COMMISSIONER OF CUSTOMS, PUNE

v.

M/S BALLARPUR INDUSTRIES LTD.

(Civil Appeal Nos. 5644-5645 of 2021)

SEPTEMBER 21, 2021

[DHANANJAYA Y CHANDRACHUD, VIKRAM NATH AND HIMA KOHLI, JJ.]

Anti-Dumping – Demand of anti-dumping duty on the product 'Styrene Butadiene Rubber' (SBR) – Two show cause notices dated 23.05.2006 and 30.06.2006 were issued to the respondent alleging that it had mis-declared its goods as 'Lutex-701' and 'Lutex-780', and they were goods SBR of 1900 series on which anti-dumping duty was leviable – Goods were confiscated and anti-dumping duty, besides the levy of interest and penalty were imposed – The Commissioner of Customs held that: (i) the goods were leviable to confiscation in terms of s. 111(m) of the Customs Act 1962; (ii) the goods were chargeable to anti-dumping duty; and (iii) the respondent was liable to pay interest u/s. 28AB and penalty u/s. 112(a) r/w. s.118(a) of the Customs Act 1962 – However, the Customs, Excise & Service Tax Appellate Tribunal (CESAT) came to the conclusion that the show cause notices could not be sustained – Before the Supreme Court, the appellant-Commissioner of Customs contended that the notice to show cause dated 23.05.2006 contained a specific reference to the fact that the test report by the Indian Rubber Manufacturers' Research Association (IRMRA) dated 06.03.2006 had revealed that the goods were found to be SBR of 1900 series and since the goods originated in Korea R.P. they were subject to anti-dumping duty and a similar averment was contained in the show cause notice dated 30.05.2006 – Further, the test reports of the IRMRA which were sought by the respondent also contained a similar finding that the goods which were imported were SBR of the 1900 series – Held: The Tribunal has set aside the decision of the

Commissioner of Customs on an evidently superficial evaluation of the issues raised in the appeals – The Tribunal came to the conclusion that there is "no whisper of any reason in the show cause notice to disturb the classification" claimed by the importer – This finding is contrary to the record – The show cause notice dated 23.05.2006 clearly states that the goods imported in question were declared as 'Lutex-701' in import documents and, as per test report from IRMRA goods were found to be SBR of 1900 Series – Similar allegations were contained in the second show-cause notice – Further, the Commissioner also recorded that the importer had also approached IRMRA independently for testing the samples of Lutex 701 and 780 in their control – A similar finding was arrived at by IRMRA from the samples furnished by the importer – None of these findings were displaced in the order of the Tribunal – The Tribunal has not looked into the merits of the appeals – The findings of the Tribunal are contrary to the record and cannot therefore be sustained – Since, the Tribunal has not considered the case of the respondent in appeal on merits, it would be appropriate to restore the proceedings back to the Tribunal for the purpose – Accordingly, the appeals are allowed and the judgment of the Tribunal is set aside.

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos.5644-5645 of 2021.

From the Judgment and Order dated 27.09.2017 of the Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench, at Mumbai Final order No.A/90222-90223 of 2017 in Customs Appeal No. C/70/17-MUM and C/71/07.

Ms. Aishwarya Bhati, ASG, Mukesh Kumar Maroria, Ms. Aruna Gupta, Ms. Deepanwita Priyanka, Mohd. Akhil, Ms. Vishakha, Advs. for the Appellant.

Surender Kumar Gupta, Neeraj, Chitvan Singhal, Prashant Rawat, Advs. for the Respondent.

The Judgment of the Court was delivered by

DR DHANANJAYA Y CHANDRACHUD, J.

1. Admit.

2. These appeals by the Commissioner of Customs, Pune arises from a judgment of the Customs, Excise & Service Tax Appellate Tribunal ("**CESAT**" or the "**Tribunal**") dated 27 September 2017. The question of law which has been formulated in the appeals is whether the Tribunal erred in setting aside the demand of anti – dumping duty on the product 'Styrene Butadiene Rubber' ("**SBR"**) classified under the heading 4002 of the First Schedule of the Customs Tariff Act, 1975and imported from Korea.

3. A show cause notice[1] dated 23 May 2006 was issued to the respondent covering five Bills of Entry under which the product 'Lutex -701' was imported namely:

"(1) Bill of Entry No. 500271 dated18.03.05;

(2) BilI of Entry No. 500044 dated03.05.05;

(3) Bill of Entry No. 500110 dated13.06.05;

(4) Bill of Entry No. 500161 dated1 7.08.05; and

(5) Bill of entry No. 500162 dated17.08.05."

Another show cause notice[2] dated 30 June 2006, covering six Bills of Entry' was issued to the respondent under which the product 'Lutex – 780'was imported. The details of the Bills of Entry are:

"(1) Bill of Entry No. 500183 dated26.08.05;

(2) Bill of Entry No. 500034 dated27.04.05;

(3) Bill of Entry No. 500073 dated24.05.05;

(4) Bill of Entry No. 500109 dated13.06.05;

(5) Bill of Entry No. 500148 ·dated28.07.05; and

(6) Bill of Entry No. 500128 dated29.06.05."

4. The allegation in the Show Cause Notice dated 23 May 2006 is that the respondent mis-declared its goods as 'Lutex – 701' which on

[1] Show Cause Notice F.No. ICD/Pimp- C'wad/BE-737/05-06 dated 23.05.2006.
[2] F.No. ICD/Pimp-Chwd/SCN/204/06-07 dated 30.06.2006.

A tests were found to be SBR of 1900 series on which anti-dumping duty was leviable. The notice proposed to confiscate the goods imported, collectively valued at Rs.1,19,16,267/- under Section 111(m) of the Customs Act 1962; to demand anti-dumping duty of Rs.10,14,101/- ;besides the levy of interest and penalty. The Show Cause Notice dated 30 June 2006 alleged a similar mis-declaration of the goods declared as B 'Lutex 780'. Confiscation of the goods collectively valued at Rs.2,10,57,783/- was proposed besides the demand of anti-dumping duty of Rs.16,88,618/-, the levy of interest and penalty.

5. The Commissioner of Customs, Pune by orders dated 17 October 2006, held that: C

(i) The goods were leviable to confiscation in terms of Section 111(m) of the Customs Act 1962;

(ii) The goods were chargeable to anti-dumping duty; and

(iii) The respondent was liable to pay interest under Section 28ABand penalty under Section 112(a) read with Section D 118(a) of the Customs Act 1962.

6. Appeals were filed before the CESAT by the respondent against the decision of the Commissioner. The CESAT allowed the appeals by its order dated 27 September 2017and came to the conclusion that the E Show Cause Notices could not be sustained.

7. The Tribunal has allowed the appeals on the basis of two findings. The first finding is as follows:

"There is no whisper of any reason in the show-cause notice to disturb the classification claimed by the appellant. Therefore, the F classification of the imported declared by the appellant under CTH 40021100 remained untouched by this order. Anti- dumping notification indicates that the goods falling under customs heading Nos.3903 and 4002 of the first schedule to the Customs Tariff Act, 1975 were subject to levy of anti-dumping duty. Accordingly, G levy was confined to the goods of heading 4002.19 since anti-dumping investigation was confined tothe goods covered by heading 4002.19.

Therefore there cannot be any misconception about the product under consideration. Notification no.2004-Cus dated 26.09.2004 H was issued pursuant to sunset Review arising out of the final

findings of the designated authority made on 02.06.1999. That Authority confined his scope of investigation into the goods covered by above tariff heading in the Sunset Review which was subject matter of levy of definitive duty. Therefore pleading of the appellant that its goods having fallen under CTH 40021100 does not come under CTH 40021900 for levy of anti dumping duty for the reason that goods of CTH 4002 1100 were not subject matter of antidumping investigation at any stage."

The second finding is as follows:

"It may be stated that while issuing show-cause notice, learned adjudicating authority had not examined the classification based on the report of the Laboratory. The show-cause notice issued in 2006 was to finalise the assessment only, without any proposal to levy anti-dumping duty. There was no reference to the character and nature of the imported product also therein. The Notification No.100/2004-Cus dated 26.09.2004 does not intend to levy anti-dumping duty on the product imported by the appellant. Accordingly, the show cause notice having no basis, both the appeals are allowed."

8. The Commissioner of Customs, Pune is in appeal.

9. Before we deal with the submissions which have been urged on behalf of the contesting parties, it is necessary to preface this judgment with a reference to Notification 100/2004-Cus dated 28 September 2004.The Notification sets outthat on 30 July 2003 the Designated Authority had initiated a sunset review in the matter of continuing anti-dumping duty on imports of SBR 1900 series falling under heading 3903 or 4002 of the First Schedule to the Customs Tariff Act 1975 (referred to as the "subject goods") originating in or exported from Japan, Korea R.P. and the United States of America. The anti-dumping duty had been imposed by the Government of India in the Ministry of Finance (Department of Revenue), by Notification No.73/2000-Customs dated 22 May 2000. By a communication dated 29 April 2004, the continuation of the anti-dumping duty for an additional period for six months was requested pending the completion of the review. The Central Government had extended the anti- dumping duty on the subject goods originating in or exported from the above countries by a Notification dated 26 July 2004, for an additional period of six months up to and inclusive of 25

October 2004. On a sunset review, the Designated Authority had rendered its findings on 27 July 2004 coming to the conclusion that:

> "(i) subject goods, originating in or exported from subject countries has been exported to India below normal value, resulting in dumping;
>
> (ii) the domestic industry is suffering material injury;
>
> (iii) dumping of subject goods is continuing from the subject countries; and
>
> (iv) the material injury to the domestic industry may continue and intensify if anti-dumping duty is removed."

Hence, in exercise of the powers conferred by sub-sections (1) and (5) of Section 9A of the Customs Tariff Act 1975 read with Rule 23 of Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules 1995, the Central government imposed an anti-dumping duty as specified in the following table:

Sl. No.	Country	Name of exporter/producer	Amount (USD/kg)
(1)	(2)	(3)	(4)
1.	Korea RP	All exporters/producers	0.0689
2.	Japan	All exporters/producers	0.1045
3.	USA	All exporters/producers	0.197

Chapter 40 of the Customs Tariff Act 1975 is titled 'Rubber and articles thereof'. Tariff item 4002 and its relevant entries are given below:

4002	Synthetic rubber and factice dervied from oils, in primary forms or in plates, sheets or strip; mixtures of any product of heading 4001 with any product of this heading, in primary forms or in plates, sheets or strip - *Styrene butadiene rubber (SBR); carboxylated styrene-butadiene rubber (XSBR)*		
4002 11 00	- *Latex*	kg.	10%
4002 19	- *Other*		
4002 19 10	- Oil extended styrene butadiene rubber	kg.	10%
4002 19 20	- Styrene butadiene rubber with styrene content exceeding 50%	kg.	10%
4002 19 30	- Styrene butadiene styrene oil bound copolymer	kg.	10%

10. The respondent contends that its goods were classified under CTH 40021100 and were provisionally cleared. The respondent submits that the assessment was finalized by the order of the Commissioner of Customs, levying anti-dumping duty without there being any proposal in the show cause notice for change in the classification. The Revenue contended that anti-dumping duty was imposed in terms of Notification No.100/04 – Customs dated 26 September 2004 and anti-dumping duty was correctly levied on the goods.

11. In the present proceedings, there is no dispute about the position that the product under consideration of the Designated Authority was SBR of 1500, 1700 and 1900 series falling under CTH 4002.19 of the Customs Tariff Act 1975 but not goods covered by the CTH 40021100. The Tribunal, as is evident from the two extracts of its decision which have been reproduced earlier came to the conclusion that:

(i) No basis was indicated in the show cause notice to disturb the classification claimed by the respondent as the result of which the declaration by the respondent that the goods fell under CTH 40021100 "remained untouched"; and

(ii) While issuing the notice to show cause, the adjudicating authority had not examined the classification based on the Laboratory report.

12. Ms Aishwarya Bhati, Additional Solicitor General appearing on behalf of the appellant submits that both the underlying findings of the Tribunal are flawed for the following reasons:

(i) The notice to show cause dated 23 May 2006 contained a specific reference to the fact that the test report by the Indian Rubber Manufacturers' Research Association ("**IRMRA**") dated 6 March 2006 had revealed that the goods were found to be SBR of 1900 series and since the goods originated in Korea R.P. they were subject to anti-dumping duty;

(ii) A similar averment was contained in the show cause notice dated 30 May 2006;

(iii) The test reports of the IRMRA which were sought by the respondent also contained a similar finding that the goods which were imported were SBR of the 1900 series;

(iv) The Commissioner had specifically considered and placed reliance on the tests reports of IRMRA; and

(v) The finding of the Tribunal that the notice to show cause did not refer to the classification purportedly made by the importer in the Bills of Entry is belied by the contemporaneous record.

13. On the above premises it has been submitted that the test reports which were commissioned both by the department as well as the importer from IRMRA indicated that the goods imported were SBR and there is no challenge to these reports. In the circumstance, it has been urged that the Tribunal had ignored material evidence on the record warranting the interference of this Court in appeal.

14. On the other hand, Mr Surender Kumar Gupta, learned Counsel appearing on behalf of the respondent urged that:

(i) The explanation provided by the respondent in the reply to the notice to show cause was to the following effect:

"3.4 <u>SBR of 1900 series is essentially a dry polymer</u>

The Test Report of the Deputy Chief Chemist itself describes the sample tested as:

''the samples is in the form of white liquid. It is an aqueous emulsion of styrene butadiene ..... " *(Kindly refer to Annexure 8)*

The goods imported by us, which exists in a liquid form, are widely used in the paper industry and known in common trade

parlance as Latex. Unlike the former, SBR of the 1900 series is a dry polymer, which is incapable of existing in a liquid form. Unlike Latex, SBR of 1900 series has wide application in the footwear industry and in the manufacture of "V" Belts. Thus the two products are completely different in their physical state or applicability though there are certain common chemicals in their chemical composition."

(ii) Moreover, according to the respondent, in its reply:

"3.8 Latex and SBR of 1900 are two separate products-

As mentioned above, the product imported by us is "Styrene Butadine Co-polymer". The goods imported by us, **which** exists **in a liquid form,** are widely used in the paper industry and known in common trade parlance as Latex. Kindly note that, SBR of the 1900 series is a dry polymer, which is incapable of existing in a liquid form. Unlike Latex, SBR of 1900 series has wide ·application in the footwear industry and in the manufacture of "V" Belts."

In other words, while SBR of the 1900 series is a dry polymer, the goods imported by the respondent were in a liquid form andhence, according to the respondent, fall for classification under CTH 40021100 as Latex. In this context, reliance was sought to be placed on the Vanderbiit Rubber Handbook and an opinion obtained from the University of Mumbai. On the above premises, it was submitted that the goods which were imported fall under CTH 40021100. It was urged that the literature indicates that goods imported in a liquid form would fall for classification as Latex and the opinions of experts demonstrate that the Styrene content is not decisive on whether or not the goods would fall for classification as Latex.

15. The Tribunal has set aside the decision of the Commissioner of Customs on an evidently superficial evaluation of the issues raised in the appeals. The Tribunal came to the conclusion that there is "no whisper of any reason in the Show Cause Notice to disturb the classification" claimed by the importer.This finding is contrary to the record. Paragraph 3 of the Show Cause Notice dated 23 May 2006 is extracted below:

"3. Whereas, as per the test report No: RPT/0502588rt14478/205 dated. 03.03.2006and Ref. No: IRMRA/RK/03-06/23-RD dated06.03.2006 (copy enclosed) received from Indian Rubber

A Manufacturers Research Association (IRMRA), the sample goods found as STYRENE BUTADIENE RUBBER of 1900 series. As per Anti-dumping duty Notification No:. 100/2004 dated 28.09.2004, the goods i.e. STYRENE BUTADIENE RUDDER of 1900 series falling under heading 3903 or 4002 of the First Schedule to the Customs Traffic Act 1975, originated in, or exported from, Korea R.P. are chargeable to Anti-dumping Duty @ US $ 0.0689 per Kg. In view of the fact that the goods covered under five Bills of Entry referred as above ·are found as STYRENE BUTADIENE RUBBER of 1900 series as confirmed by IRMRA Test Report dated 06.03.2006 and the goods are of Korea R.P. origin, the goods become chargeable to Anti-dumping duty @ US $ Q.0689 per kg as per Notification No: 100/2004 dated· 28.09.2004."

Paragraph 4 of the Notice contains similar allegations that:

"4. Whereas the goods imported in question were declared as 'LUTEX 701' in import documents and, not as 'Styrene Butadiene Rubber (SBR) of 1900 Series which has been confirmed by Test Report dated 06.03.2006 from IRMRA. The importer is regular importer of subject goods and are actual users of the goods and therefore they should be well aware of the description of the goods imported and the duty liability thereon. Therefore it appeared that the Importer mis declared the description of the goods as TUTEX 701 instead of as Styrene Butadiene Rubber (SBR) of 1900 Series with the intention to evade the Anti Dumping Duty. At the time of filing of Dills of Entry, the Importer did not come up with full a.id complete description of the goods imported. If the Importer had declared the complete and proper description of the. goods at the time of filing of Bills of Entry, the Anti Dumping duty would have been levied at the time of provisional assessment. Therefore it appears to be a case of suppression of facts on the part of the Importer by not declaring proper description of the goods and mis declaring the description of the goods as'LUTEX-701' against proper description as4 Styrene Butadiene Rubber (SBR) of 1900 Series. As importer is an actual user *of* the goods ii question and was aware of the Anti Dumping duty notification no: 100/2004 issued on 28.09.2004 at the time of filing of import documents, it appears that the importer willfully did not declare the proper

and complete description of the goods in import documents with the intention to evade the Anti dumping duty."

A similar allegation was contained in the second show cause notice. The Commissioner of Customs specifically dealt with the contents of the test reports in paragraph 6.2of the order dated 17 October 2006, which is extracted below:

"6.2 As has been extracted at paras 4 and 5 supra, the said Importer has heavily argued that the Test Reports of IRMRA are Inconclusive and have sought for the cross examination of the official of the IRMRA. For the reasons recorded here under, I am not persuaded by these arguments of the said Importer. As per the facts, it may be seen that, initially, samples of Lutex 701 and Lutex 780 were drawn for tests to be done by the Dy. Chief Chemist, CCRL Nhava Sheva to ascertain (1) composition (2). percentage of Styrene, and (3) whether the goods are Styrene Butadiene Rubber of 1900 series. The Dy. Chief Chemist CRCL vide his report dated 30th June, 2005, for the product, Lutex 701, informed that "the samples In the form of white coloured liquid. It Is an aqueous emulsion based on synth1tic resin - Styrene Butadiene type solid contents = , 54.5°/o. For content of Syrene, sample may be forwarded tosome rubber testing laboratory" Similarly, In his report dated 5th July, 2005, relating to the samples of Lutex 780 it was informed by the Dy. chief Chemist, CRCL, that "The· sample is in the form of white liquid. It. is an aqueous· emulsion of Styrene Butadiene, For content of Styrene, sample may be forwarded to rubber testing laboratory;"

16. The Commissioner also recorded in paragraph 6.4 that the importer had also approached IRMRA independently for testing the samples of Lutex 701 and 780 in their control. A similar finding was arrived at by IRMRA from the samples furnished by the importer. Paragraphs 6.4 of the decision of the Commissioner reads as follows :

"6.4 It may be pertinent to again mention here that the said Importer themselves had also approached the IRMRA for an independent testing of the samples of Lutex 701 and Lutex 780 which were in their control and the said IRMRA, vide their Evaluation Report dated 14.09.2006, for the same goods under the control of the said Importer and which are also covered under the First Notice

A and the Second Notice *conveyed* the results thereof to the said Importer wherein the Styrene content was observed to be 64.44% and 66.75% respectively for Lutex 701 and Lutex 780."

In this background, the Commissioner held:

B "6.5 Thus, It may be seen that when the said Importer got the Impugned goods tested on his own from the same laboratory where the department had sent the goods for ascertaining the Styrene content, in the imported Lutex 701 and Lutex 780, the styrene content was reported to be above, 60%."

C None of the above findings have been displaced in the order of the Tribunal. The Tribunal has not looked into the merits of the appeals at all on the facetious ground that the show cause notice did not contain any basis to doubt the classification of the goods and that while issuing the notice, the adjudicating authority had not examined the classification based on the report of the laboratory. The findings of the Tribunal are D contrary to the record and cannot therefore be sustained.

17. At the same time, since the Tribunal has not considered the case of the respondent in appeal on merits, we are of the considered view that it would be appropriate to restore the proceedings back to the Tribunal for the purpose. In order to facilitate a fresh decision on remand, E we have recorded the broad submissions of the contesting parties on the merits as well but leave open the matter for evaluation by the Tribunal on remand. We accordingly allow the appeals and set aside the judgment of the Tribunal dated 27 September 2017. Appeal Nos. C/70 & 71/07 arising out of the orders in Original No.II/Cus/2006 and 12/Cus/2006 both dated 17 October 2006 of the Commissioner of Customs, Pune are F restored to the file of the Tribunal for determination afresh.

18. The appeals are disposed of in the above terms with no order as to costs.

Ankit Gyan Appeals disposed of.