

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

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WRIT PETITION NO.3818 OF 2009

WITH

INTERIM APPLICATION NO.3330 OF 2019

IN

WRIT PETITION NO.3818 OF 2009

P. G. Foils Ltd.

...Petitioner

Versus

Director General (Special Safeguards)

Department of Revenue & Ors.

...Respondents

Mr. Ankit Totuka for the Petitioner.

Mr. J. b. Mishra a/w. Ms. Maya Majumdar for Respondent Nos.1 to 3.

Mr. Yakshay Chheda for Respondent No.5.

**CORAM : G. S. KULKARNI,
JITENDRA JAIN, J.J.**

DATE : 23rd JUNE, 2023.

Oral Judgment (Per G. S. Kulkarni, J.)

1. This petition under Article 226 of the Constitution of

India was filed on 6th April 2009, praying for the following reliefs:

“(a) That this Hon’ble court be pleased to issue a writ of Certiorari or a writ in the nature of Certiorari or any other writ, order or direction under Article 226 of the Constitution of India calling for the records pertaining to the Petitioner’s case and after going into the validity and legality thereof to quash and set aside the impugned Customs Notification No.26/2009 dated 23.03.2009 and Preliminary Findings dated 02.02.2009 (Exhibit “A” & “B”).

(b) That this Hon’ble Court be pleased to issue a writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ or order or direction under Article 226 of the Constitution of India ordering and directing the

Respondents themselves, their officers and subordinates (i) to withdraw and/or cancel the impugned Customs Notification No.26/2009 dated 23.03.2009 and Preliminary Findings dated 02.02.2009 (Exhibit "A" & "B" hereto);

- (c) *That pending the hearing and final disposal of this Petition, the Respondents by themselves, their officers, subordinates, servants and agents be restrained by an interim order and injunction of this Hon'ble Court from taking any steps or proceedings in pursuance of and/or in furtherance of and/or in implementation of impugned Customs Notification No.26/2009 dated 23.03.2009 and Preliminary Findings dated 02.02.2009 (Exhibit "A" & "B" hereto);"*

2. Relevant facts: On 27th January 2009, on the backdrop of an application filed by the domestic industry, Respondent No.1 initiated safeguard investigation on the imports of Aluminum Foil vide Notification No.D-22011/46/2008 dated 27th January 2009. By such application, the domestic industry had requested for imposition of safeguard duties of at least 50% for a period of four years from the date of imposition, on imports of such goods.

3. Pursuant thereto on 2nd February 2009, Respondent No.1 issued preliminary findings, which according, to the Petitioner were made sans an opportunity of a hearing to the Petitioner and the other interested parties. In such circumstances, Respondent No.1 took steps to have a public hearing. The Petitioner also filed its submission on 30th March 2009 before the deadline as prescribed. The Petitioner, however, contends that without addressing the issues as raised by the parties who were be pre-judicially affected, the impugned notification came to be issued recommending provisional

safeguard duty @ 21% ad-valorem on all goods falling under the heading 7606 (Aluminium Flat Rolled Products) and at the rate of 35% ad-valorem on all the goods falling under heading 7607 (Aluminium Foil).

4. On the above backdrop, the Petitioner approached this Court in the present proceedings. Several contentions are raised by the Petitioner in support of the prayers as made including that no rules were framed by the Respondents, as per the requirement of Sub-section 6 of Section 8C of the Customs Tariff Act, 1975 (for short “the Act”).

5. A Coordinate Bench of this Court on 8th May 2009 heard the parties on the present proceeding on the question of interim relief. Considering the rival contentions and the position in law, an order of the even date was passed by the Court. By such order the present writ petition was admitted and interim orders were granted in favour of the Petitioner, in terms of prayer clause (c), of the petition, in terms of what was observed by in para 7, *inter-alia* directing the Petitioner to furnish a bond. The said order reads thus:-

- “ Rule. The question is whether the petitioners are entitled to any ad-interim relief. The challenge is to a notification issued under the Customs Tariff Act, 1975, an exercise in sub ordinate legislation. Parties have argued the matter extensively. However, in the absence of pleadings being completed it will not be possible to dispose of the matter finally.
- . In so far as interim reliefs is concerned, there are really no

substantial pleadings in support of the plea for interim relief in so far as balance of convenience and irreparable hardship. Though it is submitted the additional duty will impose a financial burden. In the absence of figures showing the cost at the time of export and the price in the domestic market it will not be possible to consider the contention. The fact, however, remains that the petitioner is an importer of aluminum Flat Rolled Products and as also aluminum foil. The petitioner used to import through Nava Seva. The petitioner has, however, contended that though safeguard duty may be imposed nonetheless there are no provisions or rules made for assessment and collection of duty. It is, therefore, submitted that in the absence of that mechanism it is not open to the Respondents to collect safeguard duties. The notification under Section 8C was issued on 23rd March, 2009. The duty is effective upto and include 8th October, 2009. It is not necessary for us to deal with the several contentions as advanced at the bar.

2. *Under the provisions of Section 8C(6) of the Customs Tariff Act, 1975 it is provided as under:*

“ The Central Government may, by notification in the Official Gazette, make rules for the purposes of this section, and without prejudice to the generality of the foregoing, such rules may provide for the manner in which articles liable for safeguard duty may be identified and for the manner in which the causes of market disruption or causes of threat of market disruption in relation to such articles may be determined and for the assessment and collection of such safeguard duty disruption in relation to such articles may be determined and for the assessment and collection of such safeguard duty.”

3. *Pursuant to this provision Rules have been framed known as Customs Tariff (Transitional Product Specific Safeguard Duty) Rules, 2002. deciding ‘market These are Rules for the purpose of disruption’ which is an essential requirement for the purpose of imposing safeguard duty. Power is conferred on the Director General to verify all relevant factors for the purpose of investigation to determine critical circumstances for market disruption. The argument advanced on behalf of the petitioner is that though under Section 8C(6) power has been conferred on the Central Government to make Rules “ for assessment or collection such safeguard duty” such Rules have not been made. It has, therefore, been submitted that in the absence of such Rules the machinery under the Customs Act cannot be availed of for assessment and collection of safeguard duty. Our attention has been invited to other provisions of the Customs*

Tariff Act, 1975.

4. *Before that we may also refer to Section 8B of the said Act which confers power on the Central Government to impose safeguard duty. Under subsection (5) of Section 8B power is conferred on the Central Government to make Rules including for the assessment of collection of such safeguard duty. Admittedly no Rules have been made either under Section 8B or 8C for the purpose of assessment or collection of safeguard duty. We may now look at the other provisions of the Customs Tariff Act,*

1975. Under Section 3(8) the provisions of the Customs Act, 1962 and the Rules and Regulations made thereunder, including those relating to drawbacks, refund, etc. so far as may be, apply to the duty chargeable under the Section. Similarly under Section 9(7A) in the matter of countervailing duty the provisions of the Customs Act, Rules and Regulations are made applicable. Under Section 9A in the matter of Antidumping duty and dumped articles, it is similarly provided under Section 9A(8). By pointing out these provisions on behalf of the petitioner learned Counsel has submitted that even if this Court comes to the conclusion that the Notification prima facie is not illegal, nevertheless in the absence of powers to assess and for collection of duty the authorities under the Customs Act have no jurisdiction.

5. On the other hand on behalf of the private respondent namely respondent No.5 it is sought to be contended that the provisions making applicable the provisions of the Customs Act to the Customs Tariff Act, are more of a clarificatory nature and only for the purpose of making applicable the Rules and Regulations. It is submitted that in fact all customs duties are chargeable to duty under Section 12 of the Act and consequently the provisions of the Act, Rules and Regulations will be applicable without the need for any further rules for assessment of collection or safeguard duty. On behalf of the Union of India learned Counsel also partly concurs with the argument advanced on behalf of the private Respondent.

6. The argument on behalf of the respondents perhaps could have been considered if Section 12 of the Customs Act was the only charging Section in respect of duties imposed on import of goods. Considering, however, the decided case law in our opinion it is not possible to accept the said contention. Secondly no provisions of a legislation ought normally to be read as otiose. In the case of Hyderabad Industries Ltd. vs. Union of India, 1999 (108) E.L.T. 32 (S.C.) a similar argument was advanced on behalf of the respondent that Section 12 of the Customs Act is the charging Section. The law as it then stood was as explained in the judgment of the Supreme Court in Khandelwal Metal & Engineering Works v. Union of India, 1985 (2) E.L.T. 222 (S.C.), when Section 12 was held to be the charging section for customs duties. The Supreme Court, however, in Hyderabad Industries Ltd. (Supra) was pleased to hold that the charging Section under the Customs Tariff Act, 1975 for the purpose of levying additional duty under subsection (3) is not Section 12 of the Customs Act, but Section 3 of the Customs Tariff Act, 1975. The view taken in Khandelwal Metal & Engineering Works (supra) was consequently held not to be the correct law.

4. In *Sneh Enterprises v. Commissioner of Customs, New Delhi*, 2006 (202) E.L.T. 7 (S.C.) the issue pertained to collection of anti dumping duty which had been imposed pursuant to the power conferred under Section 9A of the Customs Tariff Act, 1975. Whether the issue there was the notification dated 22 nd May, 2002 was retrospective in operation. After considering the scheme of the Act the Court was pleased to hold that anti dumping duty does not attract the provisions of the Customs Act. The Court held that the anti dumping duty does not attract the provisions of the Customs Act and such provision was made for the first time in the year 2004. Under these circumstances the Court

held that it could not be held that Parliament intended to apply the provisions of Section 12 of the Customs Act in Section 9A of the Customs Tariff Act prior to 2004.

5. It would, therefore, be clear that Section 12 is not the charging Section for the purpose of safeguard duty and nor are the provisions of the Customs Act, Rules and Regulations applicable in the absence of any provisions making them applicable. On the contra power has been conferred on the Central Government to make Rules which Rules have not been made. Accepting the contention of the respondents would also mean that the provisions of Section 8C(6) and the following words "for the assessment and collection of such duty" would be rendered otiose. The first construction will be that no provision should be rendered as otiose. Secondly, there is a clear indication in the Act itself that if the Parliament intended that the provisions of the Customs Act ought to be applied they would have so done it. Section, 3, Section 9 and Section 9A are illustrative instances. We are, therefore, clearly of the opinion that there is no machinery provided for assessment and collection of safeguard duty, even though prima facie we are of the opinion that exercise of power under Section 8C to impose transitional duty exists.

6. In *Rapti Commission Agency vs. State of U.P. & Others*, (2006) 6 S.C.C. 522 the Court was pleased to observe that if a person is not liable to payment of tax at all, at any time, the collection of a tax from him, with a possible contingency of refund at a later stage, will not make the original levy valid, because if sales or purchases are exempt from taxation altogether, they can never be taken into account, at any stage, for the purpose of calculating or arriving at the taxable turnover and for levying tax. We have referred to this judgment as a submission was made on behalf of the petitioners in answer to the contention raised on behalf of the respondents that if ultimately the Respondent Government does not issue the notification under Section 8B the petitioner would be entitled to refund of the safeguard duty.

7. Our attention is also invited to the orders passed in other jurisdiction in the nature of interim measures like Section 8C. As noted earlier as there is no machinery for collection and assessment of tax it will not be possible for the respondent Customs Authorities to recover the safeguard duties. Under these circumstances we are of the opinion that the petitioner would be entitled to interim relief in terms of prayer clause (c). However, at the same time the respondent Nos.1 to 3 cannot be left at the mercy of the petitioner if they seek to import the goods from China. In our opinion to protect the Revenue the petitioners be called upon to furnish bond for the amount in usual terms, but without security. For the aforesaid reasons the following order:-

- (i) It will be open to the petitioner to import the goods covered by the Notification which are the subject matter of the impugned Notification. The Respondents to release the goods with usual bond but without bank guarantee. This order will be subject to any Rules that the Respondents may make in terms of the necessary statutory provisions. If such Rules are made liberty to the Respondents to move this Court for further directions.

. Respondents waive service."

6. It needs to be observed that soon after the aforesaid interim order was being passed by the Court with effect from 19th August 2009, an amendment came to be incorporated to the provisions of Section 8C of the Act by insertion of Sub-section (5A) by Finance No.2 Act, 2009 w.e.f. 11th May 2002 (33 of 2009) Sub-section (5A) reads thus:-

“(5A) The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, including those relating to the date for determination of rate of duty, assessment, non-levy, short levy, refunds, interest, appeals, offences and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act.”

7. In view of such amendment to Section 8C of the Act, the Respondents moved a Civil Application in the present proceeding (Civil Application No.776 of 2010) praying for vacating of the interim orders dated 8th May 2009 and/or for modification of the interim order, that the Petitioners be directed to discharge the duty liability in terms of what was observed by the Court in the interim order dated 8th May 2009. This Court disposed of the said Civil Application by an order dated 11th June 2010, whereby the Petitioner was directed to furnish a Bank Guarantee to the extent of 50% of the amount covered by the bond, in addition to the bond executed by the Petitioner. Such order was to operate during the pendency of the petition, and accordingly, the interim order dated

8th May 2009 came to be modified. The relevant extract of the order dated 11th June 2010, reads thus:-

- “(7) *Having heard both parties, it is clear that vide interim orders dated 8th May 2009 the Petitioners were directed to execute bonds, which the Petitioners have admittedly executed. The Petitioners after execution of the bonds have not imported any goods. The Revenue is sufficiently protected in view of the bonds executed by the Petitioners.*
- (8) *On this backdrop, considering the parameters for the grant of interim relief, we find that the issue sought to be raised in the petitions needs consideration. The Petitioners have made out prima-facie case. The interim orders are already operating in their favour since May, 2009. In our considered view, end of justice would be met by directing the Petitioners to furnish additional security by way of bank guarantee to the extent of 50% of the amount covered by the bonds in addition to the bonds already executed by them, which shall also continue to operate during the pendency of the petition. With this slight modification in the interim orders dated 8th May, 2009, both civil applications stand disposed of with no order as to costs.*”

(emphasis supplied)

8. On the above backdrop, the proceedings are before us today for final hearing.

9. We have heard learned counsel for the parties and with their assistance, we have perused the record.

10. It is not in dispute that the proceedings have remained pending as they stood on 11th June 2010, that is when the Court passed the modified interim order. Never an application was made by the Respondents after 11th June 2010 for vacating of the said orders. The Bank Guarantee as furnished by the Petitioner in pursuance of the order dated 11th June 2010 passed by the Court, has continued to remain with the Respondents, the validity

of which has been extended from time to time. The bond as furnished by the Petitioner also has continued to remain valid. Almost about 13 years having lapsed after the order dated 11th June 2010, the Respondents are yet to pass a final assessment order. However in the intervening period there was a self assessment as made by the Petitioner in the year 2017, in pursuance of which the Petitioner deposited duty amounting to Rs.97,44,034/-. Thus now the next step which would be required to be taken by the Respondents is to undertake assessment and pass a final assessment order.

11. In these circumstances, when the interim protection granted to the Petitioner continuous to operate the only apprehension of the Petitioner, today is that although the Respondents may take forward the matter to pass a final assessment order, however, in the peculiar facts and circumstances of the case and more particularly in view of the interim order passed by this Court dated 8th May 2009, as modified by order dated 11th June 2010, in the final assessment order which may be passed, the Petitioners ought not to be subjected to the levy/payment of interest. Such apprehension of the Petitioner is in the light of the letter of Assistant Commissioner (H) dated 28th March 2017, addressed to the Petitioner a copy of which has been placed on record.

12. Learned counsel for the Petitioner has fairly stated that in the peculiar circumstances, the Petitioner having already deposited duty of Rs.97,44,034/- under self-assessment, the issue in regard to the validity of the notification is not being pressed by the Petitioner. Thus several contentions as raised by the petitioner in the petition which would have otherwise fallen for our adjudication in the present proceedings *inter alia* whether the action of respondents in issuing the notification at the relevant time was at all legal and valid, are not required to be gone into.

13. In the above circumstances and peculiarly in the fair position as taken by the Petitioner, in our opinion, this is certainly not a case where the Petitioner ought to be foisted with interest under Section 28AA of the Customs Act as made applicable by Sub-section 5A of Section 8C of the Customs Tariff Act. It may be observed that the Respondents also, were in no manner aggrieved by the self-assessment as undertaken by the Petitioner under which duty was paid. Moreover, a final assessment order is yet to be passed, even assuming that the Respondents are of the opinion that the interim orders would come in the way of the Respondent in passing an assessment order. It was open to the Respondents to move this Court to permit them to pass an assessment order, which was never resorted to. We may also observe that a Division Bench of this court in case of *Commissioner of Customs (Import)*

Vs. Jain Exports Pvt. Ltd. and Another¹ while confirming the observations of the tribunal has held that for Section 28AA to be applicable duty has to be first determined under Section 28(2) of the Act.

14. Be that as it may, the situation needs to be balanced, on one hand, any order passed by the Court ought not to cause any prejudice/damage to the Petitioner and on the other hand as observed above the interim orders passed by this Court never precluded the Respondents from approaching the Court after 11th June 2010 with prayers that the Respondents be permitted to proceed to finalise the assessment. Also the Petitioner has fairly taken a position not to press the principal challenge on validity of the notification. We are thus of the opinion that interest ought not to be foisted on the petitioner in the proposed assessment which would be now undertaken by the respondents.

15. In the aforesaid circumstances, we direct the Respondents to proceed to pass a final assessment order, however, without levy of any interest on the assessment which may be arrived.

16. As rightly suggested by Mr. Mishra, learned counsel for the Revenue, the assessing authority may hear the Petitioner and pass an assessment order expeditiously. Let such assessment

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order be passed within a period of six weeks from today. The Bank Guarantee furnished by the Petitioner be released by the Respondents within a period of six weeks from today.

17. All contentions of the Petitioner on the assessment are expressly kept open.

18. Disposed of. No costs.

19. In view of disposal of Writ Petition No.3818 of 2019, Interim Application No.3330 of 2019 does not survive and it also stands disposed of.

[JITENDRA JAIN, J.]

[G. S. KULKARNI, J.]