on 07.12.2014. When the notification dated 16.12.2010 lapsed on the expiry of five years on 07.12.2014, the question of amending a non-existing notification does not arise. To lend support to this assertion, on behalf of the petitioner, the Order dated 01.03.2017 of the Delhi High Court in the case of Kumbho Petrochemicals Pvt Ltd vs. Union of India passed in WP (C) Nos. 4633, 4885, 4969, 5228, 5265 and 9407 of 2014 was relied before the Writ Court and prayed to set aside the show cause notice dated 15.07.2017 issued by the first respondent/appellant herein.

6. The writ petition was opposed by the respondents therein primarily on the ground that even before a final order is passed, pursuant to the issuance of the show cause notice dated 15.07.2017, the writ petition at the instance of the writ petitioner is not maintainable.

7. The learned single Judge, on appreciation of the rival contentions, observed that it is well settled that as against a show cause notice, a writ petition is not maintainable, however, there are some exceptions carved by the Constitutional Courts and one such exceptions arise in the present case. As far as the validity of the show cause notice issued by the appellant

herein, the learned single Judge, by placing reliance on the decision of the Delhi High Court in the case of Kumbho Petrochemicals Private Limited vs. Union of India, which was subsequently affirmed by the Honourable Supreme Court in the case of Union of India vs. Kumho Petrochemicals Company Limited reported in 2017 (351) E.L.T. 65 (SC), held that the legal issue having been settled by the Honourable Supreme Court, the writ petitioner is entitled to succeed. Accordingly, the learned Judge, allowed the writ petition with the following observations:-

> "The demand of ADD under the show cause notice dated 28.10.2015, for the period from 08.12.2014 to 26.04.2016 i.e., after the lapse of the Notification No.125 of 2010 is not sustainable. The said show cause notice has been issued seeking ADD payable on PCBAs for the period from 14.11.2014 to 31.08.2015. The notification No.125 of 2010 was in vogue till 07.12.2014. In the light of the decision of the Hon'ble Supreme Court, in the case of Union of India vs. Kumho Petrochemicals Pvt. Ltd reported in 2017 (351) E.L.T. 65 (S.C.)., such notification cannot be extended after it had lapsed. Consequently, the demand of ADD for the period from 08.12.2014 to 26.04.2016 is not sustainable. Therefore, the ADD demanded in the show cause notice dated 28.10.2015, for the period from 08.12.2014 to 31.08.2015 has to be held to be without jurisdiction.
>
> The impugned show cause notice insofar it relates to levy of ADD for the period from 01.09.2015 to 07.12.2015 is set aside. The demand for ADD in the show cause notice dated 28.10.2015 for the period from 08.12.2014 to 26.04.2016 is also set aside. With regard to the other issues, which are subject matter of show cause notice, dated 15.07.2017, the petitioner is directed to participate in the adjudication process and extend full cooperation to the Adjudicating Authority to finalize the proceedings. However, since the issue relating to demand of ADD has been settled by the Hon'ble Supreme Court in Kumho Petrochemicals Pvt. Ltd (supra), it would be an empty formality for the petitioner to go before the Adjudicating Authority, who issued the show cause notice, dated 28.10.2015, to raise such contentions when the decision of the Hon'ble Supreme Court binds the respondents."

8. Assailing the aforesaid order passed by the learned Judge, the learned Additional Solicitor General appearing for the appellant would contend that the decision of the Delhi High Court in the case of Kumho Petrochemicals Pvt Ltd., vs. Union of India was dissented by the Division Bench of this Court in the

case of Hyundai Motors India Ltd., vs. Union of India reported in (2015) 318 ELT 83 (Mad) by giving a different interpretation for Rule 9A(5) of the Customs Tarrif Act 1975 but it was not considered by the learned Judge. The decision rendered by the Division Bench of this Court is on the same subject. While so, the learned Judge ought not to have allowed the writ petition by placing reliance on the decision of the Delhi High Court. The notification extending the period of levying Anti Dumping Duty (ADD) is not required to be issued before the expiry of the period of the Notification, but it was not properly appreciated by the learned Judge. He further submitted that the learned Judge had committed an error in entertaining the writ petition, when the jurisdiction of the adjudicating authority's power to issue notice is admitted by the writ petitioner/first respondent. It is further contended that what was challenged in the writ petition is only a show cause notice dated 15.07.2017 issued by the appellant and not a final order. If that is so, the learned Judge ought to have refrained from entertaining the writ petition and therefore, the learned Additional Solicitor General prayed for allowing this writ appeal by setting aside the order passed by the learned Judge.

9. On the above contentions raised by the learned Additional Solicitor General appearing for the appellant, the learned Senior counsel for the writ petitioner/first respondent would contend that the issue involved in this appeal was settled by virtue of the judgment of the Honourable Supreme Court in Union of India vs. Kumho Petrochemicals Company Limited reported in 2017 (351) E.L.T. 65 (SC), upholding the order passed by the Delhi High Court. Therefore, the learned Senior counsel for the writ petitioner /first respondent would submit that there is no infirmity or illegality in the order passed by the learned Judge and he prayed for dismissal of this appeal.

10. We have heard the learned Additional Solicitor General appearing for the appellant as well as the learned Senior Counsel appearing for the first respondent/writ petitioner and perused the materials placed on record, including the typed set of papers.

11. The issue involved in this intra-court appeal is, as to whether the appellant has power to issue a subsequent notification dated 05.01.2015, after the period of validity of the earlier notification dated 16.12.2010 lapsed on the expiry of five years on 07.12.2014. This issue is no longer res integra as it was decided by the Honourable Supreme Court in the case of Union of India vs. Kumho Petrochemicals Company Limited reported in 2017 (351) E.L.T. 65 (SC). In Para No.36 of the decision, it was observed by the Honourable Supreme Court, as under:-

"36. As noticed above, the High Court has held that once the earlier notification by which anti-dumping duty was extended by five years, i.e., up to January 1, 2014, expired, the Central Government was not empowered to issue any notification after the said date, namely, on January 23, 2014, inasmuch as there was no notification in existence the period whereof could be extended. The High Court, in the process, has also held that the notification extending anti-dumping duty by five years i.e., upto January 1, 2014 was in the nature of temporary legislation and validity thereof could be extended, in exercise of powers contained in second proviso to sub-section (5) of Section 9A of the Act only before January 1, 2014.

37. We do not find any infirmity in the aforesaid approach of the High Court in interpreting the second proviso to Section 9A(5) of the Act. The High Court has rightly interpreted the aforesaid provision in the light of Article 11.1, 11.2 and 11.3 of the Agreement for implementation and Article VI of the GATT, commonly known as Implementation Agreement...."

12. In the light of the above decision rendered by the Honourable Supreme Court, the challenge made by the appellant to the order dated 06.10.2017 made in W.P.No.22770 of 2017 by the learned Judge fails. Accordingly, the writ appeal stands dismissed. No costs. Consequently, C.MP.No.11750 of 2018 is closed.

Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

vkr/rsh

To

1.The Development Commissioner,
Office of the Development Commissioner,
MEPZ-Special Economic Zone,
NH 45, Administrative Office Building,
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+1cc to Mr.Karthik Sundaram, Advocate SR.No.10471

WA No.1489 of 2018

JPL(CO)
GMY(10/03/2022)