In the High Court of Judicature at Madras

Dated : 27.10.2015

Coram :

The Honourable Mr.Justice V.RAMASUBRAMANIAN

and

The Honourable Mr.Justice T.MATHIVANAN

C.M.A.Nos.2110 to 2116 of 2015 and all connected pending MPs

M/s.Prachi Silks, rep.by its Proprietor, Bangalore ...Appellant in CMA.Nos.2110 & 2112/2015

M/s.Nupur Impex, rep.by its Proprietor, Bangalore ...Appellant in CMA.No.2111/2015

M/s.Mahalaxmi Silk Trading, rep.by its Proprietor, Bangalore ...Appellant in CMA.No.2113/2015

Radhey Shyam Rander, M/s.Mahalaxmi Silk Trading Co., Bangalore ...Appellnat in CMA.No.2114/2015

M/s.Goyal Enterprises, rep.by its Proprietor, Bangalore ...Appellant in CMA.No.2115/2015

Hemanth Kumar, M/s.Maharaja Impex, Bangalore ...Appellant in CMA.No.2116/2015

Vs

1.The Commissioner of Customs,
(Port Export), Customs House,
No.60, Rajaji Salai, Chennai-1.

2.The Customs, Excise & Service Tax
Appellate Tribunal, South Zonal
Bench, No.26, Shastri Bhavan
Annexe Building, Haddows Road,
Chennai-6. ...Respondents
in all the CMAs

APPEALS under Section 130(A) of the Customs Act, 1962 against the common order dated 26.5.2015 made in Misc.Order Nos.40817, 40818, 41820, 40821, 40822, 40823 and 40824/2015 in Application Nos.C/S/41858 of 2014, C/S/41843 of 2014, C/S/41846 of 2014, C/S/41848 of 2014, C/S/41850 of 2014, C/S/41852 of 2014 and C/S/41854 of 2014 in Appeal Nos.C/41585 of 2014, C/41586 of 2014, C/41590 of 2014, C/41591 of 2014, C/41592 of 2014, C/41593 of 2014 and C/41594 of 2014 on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai-6.

For Appellants : Mr.V.T.Gopalan, SC for Mr.S.Ashok Kumar

For Respondent-1 : Mr.V.Sundareswaran, S.P.C.

COMMON JUDGMENT

(Judgment was delivered by V.RAMASUBRAMANIAN,J)

These appeals are filed by assessees under Section 130-A of the Customs Act, 1962, questioning the correctness of a common order passed by the Customs, Excise and Service Tax Appellate Tribunal, directing the appellants to make a deposit of an amount almost equivalent to or little more than the duty demanded, as a condition precedent for entertaining their appeals.

2. Heard Mr.V.T.Gopalan, learned Senior Counsel appearing for the appellants and Mr.V.Sundareswaran, learned Senior Panel Counsel appearing for the first respondent.

3. It appears that in the course of an investigation, it was found out that imports of mulberry raw silk/silk yarn of 27,020.93 Kgs valued at Rs.3,36,10,640/- were made duty free, using three advance authorisations of one M/s.Kalp Impex of Surat by one Ramanand Surekha, owner of Goyal Enterprises of Bangalore. It was claimed that by diverting the goods to Bangalore without being transported to Surat, the Customs was defrauded. Therefore, the entire quantity of mulberry raw silk/silk yarn imported under nine Bills of Entry were confiscated. A redemption fine of Rs.67 lakhs was imposed under Section 125 of the Customs Act, 1962. Customs duty of more than Rs.1 Crore was imposed enforcing the bond executed for imort of goods duty free. Penalties were also levied upon seven persons under Section 112(a) or 112(b) of the Customs Act, 1962.

4. Aggrieved by the common order in original passed on 27.3.2014 against various persons, 21 independent appeals came to be filed before the Customs, Excise and Service Tax Appellate Tribunal. The appeals were accompanied by applications for waiver of pre-deposit condition and also for stay of enforcement of the order in original pending disposal of the appeals. 5. The miscellaneous petitions for waiver and stay were disposed of by the South Zonal Bench at Chennai of the Customs, Excise and Service Tax Appellate Tribunal, by a common order dated 26.5.2015. By the said order, the Tribunal held that the appellants had no prima facie case and that therefore, they were liable to make pre-deposit, almost equivalent to or a little more than the duty levied. Aggrieved by such conditional order, the appellants are before us.

6. Though there were 21 appeals before the Tribunal, some of them were filed by the same individual. In other words, three of those appeals were filed by Lalit Kumar Jain, three were filed by Kalpesh Patel, one was filed by Swapnil Patel, two were filed by Dipal J.Shah, two were filed by Prachi Silks, one was by Mahalaxmi Silk Trading, one was filed by Masterstroke Freight Forwarders Private Limited, another was filed by Meticulor Forwarders, yet another appeal was filed by Ramanand Surekha, one appeal each was filed by Radhey Shyam Rander, Goyal Enterprises, Hemanth Kumar, Super Shipping Services, Nupur Impex and Manjunatha Shipping Services Private Limited.

7. The amount fixed by the Tribunal for the appellants to deposit, is given in the table found in paragraph 22.6 of the order of the Tribunal. The table is extracted as follows :

S No	Stay Petition (No.)	Appellant	Duty levied	Penalty imposed	Pre-deposit directed
(1)	(2)	(3)	(4) (in Rs.)	(5) (in Rs.)	(6) (in Rs.)
1	C/S/41644/2014 in C/41358/2014	Lalit Kumar Jain		5,00,000/-	5,00,000/-
2	C/S/41645/2014 in C/41359/2014	Lalit Kumar Jain		5,00,000/-	5,00,000/-
3	C/S/41646/2014 in C/41360/2014	Lalit Kumar Jain		4,00,000/-	4,00,000/-
4	C/S/41873/2014 in C/41623/2014	Kalpesh Patel		2,00,000/-	50,000/-

5	C/S/41874/2014 in C/41624/2014	Kalpesh Patel		2,00,000/-	50,000/-
6	C/S/41875/2014 in C/41625/2014	Swapnil Patel		3,00,000/-	50,000/-
7	C/S/41876/2014 in C/41626/2014	Kalpesh Patel	1,03,78,016/-	26,00,000/-	NIL
8	C/S/41662/2014 in C/41376/2014	Dipal J.Shah		3,00,000/-	50,000/-
9	C/S/41663/2014 in C/41377/2014	Dipal J.Shah		2,00,000/-	30,000/-
10	C/S/41366/2014 in C/41142/2014	Masterstroke Freight Forwarders P.Ltd.		4,00,000/-	3,00,000/-
11	C/S/41841/2014 in C/41584/2014	Ramanand Surekha		10,00,000/-	10,00,000/-
12	C/S/41858/2014 in C/41585/2014	Prachi Silks	80,97,134/-	20,00,000/-	80,00,000/-
13	C/S/41843/2014 in C/41586/2014	Nupur Impex	1,48,47,512/-	37,00,000/-	1,50,00,000/-
14	C/S/41845/2014 in C/41587/2014	Meticulor Forwarders		15,00,000/-	10,00,000/-
15	C/S/41846/2014 in C/41590/2014	Prachi Silks	10,94,412/-	2,00,000/-	10,00,000/-
16	C/S/41848/2014 in C/41591/2014	Mahalaxmi Silk Trading	44,33,270/-	10,00,000/-	50,00,000/-
17	C/S/41850/2014 in C/41592/2014	Radhey Shyam Rander		5,00,000/-	5,00,000/-
18	C/S/41852/2014 in C/41593/2014	Goyal Enterprises	1,49,24,031/-	25,00,000/-	1,50,00,000/-

19	C/S/41854/2014 in C/41594/2014	Hemanth Kumar		5,00,000/-	5,00,000/-
20	C/COD/42026/2014, C/S/42025/2014 in C/41738/2014	Super Shipping Services		10,00,000/-	7,00,000/-
21	C/COD/42028/2014, C/S/41027/2014 in C/41739/2014	Manjunatha Shipping Services Pvt.Ltd.		5,00,000/-	3,00,000/-

8. Out of the appellants in Col.No.3 of the table given above, only seven persons, whose names are found at S.No.12, 13 and 15 to 19, namely Prachi Silks, Nupur Impex, Mahalaxmi Silk Trading, Radhey Shyam Rander, Goyal Enterprises and Hemanth Kumar have come up with the present appeals questioning the correctness of the order passed by the Tribunal.

9. The main grievances of the appellants, as projected by Mr.V.T. Gopalan, learned Senior Counsel for them, are :

(i) that the direction given by the Tribunal to the appellants to make a pre-deposit, is wholly illegal, since the appellants were neither the importers nor the owners of the goods

(ii) that instead of deciding the question of waiver of pre-deposit, on the parameters of undue hardship, as stipulated in Section 129E, the Tribunal laid focus on prima facie case and arrived at a wrong conclusion

(iii) that the Tribunal erred in taking the interests of the Revenue alone to be the only criterian for deciding the applications for waiver and deposit and

(iv) that by recording fullfledged findings on the question of prima facie case against the appellants, the Tribunal had virtually decided the appeals against the appellants.

10. We have carefully considered the submissions made by the learned Senior Counsel for the appellants.

11. It is true that the Proviso to Section 129E of the Customs Act, 1962 empowers the Appellate Commissioner and the Tribunal to dispense with the whole or any part of the pre-deposit amount, if the Appellate Authority is of the opinion that the deposit of duty and interest demanded or penalty levied would cause undue hardship to such persons. But at the same time, while ordering a waiver of pre-deposit, the Appellate Authority is entitled to impose such conditions as it may deem fit to impose, so as to safeguard the interests of the Revenue.

12. Therefore, the exercise of power to dispense with the pre-deposit condition is controlled by two guiding factors namely (a) undue hardship to the appellants and (ii) safeguarding the interests of the Revenue.

13. In other words, the Proviso to Section 129E is not akin to the provisions of Order XXXIX Rules 1 and 2 of the Civil Procedure Code, where an application for injunction is required to be decided on the touchstone of prima facie case, balance of convenience and relative hardship. But, at the same time, while considering the application for waiver, the Appellate Authority cannot completely ignore the existence or absence of a prima facie case. Courts have read the parameters of prima facie case into the issue of undue hardship.

14. In Vijay Prakash D.Mehta Vs. Collector of Customs [AIR 1988 SC 2010], the Supreme Court indicated that all relevant factors such as the probability of a prima facie case for the appellants, the conduct of the parties, etc., can be taken into account, while deciding the question of undue hardship. At the same time, the Supreme Court cautioned in Benara Volves Vs. C.C.E. [2006 (13) SCC 347], that merely upon the establishment of a prima facie case, interim orders of protection cannot be passed. However, the Court also observed that if, upon a cursory glance, it appears that the demand raised has no legs to stand, it would be desirable to require the assessee to pay the full or substantive part of the demand.

15. Again in Bhavya Apparels (P) Ltd. Vs. Union of India [2007 (10) SCC 129], the Supreme Court observed that the Tribunal is also required to apply its mind in regard to the question of undue hardship, upon considering the existence of a prima facie case. But, the Court cautioned that merits of the case should not otherwise be ordinarily gone into, unless the question on the face of it appears to be concluded.

16. Keeping in mind these parameters, if we come back to the case on hand, it is seen that the Tribunal went only into the question of prima facie case from paragraphs 22.1 upto 22.5 of its order. The Tribunal did not go into the question of undue hardship at all.

17. Therefore, it is vehemently contended by Mr.V.T.Gopalan, learned Senior Counsel for the appellants that the parameters laid down in the Proviso to Section 129E have been thrown into the winds by the Tribunal and that therefore, the order requires interference.

18. However, it is contended by Mr.V.Sundareswaran, learned

Senior Panel Counsel for the Department that the appellants herein did not even plead undue hardship in their applications for waiver and stay. Therefore, the learned Senior Panel Counsel submitted that the Tribunal could not have gone into that question in the absence of any specific pleading.

19. In the light of the submissions made by the learned Senior Panel Counsel for the Department, we directed the learned counsel for the appellants on record to file copies of the waiver applications made by the appellants before the Tribunal. The applications for waiver, filed by all the appellants herein, have been filed before us.

20. It is seen from the applications for waiver filed by the appellants that they are all stereotyped. The applications of all the seven appellants contain the very same submissions. There is no specific pleading to the effect that the compliance of the pre-deposit condition would cause undue hardship to the appellants.

21. We agree that it is not necessary for the appellants before the Tribunal to repeat the very same language used in the Proviso to Section 129E parrotlike, for securing an order for waiver. But at the same time, undue hardship, being a question of fact and being a factor that would vary from case to case and from person to person, an obligation is primarily cast upon any person seeking waiver to specifically plead the circumstances, in which, he is placed. But unfortunately, none of the appellants fulfilled this most fundamental requirement, in their application for waiver.

22. As a matter of fact, all the applications for waiver filed by the appellants herein contained six paragraphs. The first paragraph gave details of the duty levied and the penalty imposed. The second paragraph contained a claim that prima facie no demand can be made against them, as they were not importers. The third paragraph made a reference to the grounds of appeal. The fourth paragraph attacked the order in original as an example of gross judicial indiscipline. While doing so, a very weak appeal, that could at the most be termed as apology of a plea of undue hardship, was made. The relevant portion of paragraph 4 of the application for waiver is extracted as follows :

> "Under the said circumstances, the appellants submit that calling upon them to pre-deposit any amounts towards hearing of the captioned appeal would be an onerous one, particularly when the balance of convenience and prima facie case is in favour of the applicants. The applicants further submit that they are going through a deep financial crisis, particularly because goods worth over Rs.2 Crores sold by them on high seas sales to M/s.Ravi Enterprises, Surat are lying at

> Chennai Port, since 2010 and the said dispute was also adjudged by this Honourable Tribunal on more than one occasion."

23. What is extracted above forms part of paragraph 4 of the application for waiver filed by Prachi Silks. But, in so far as the above appellants are concerned, their pleadings fell completely short of even what was pleaded by Prachi Silks. The relevant portion of paragraph 4 of the application for waiver filed by the other appellants, is extracted as follows :

> "Under the said circumstances, the applicants submit that calling upon them to pre-deposit any amounts towards hearing of the captioned appeal would be an onerous one, particularly when the balance of convenience and prima facie case is in favour of the applicants. The applicants further submit that they are going through a deep financial crisis and are not in a position to come up with any amount for pre-deposit, despite they having an excellent case on merits."

24. Therefore, the Senior Panel Counsel was right in his contention that in the absence of the averments pleading undue hardship by providing relevant details, the Tribunal could not have dealt with the issue of undue hardship. Hence, the contention that the relevant parameters indicated in the Proviso to Section 12E were not followed, cannot be accepted.

25. In so far as the prima facie case is concerned, the Tribunal has recorded certain facts. Paragraphs 22.1 to 22.4 read as follows :

> "22.1 Detailed examination of the 4 adjudication orders above, prima facie reveals that advance authorisations were obtained by Vishal Agarwal in the name of his binamidar employees without any plant or machinery installed at the premises falsely declared to be the place of manufacture. Such authorisations were lent to the importers of Bangalore to import silk yarn duty free. They pretended to be high sea sellers on the basis of fabricated documents. Upon clearance of the duty free goods in Chennai Port, those were transported to Bangalore with oblique motive. Mulberry silk yarn imported duty free were not at all used in manufacture in Surat. That defeated the purpose of the advance authorisations. That not only caused evasion of customs duty, but no foreign exchange came to India without any export of finished goods

made.

22.2. The high sea sales prima facie appears to be a premeditated design by importers in collusion with Vishal Agarwal to defraud customs. Importers sent money from Bangalore to Surat routing through angadias. Such money parked in different bank accounts maintained in the name of benamidars, some of whom were holders of advance authorisation. Such money again reverted back as sales consideration of imported goods to the original importers pretending to be high seas sellers. High seas sale was nothing but a cloak and the importers masqueraded as high seas sellers. Ultimate beneficiary of fraud was importers and Vishal Agarwal. The advance authorisation agreements executed by benamidars were no man of means being employees of Vishal Agarwal.

22.3. Prima facie, it also appears that advance authorisations were obtained fraudulently without any plant and machinery installed. False certificates issued by the Chartered Accountant Dipal J.Shah were utilized to get advance authorisations. Such authorisations were used to clear the imports duty free paying commission to Vishal Agarwal. Appellant have not come out with clean hands to show their bona fide. Entire racket operated with hand in glove. Conduits also acted to cause detriment to the interest of revenue and evasion of customs duty of high scale was made by the racket.

22.4 Further, the plea that in earlier occasion, appeals were remanded has no logical sense when the apparent is not real and prima facie the case reveals that Revenue has been prejudiced. Also there is no question of time bar when apparent fraud from record suggests that the appellant should be dealt in the jaws of the law. It is settled principles of law that when import is made under bond, the importer cannot plead immunity from the imposition of redemption fine even though the goods were cleared as has been held by Honourable Supreme Court in Weston Components Vs. Commissioner of Customs, New Delhi - 2000 (115) ELT 278 (SC)."

26. Therefore, the appellants cannot even contend that they have a prima facie case.

27. Yet another arugment was advanced in the course of hearing. Drawing our attention to the table that we have extracted in paragraph 7 above, it was contended by Mr.V.T.Gopalan, learned Senior Counsel that the Tribunal has given waiver ranging from 0% to 100% in those 21 appeals before it, without even giving any reasons as to why the appellants came to be treated differently from one another.

28. But, we do not think that the said contention is correct. A careful look at the table extracted in paragraph 7 above would show that the Tribunal decided the cases into two categories namely (i) those, in which, a duty was levied together with penalty and (ii) those where only a penalty was imposed. It is in cases where what was imposed was only penalty that the Tribunal has given some waiver. In cases where a duty is levied together with penalty, the Tribunal has rounded off the duty amount to the next higher or lower figure and directed the said amount to be deposited.

29. For instance, in the case of Prachi Silks, they were the appellants in two cases. In one case, a duty of nearly about 81 lakhs together with a penalty of Rs.20 lakhs had been levied on them. The Tribunal directed them to deposit nearly 100% of the duty amount, waiving the penalty amount in entirety. The same yardstick appears to have been followed in other cases also. Therefore, we do not find any arbitrary exercise of power by the Tribunal, especially when the facts of the case, as indicated in paragraphs 22.1 to 22.4 of the impugned order, are so glaring.

30. We have one more reason as to why we cannot uphold the objections of the appellants. One company by name Masterstroke Freight Forwarders Private Limited, which was one of the appellants that had filed 21 appeals before the Tribunal (whose name is found at S.No.10 of the table in paragraph 7 above), had already come up with an appeal in C.M.A.No.1473 of 2015 as against the very same common impugned order. That appeal appears to have been dismissed by another Bench of this Court by a judgment dated 31.7.2015. Therefore, we see no reason to interfere with the order of the Tribunal.

31. Accordingly, all the civil miscellaneous appeals are dismissed. No costs. Consequently, all connected pending MPs are also dismissed.

Sd/-
Asst.Registrar (CCC)

/true copy/

Sub Asst. Registrar

RS

To

1.The Commissioner of Customs,
(Port Export), Customs House,
No.60, Rajaji Salai, Chennai-1.

2.The Customs,
Excise & Service Tax Appellate Tribunal,
South Zonal Bench, No.26,
Shastri Bhavan Annexe Building, Haddows Road,
Chennai-6.

1 cc to Mr.V. Sundareswaran, Advocate, Sr. 58232
7 ccs to Mr.S. Ashok Kumar, Advocate, Sr. 58288

CMA.Nos.2110 to 2116/2015
& all connected pending MPs

NM (CO)
kk 12/1