

NON-REPORTABLE

**IN THE SUPREME COURT OF INDIA
EXTRA-ORDINARY APPELLATE JURISDICTION**

SPECIAL LEAVE PETITION (C) NO.2208 OF 2022

M/s. Asean Cables Pte. Ltd.

..Petitioner

Versus

The Commissioner of Customs

..Respondent

ORDER

1. Feeling aggrieved and dissatisfied with the impugned order dated 17.12.2021 passed by the High Court of Kerala at Ernakulam in Customs Appeal No.1 of 2021 by which the High Court has overruled the objection raised by the petitioner herein – assessee on the maintainability of the appeal before the High Court under Section 130(1) of the Customs Act, 1962 (hereinafter referred to as ‘the Act’), the

original assessee – respondent before the High Court has preferred the present Special Leave Petition.

1.1 That the petitioner herein operates the cables ship CS Asean Explorer (“vessel AE”) for the purposes of laying, repairs and maintenance of submarine cables. Various telecommunication companies entered into an agreement with cables ship operators (including the petitioner herein) to undertake repair and maintenance of the submarine cable wires through cables ships such as the vessel AE. That the vessel AE is stationed at Kochi, India, to undertake repairs and maintenance of submarine cables.

1.2 A show cause notice dated 10.07.2012 along with corrigendum dated 14.08.2012 was issued proposing to initiate action under Sections 111(b) and (f) of the Act read with Section 125 of the Act. The petitioner resisted the same. It was the case on behalf of the petitioner that CS Asean Explorer, which was subjected to a confiscation order, is a foreign-going vessel falling within the definition of Section 2(21) and Section 87 of the Act and therefore entitled to exemption from payment of any duty under the

Act, as CS Asean Explorer is a foreign-going vessel. Thus, as such the petitioner claimed the exemption from payment of duty under Section 87 of the Act. It was the case on behalf of the petitioner that as petitioner is not answerable to any duty leviable under the Act and therefore, no assessment is required for the purpose of determining the amount payable by it. That the Commissioner of Customs confirmed the demand vide order dated 04.04.2013 and also imposed the penalty.

1.3 Petitioner aggrieved by the order dated 04.04.2013 filed an appeal before the CESTAT, South Zonal Bench, Bangalore being Customs Appeal No. 27102 of 2013. The CESTAT allowed the said appeal and remanded the appeal for determining the extent of applicable duty on the ship's stores consumed by the petitioner during the period of time that the vessel was engaged in operations in Indian territorial waters and for the normal period. Thus, the CESTAT accepted the case on behalf of the petitioner that vessel AE is a foreign going vessel and Section 87 of the Act is attracted to stores consumption on board and therefore

the petitioner is exempted from payment of duty as per Section 87 of the Act.

1.4 Aggrieved by the final order passed by the CESTAT dated 18.02.2020 in holding that vessel AE is a foreign-going vessel and therefore Section 87 of the Act shall be attracted to store consumption on board and therefore the applicant petitioner is exempted from payment of the customs duty, the Revenue has preferred the further appeal before the High Court under Section 130(1) of the Act.

1.5 A preliminary objection was raised on behalf of the petitioner on the maintainability of the appeal before the High court under Section 130(1) of the Act. It was the case on behalf of the petitioner that as the principal question is determination of rate of duty, against the order passed by the CESTAT, Appeal under Section 130E(b) shall be maintainable to the Hon'ble Supreme Court. By the impugned order the High Court has overruled the said objection on the maintainability of the appeal before the High Court against the order passed by the CESTAT by holding that the principal question in the present case is,

not in relation to the rate of duty but determining whether, vessel AE, is a foreign-going vessel or not and if the vessel AE is a foreign-going vessel, whether Section 87 of the Act would be applicable or not. Thus, according to the High Court, the principal question is not the determination of the rate of duty but that the exemption under Section 87 of the Act shall be allowable or not.

2. Feeling aggrieved and dissatisfied by the impugned order passed by the High Court holding that against the order passed by the CESTAT dated 18.02.2020 appeal would be maintainable before the High Court under Section 130(1) of the Act, the assessee – respondent before the High Court has preferred the present Special Leave Petition.

2.1 Shri Mukul Rohatgi, learned Senior Advocate, appearing on behalf of the petitioner has vehemently submitted that in the facts and circumstances of the case the High Court has committed a grave error in holding that against the order passed by the CESTAT impugned before the High Court the appeal before the High Court would be maintainable under Section 130(1) of the Act.

2.2 It is further submitted by Shri Mukul Rohatgi, learned Senior Advocate, that an appeal shall lie to the Hon'ble Supreme Court from an order passed by the Appellate Tribunal relating, amongst other things, to the determination of any question having a relation to the rate of duty of the customs or to the value of case for purposes of assessment. It is submitted that in the present case the principal issue is the rate of duty applicable on imported stores on the vessel AE. It is submitted that as per Section 87 of the Act any imported stores on board a vessel or aircraft (other than stores to which Section 90 applies) may without payment of duty, be consumed thereon as stores during the said period such vessel or aircraft is a foreign-going vessel or aircraft. It is submitted that therefore if the stores are eligible to the exemption under Section 87 of the Act as claimed by the petitioner, the duty on imported stores will be NIL, and if not, (as per the case of the Customs Department), it will be applicable rate of duty. It is submitted that therefore, the dispute can be said to be having a relation to the rate of duty for the purpose of

assessment and hence against the order passed by the CESTAT, holding that the petitioner is not liable to pay any duty applying Section 87 of the Act, appeal shall be maintainable to this Court only.

3. Making the above submissions, it is prayed to set aside the impugned order passed by the High Court holding that against the order passed by the CESTAT impugned before the High Court under Section 130(1) would be maintainable.

4. The short question to be considered in the present Special Leave Petition, is whether, against the order passed by the CESTAT impugned before the High Court the appeal would be maintainable before the High Court under Section 130(1) of the Act or the appeal before this Court would be maintainable under Section 130E(b) of the Act.

4.1 While considering the aforesaid issue the main controversy and/or the principal question is required to be addressed. It was/is the case on behalf of the petitioner that the vessel AE being a foreign-going vessel the imported stores are eligible to the exemption under Section 87 of the

Act. Therefore, the principal question/issue is the exemption claimed under Section 87 of the Act. Whether the assessee is entitled to exemption as claimed or not, such an issue cannot be said to be an issue relating, amongst other things, to the determination of any question having relation to the rate of duty. The submission on behalf of the petitioner that the duty will be NIL and if not, which is the case of the Customs Department, it will be the applicable rate of duty and therefore, such a dispute can be said to be in relation to the rate of duty, has no substance. The dispute with respect to the exemption claimed and the dispute with regard to the rate of duty are both different, distinct and mutually exclusive. We are of the firm opinion that the dispute concerning an exemption cannot be equated with a dispute in relation to the rate of duty.

5. A somewhat similar question had arisen before this Court in the case of **Commissioner of Customs vs. Motorola (India) Ltd., (2019) 9 SCC 563**. The question involved in the said case was, whether, the assessee violated the conditions of the exemption notification by not utilising

the imported materials for manufacturing of the declared final product and was, therefore, liable for payment of duty, interest and penalty. The High Court held that the appeals before the High Court would not be maintainable but were tenable before this Court under Section 130E of the Act. While setting aside the order passed by the High Court, this Court observed and held that neither any question with respect to determination of rate of duty arises nor a question relating to valuation of the goods for the purposes of assessment arises and the appeals also do not involve determination of any question relating to the classification of goods. By observing so, this Court observed that the High Court was not justified in holding that the appeals were not maintainable under Section 130(1) of the Act but were tenable before the Supreme Court under Section 130E of the Act.

6. Therefore, in the facts and circumstances of the present case the High Court is right in observing that the principal question in the present case is not in relation to the rate of duty but determining whether vessel AE is a

foreign-going vessel or not, and if the vessel AE is a foreign-going vessel, Section 87 of the Act will be applicable or not. Therefore, with respect to such an issue, against the order passed by the CESTAT, the appeal would be maintainable before the High Court under Section 130 of the Act. We are in complete agreement with the view taken by the High Court.

In view of the above, the present Special Leave Petition deserves to be dismissed and is accordingly dismissed.

.....J.
(M. R. SHAH)

.....J.
(B. V. NAGARATHNA)

New Delhi,
March 15, 2022