

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 754 OF 2021

M/s. Sarla Performance Fibres Ltd. ... Petitioner

Versus

Union of India, through the Secretary, Ministry of Finance & Ors. ... Respondents

Mr. Bharat Raichandani a/w. Mr. Naresh Jain, Ms. Neha Anchlia, Ms. Ujjwala Chaturvedi for the petitioner.

Mrs. Shehnaz V. Bharucha for respondent no. 1.

Mr. Vijay H. Kantharia a/w. Mr. Ram Ochani for respondent nos. 2 to 4.

Mr. Y.R. Mishra a/w. Mr. Dhananjay Deshmukh for respondent no. 5.

CORAM: G. S. KULKARNI &
JITENDRA JAIN, JJ.
DATED: 30 October, 2023

P.C.

1. We have heard Mr. Raichandani, learned counsel for the petitioner, Ms. Bharucha, learned counsel for respondent no. 1, Mr. Kantharia, learned counsel for respondent nos. 2 to 4 and and Mr. Mishra, learned counsel for respondent no. 5.

2. This petition under Article 226 of the Constitution of India raises an issue on the legality of the impugned notifications dated 13 January, 2012 and 19 January, 2017 issued by the Government of India in exercise of the provisions of Section 9A(5) of the Customs Tariff Act, 1975 imposing anti-dumping duty in respect of goods in question, which are Nylon Filament yarn,

as described in the said notifications. The petitioner has pointed out in the memo of the petition that a show cause notice was issued to the petitioner on 27 December, 2016, to which a reply came to be submitted by the petitioner on 30 March, 2017 and 20 April, 2017. After a personal hearing being granted to the petitioner, on 18 December, 2017 the Commissioner of Central Excise and GST passed an order imposing on the petitioner an anti-dumping duty amounting to Rs.4,31,05,000/- based on the impugned notification.

3. It is not in dispute that the petitioner has filed an appeal against the said order before the Customs, Excise and Service Tax Appellate Tribunal, Western Zonal Bench, Ahmedabad (for short “**CESTAT**”) on 23 February, 2018 and certainly the challenge to the orders passed by the Commissioner are on all grounds including applicability of the notifications.

4. Mr. Raichandani, learned counsel for the petitioner, however, submits that the notifications are required to be struck down by this Court, which is not the power conferred with the Tribunal. He submits that in a similar situation, such issue had fell for consideration of the Supreme Court in the case of *Union of India & Anr. vs. M/s. Kumho Petrochemicals Company Ltd. & Anr.*¹ as also before the Division Bench of this Court in *Gima Manufacturing Pvt. Ltd. & Anr. vs. Union of India*². It is submitted that it is

1 2017 (6) TMI 526

2 2017(8) TMI 630

now held to be a settled principle of law that when the primary notification itself has lapsed on the expiry of the period as specified in the notification, there would be no question of an amendment being caused to the non-existing notification or in other words, the amendment was not to be carried out during the life time of the notification, was the view taken by the Supreme Court, thereby confirming the decision of the Delhi High Court in the case of Kumho Petrochemicals Co. Ltd. vs. Union of India. The said position of law was considered by the Division Bench of this Court in ***Gima Manufacturing Pvt. Ltd. & Anr.*** (supra) as noted above, wherein referring to the decision of the Supreme Court in ***Union of India & Anr. vs. M/s. Kumho Petrochemicals Company Ltd.*** (supra), the Court had made the following observations:

5. The Apex Court in Union of India vs. M/s. Kumho Petrochemicals Co. (supra) was considering an identical fact situation as is evident from the following events/dates :

(a) On 2.1.2009, the Respondent issued a Notification u/s.9A (1) and (5) of the Customs Tariff Act, 1975 imposing anti-dumping duty on import of Rubber from Korea and Germany. The validity of the above Notification was for a period of five years to remain in force till 1.1.2014.

(b) On 31.12.2013, the Respondents initiated proceedings under Section 9A(5) of the Customs Tariff Act, 1975 for sunset review of anti-dumping duty imposed by Notification dt. 2.1.2009.

(c) On 23.1.2014, the Central Government issued notification extending the validity of anti-dumping duty imposed by notification dt.2.1.2009 by one year i.e. till 1.1.2015.

(d) In the above facts, the Apex Court framed the following question for its consideration :

“Whether Amendment Notification dated January 23, 2014, amending Notification dated January 02, 2009 by allowing it to remain in force till January 01, 2015 issued after the expiry date of the original Notification i.e. January 01, 2014 is without any legal authority and is, therefore, null and void ?”

(e) The Apex Court answered the aforesaid question 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 01, 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 antidumping duty by five years, i.e. up to January 01, 2014 was in the nature of temporary legislation and validity thereof could be extended, in exercise of powers contained in second proviso to subsection (5) of Section 9A of the Act only before January 01, 2014.

40. Two things which follow from the reading of the Section 9A(5) of the Act are that not only the continuation of duty is not automatic, such a duty during the period of review has to be imposed before the expiry of the period of five years, which is the life of the Notification imposing anti-dumping duty. Even otherwise, Notification dated January 23, 2014 amends the earlier Notification dated January 02, 2009, which is clear from its language, and has been reproduced above, However, when Notification dated January 02, 2009 itself had lapsed on the expiry of five years, i.e. on January 01, 2014, and was not in existence on January 23, 2014 question of amending a non-existing Notification does not arise at all. As a sequitur, amendment was not to be carried out during the lifetime of the Notification dated January 02, 2009. The High Court, thus, rightly remarked that Notification dated January 02, 2009 was in the nature of temporary legislation and could not be amended after it lapsed. “

5. However, insofar as the consequence which would entail by the quashing of the notifications, i.e., refund of anti-dumping duty, the Court

made the following observations including considering the fact of unjust enrichment, which reads thus:

“7. Besides seeking quashing of the impugned notification, the petitioners also seek a direction that the respondent be directed to refund anti-dumping duty paid by the petitioner after 25.7.2015. We are not inclined to grant this prayer in view of decision of this Court in Commissioner of Customs (Imports), Mumbai .vs. Kanakia Constructions Pvt. Ltd., 2008 (230) E.L.T. 592 (Bom.), wherein our Court has set aside the order of Central Excise, Customs and Service Tax Appellate Tribunal which had held that since antidumping duty is covered by Section 9A of the Customs Tariff Act, 1975, the doctrine of unjust enrichment does not apply. This Court restored the issue to the Tribunal for fresh consideration and also examine whether the doctrine of unjust enrichment is applicable in the facts of the case.

8. In response, Mr.Bhangde, learned Senior Counsel appearing for the petitioners submits that the Revenue be directed to grant refund of the amount paid as anti-dumping duty after 25.7.2015. This in view of fact that the Delhi High Court in M/s.Kumho Petrochemicals Co. Ltd (supra) rendered on 11.7.2014 had, while setting aside the amending Notification, has stated that “the petitioners are entitled to refund of amounts paid till date”. This view of the Delhi High Court has been upheld by the Apex Court in Union of India .vs. M/s. Kumho Petrochemicals Co. Ltd. (supra). We find that there was no occasion for the Delhi High Court and the Supreme Court to discuss the applicability of unjust enrichment in respect of anti-dumping duty collected under the Customs Tariff Act, 1975. Moreover, our reading of Delhi High Court decision is that it merely states that the petitioners are entitled to refund of the amount of anti-dumping duty paid till date would not do away with the requirement of the petitioner's therein satisfying the doctrine of unjust enrichment, if at all applicable in the facts of that case.

9. Be that as it may, we are bound by the decision of the Coordinate Bench of this Court in M/s.Kanakia Constructions (P) Ltd. (supra). Therefore, though the petitioners would be entitled to refund of anti-dumping duty paid after 25.7.2015 on our having set aside the Notification No.37/2015, it would be subject to compliance with the law. Therefore, the respondent is directed to grant refund to the petitioners of the anti-dumping duty paid after 25.7.2017, if they are so entitled to, in accordance with law.”

6. Having noticed the law as laid down by the Supreme Court on the legal status of such extended notifications, we may observe that the law as laid down by the Supreme Court under Article 141 of the Constitution of India is the law of land. Once the principle of law has been laid down by the Supreme Court, it is binding on all the Courts in the country, which would also include this Court and the Tribunal. For such reason, we are not in agreement with Mr. Raichandani when he submits that such a position in law is not likely to be considered in the proceedings which are pending before the CESTAT.

7. In the present case we have noted that the CESTAT is already seized of the matter. There are several grounds on facts and law which are raised. We are thus inclined to observe that the petitioner is not precluded from urging all contentions as raised in this petition before the Tribunal including to assert its contentions that by virtue of the principles of law as laid down by the Supreme Court, if applicable in the facts of the present case, the petitioner would become entitled to refund of duty.

8. Needless to observe that the legal contentions as urged by the petitioner in this regard may certainly be considered by the Tribunal and appropriate orders in the facts of the present case would be passed by the Tribunal.

9. Thus, keeping open all contentions of the petitioner on the challenge as raised in the petition, we dispose of this petition with liberty to the petitioner

to raise the contentions before the CESTAT and/or if need arises file appropriate proceedings.

10. Disposed of in the above terms. No costs.

11. Liberty to the petitioner to apply before the Tribunal for early disposal of the pending appeal.

(JITENDRA JAIN, J.)

(G. S. KULKARNI , J.)