IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6658 OF 2014

Dadi Impex Private Limited	}	
a company registered under the	}	
Companies Act, 1956 and having	}	
its office at 614, Laxi Plaza	}	
Industries Estate, Off New Link	}	
Road, Andheri (West),	}	
Mumbai 400 053	}	**Petitioners**
versus		
1. The Union of India	}	
through the Secretary,	}	
Ministry of Finance, Department	}	
of Revenue, North Block,	}	
New Delhi 110 001	}	
	}	
2. The Commissioner of Customs	}	
(Imports), Jawaharlal Nehru	}	
Custom House, Nhava Sheva,	}	
Dist. Raigad, Maharashtra	}	
	}	
3. The Assistant Commissioner of	}	
Customs (Preventive),	}	
M & P Wing, Alibag Division,	}	
Customs House, Koliwada, Aliba,	}	
Dist. Raigad – 402 201	}	
	}	
4. The Superintendent of Customs	}	
(Preventive), M & P Wing,	}	
Alibag Division, Customs House,	}	
Koliwada, Aliba,	}	
Dist. Raigad – 402 201	}	

Mr. Prakash Shah with Mr. Jas Sanghavi and Mr. Prarsad Poojari i/b. M/s. PDS Legal for the Petitioner.

Mr. Vijay Kantharia with Ms. Anamika Malhotra for the Respondents.

CORAM :- S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.

DATED :- SEPTEMBER 29, 2015

ORAL JUDGMENT :- (Per S.C.Dharmadhikari, J.)

Rule. Respondents waive service. By consent, Rule made returnable forthwith and heard.

2) This Petition was argued on 28th September, 2015 and has been placed for passing judgment/final orders today.

3) By this Petition under Article 226 of the Constitution of India, the Petitioner is requesting to call for the records pertaining to the impugned communications referred to in prayer clause (a) and after examining their legality and validity to quash and set aside the same.

4) The Petitioners are also seeking to restrain the Respondents from enforcing the said communications and recovering any differential duty. The Petitioner is seeking a direction to the Respondents to cancel a final assessment of bill of entry dated 26th October, 2009 and pass a speaking order after affording an opportunity of being heard to the Petitioner.

5) The Petition is filed in this Court on 7th July, 2014.

6) The Petition proceeds to state that the Petitioner is export house status holder having been issued certificate of recognition by the Zonal Joint Director of Foreign Trade. The Petitioner imported bright yellow crude sulphur from an unrelated buyer from UAE. That this bright yellow crud sulphur is used in the manufacture of insecticides, fungicides and hydrochloric acids after dissolving it. The Petitioner imported the goods weighing 100 metric ton and of the value set out in para 6 of the Petition. The details of the commercial invoice and bill of entry are set out and copies of the relevant documents are annexed as Annexures 'A' to 'D' to the Writ Petition.

7) The Petitioner relies upon a certain notification exempting the goods from customs duty. Concessional rate of duty was specified in the bill of entry relying upon this notification dated 1st March, 2002. It is the claim of the Petitioner that it submitted all the relevant documents to the Customs Department for assessment of the bill of entry. It also referred to certain view taken by this Department earlier and based on the report and the opinion of the Deputy Chemist, Nhava Sheva. In para 13 of the Writ Petition, there is a reference made to the show cause notice dated 4th March, 2010 issued to the Petitioner and calling upon the Petitioner to pay differential customs duty and other charges so also interest. This notice alleges that the Petitioner did not

produce the original documents pertaining to the import of Sulphur at the time of assessment. The Petitioner submits that on 18th March, 2010 and after the show cause notice was issued, the Superintendent of Customs (Preventive) – fourth Respondent to this Writ Petition inter alia requested the Petitioner to provide the original documents in respect of the general manifest of bill of entry mentioned in the Annexure attached to this letter so as to enable the Department to finalise the assessment of goods imported. In para 15 of this Writ Petition, the Petitioner points out that a detailed reply was given to the show cause notice but thereafter they did not hear anything from the Department. However, a communication dated 28th September, 2013 was addressed and thereafter received, calling upon the Petitioner to pay the outstanding sum on account of differential duty/duty arising out of finalisation of bill provisionally assessed. The Petitioner has been maintaining that it did not receive any final order nor it is to their knowledge. Therefore, it pointed out that unless and until an adjudication in terms of the show cause notice is made or there is an assessment of the bill of entry in accordance with law, no such communication can be addressed nor any recovery can be effected. It is based on this and urging that the principles of natural justice have been violated that this Writ Petition is filed.

8) It is urged by Mr. Shah appearing on behalf of the Petitioner that a demand or recovery should precede a final assessment or any show cause notice is issued, then, an adjudication and order in furtherance thereof. However, all this has to be done after complying with the principles of natural justice, meaning thereby an opportunity of being heard to the Petitioner and duly considering its contention. In these circumstances, he would submit that the Writ Petition be allowed by quashing and setting aside the impugned communications.

9) Mr. Kantharia appearing for the Respondents, however, submits that there is no merit in the Writ Petition. He submits that the bill of entry was filed. There was a provisional assessment of the bill of entry as per section 18(1) of the Customs Act, 1962 and which was undertaken at the request of the Petitioner. It was unable to furnish the original documents at the time of import and also for want of test results. There was a bond executed and in the circumstances, the authority demanded the differential duty. The notice to show cause was issued but thereafter, the assessment was finalised under section 18(2) of the Customs Act based on the documents available.

10) With reference to the specific allegations in the Writ Petition and to be found from para 12 onwards, Mr. Kantharia would submit that the finalisation of the assessment is appealable order and an

appeal would lie to the appellate authority. Therefore, this Writ Petition should be dismissed.

11) When this Petition was placed before us on the earlier occasion, after hearing both sides on 5th March, 2015, we had passed the following order:-

> "Let Respondent Nos. 3 and 4 instruct Mr. Kantharia before the next date as to whether the notice or communication Annexure 'J' at page 72 of the paper book dated 28th September, 2013 has been issued after finalisation of the bills of entries provisionally assessed and by an order in that behalf. If such an order has been passed, whether it was passed after hearing the Petitioner and when was it communicated to the Petitioner and whether a copy of the same can be placed on the file of this Writ Petition along with an affidavit of Respondent No. 3 or 4. To enable Mr.Kantharia to do the needful, stand over to 24th March, 2015. No further adjournment."

12) It is in pursuance of this order that an affidavit in reply has been filed. It is fairly conceded that a notice or communication was issued after finalisation of the bill of entry and a demand letter dated 6th May, 2011, along with a copy of finally assessed bill of entry, was issued by the Assistant Commissioner of Customs to the Petitioner. However, the office records do not disclose that any hearing has been held before the order of finalisation of bill of entry was issued and preceding the demand notice/letter. Then, it is stated that the demand letter dated 6th May, 2011 has been despatched by Registered Post Acknowledgment Due on 14th May, 2011 at the office address but a copy of this order of finalisation of bill of entry i.e. the demand notice is not traceable at

present in the office records. Reliance is placed on Annexures '2' and '3' to the affidavit in reply dated 2nd September, 2015, but what we find is that is stated to be a proof of dispatch of some communication by Registered Post Acknowledgment Due at the Petitioner's stated address. Finally assessed bill of entry is annexed as Annexure '3' to this affidavit.

13) In the light of this fair statement and stand taken by the Respondents in the affidavit, it is evident that neither there is any record of personal hearing to the Petitioner nor there is a further record of a finalisation of the assessment and its communication to the Petitioner.

14) Once the Petitioner's essential averments in the Writ Petition have not been controverted or denied, then, it is clear that there was no adjudication preceding this letter of demand nor any order, which is stated to be appealable, is available in the records of the Revenue. These are indeed sorry state of affairs. Time and again this Court has held that once a show cause notice is issued, then it is incumbent upon the Revenue to produce proof of any order finalising or confirming the demand in the show cause notice and then alone a recovery by coercive means is permissible. There are stages in a tax legislation. The tax is imposed and levied, assessed, collected and recovered. These very terms have been considered time and again in

several judgments of this Court as also of the Hon'ble Supreme Court. At the stages preceding the collection and recovery, there is a valuation and assessment at which the Assessee has a right to object and to be heard on the objections raised. Before these objections are considered and dealt with there is no question of any confirmation of the demand or recovery and these are settled principles. In the instant case, the issuance of the show cause notice is not disputed. We have read the affidavit in reply as a whole and since the office records do not indicate anything of the aforesaid nature, we are unable to agree with Mr. Kantharia that the Writ Petition should be dismissed. His reliance on an order passed by this Court, copy of which is annexed to the affidavit in reply is equally misplaced in the given facts and circumstances. In that Writ Petition in the case of *M/s. Krishna Chemicals vs. Union of India and Ors.* (**Writ Petition No. 9787 of 2014** dated 24th August, 2015), the Petitioner had not disputed that a communication dated 10th May, 2011 was despatched by Registered Post Acknowledgment Due and this was received. There is a response thereto by letter dated 28th November, 2011. The Petitioner did not approach the Court immediately thereafter but sought to rely upon an order passed by this Court in another Writ Petition and on distinct facts. When the Petitioner was informed that the communication dated 10th May, 2011 is an order of the competent authority and therefore appealable, neither of the remedies, namely filing of an appeal or approaching this Court immediately were resorted to. That is why this Court did not interfere in Writ Jurisdiction and dismissed the Petition essentially on the ground that it is hopelessly delayed and barred by laches. Such an order cannot be of any assistance in the peculiar facts and circumstances of this case.

15) As a result of the above discussion, this Writ Petition succeeds. The demand notice is quashed and set aside but with a clarification that in the event an order is passed in pursuance of the show cause notice and after hearing the Petitioner, the Revenue can proceed to recover the tax or amounts due in accordance with law. However, prior to such a step being taken, the Revenue will have to pass an adjudication order in terms of the show cause notice and after a proper opportunity of being heard to the Petitioner. Until then, there is no question of recovery of differential dues and as threatened.

16) Rule is made absolute in the aforesaid terms.

(B.P.COLABAWALLA, J.) **(S.C.DHARMADHIKARI, J.)**

CERTIFICATE

Certified to be true and correct copy of the original signed judgment/order.