

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7981 OF 2015

Deepak Fertilisers and Petrochemicals Petitioners
Vs.
The Union of India & Others Respondents

Mr. V. Sridharan, Senior Counsel with Mr. Prakash
Shah & Mr. Jas Sanghavi i/by M/s. PDS Legal for the
Petitioners.

Mr. Pradeep S. Jetly and Ms Anamika Malhotra for
the Respondents.

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

DATE : SEPTEMBER 19, 2016

ORAL JUDGMENT (Per Shri S.C. DHARMADHIKARI, J.):

1. Rule. The respondents waive service. By consent of
the parties, rule made returnable forthwith and heard finally.

2. This writ petition challenges an order passed on
2-5-2011 by the Customs (Preventive), Alibaug Division.

2A. Very few facts are required to be noted for
appreciating the submissions of the learned Senior Counsel
appearing for the petitioners that the impugned assessments

have been finalised in violation of the principles of natural justice. Hence, the impugned communications finalising the same should be struck down only on that ground alone.

3. It is the case of the petitioners that the respondents, who are exercising powers under the Customs Act, 1962, had pursuant to certain imports by the petitioners, details of which are set out in paras 6 to 9, were concerned with 11 bills of entry. The bills of entry concerned the period January, 2006 to April, 2009. Respondent No.4 assessed the bills of entry provisionally in terms of Section 18 of the Customs Act, 1962 for want of test reports. Accordingly, samples were drawn from the imports made and the same were sent for testing. The petitioners' case is that the outcome of the test has not been communicated to them till date. Thereafter, they were served with Show Cause Notice dated 22-2-2010 proposing to finalise assessments by including certain costs incurred after importation of the goods, on the ground that such expenses can be included in terms of Rule 10(2) of the Customs Valuation (Determination of Price of

Imported Goods) Rules, 2007. Annexure-B is a copy of the Show Cause Notice.

4. The petitioners claim that they had replied in detail to this Show Cause Notice denying all the allegations. The claim of the petitioners is that instead of finalising the assessments or adjudicating the Show Cause Notice, the petitioners were communicated by the impugned letters that the respondents have finalised the matter and they are required to pay the differential duty. The communication in that behalf and impugned in this petition (at page 54) reads as under:-

*“OFFICE OF THE ASSISTANT COMMISSIONER OF CUSTOMS
(PREVENTIVE), m7p WING, ALIBAG DIVISION, KOLIWADA,
ALIBAG, DIST. RAIGAD, MAHARASHTRA, PIN-402 201.*

*F.No.VIII/1-101/ABG-CUS/FA/PNP/Gr'B'/10/224
Dharamtr, the dt. 02/05/11*

*To,
M/s. Deepak Fertilizers & Petro Chemicals Corpn. Ltd.,
Opp. Golf Course, Shastri Nagar, Yerwada, Pune-411 006.*

*Sub: Finalisation of provisionally assessed bills of entry for the
year 2005-06-reg*

*With reference to the above it is to inform you that a
special drive was undertaken for finalization of bills of entry
which were assessed provisionally. The Commissioner of*

Customs (Prev.) had nominated Shri C.S. Mishra, Deputy Commissioner of Customs, (P&V), Mumbai as proper officer i.e. Deputy Commissioner of Customs (P), Alibag for limited purpose of finalization of provisional assessment of Bills of Entry for the year 2007-08 in respect of PNP port, Dharmtar, Alibag Division under F.No.SD/INT/ADMN/35/08/RI, dtd. 13.12.2010. An annexure showing the details of Bills of Entry pertaining to you, which have been finalized by him is enclosed herewith. Besides, the attested copies of bills of entry are also enclosed.

You are requested to pay duty short paid amounting to Rs.7677173/-, within 15 days of receipt of this let. You are also requested to pay interest on the duty short paid as shown in the enclosed Annexure, in terms of Section 18(3) read with Section 28AB of the Customs Act, 1962.

Sd/-

(P.G. KINARE)

Encl: As above

Customs (Prev.), Alibag Division"

5. Mr. Sridharan submits that the issue raised in this petition is squarely covered by Judgments of this Court and in that regard our attention is invited to Division Bench Judgments of this Court in the case of **Balaji Impex Vs. Union of India**, reported in 2012 (279) E.L.T. 485 (Bom.) and **Zuari Agro Chemicals Ltd. Vs. Union of India**, reported in 2014 (307) E.L.T. 874 (Bom.). It is submitted that even in the case of **ISMT Ltd. Vs. The Union of India and Others** {Writ Petition No.6010 of 2011}, decided on 1-8-2011, this Court deprecated the

tendency of the respondents in finalising the provisional assessment of certain bills of entry under a special drive. The impugned communications in those matters and which are identical to the present case were set aside.

6. The Senior Counsel urges that therefore this writ petition be allowed. It should also be allowed because against the impugned letters the petitioners had preferred an appeal before the Commissioner of Customs (Appeals) and that has been dismissed as barred by limitation. Even that was decided *ex parte*.

7. On the other hand, Mr. Jetly, appearing on behalf of the respondents invites our attention to the affidavit in reply, particularly to paras 2 to 11 thereof. He would submit that the petitioners were issued a Show Cause Notice. They were also issued a letter dated 18-3-2010 to furnish all the documents. It is true that reply was filed to the Show Cause Notice on 19-4-2010 denying all the allegations. The finalisation of the provisional assessment was undertaken and that was completed. Upon its

completion, the petitioners were duly informed that the finally assessed bills of entry are orders of assessment and, therefore, appealable. The appeal ought to have been filed within the period of limitation prescribed by law and which commences from the date of communication of the initial order. Therefore, the Commissioner of Customs (Appeals) was right in dismissing the appeal as barred by limitation. Now the petitioners have challenged the original orders and after having unsuccessfully impugned them in appeal.

8. We have heard both sides. True it is that an appeal had been filed by the present petitioners. Further, it is true that it was dismissed as barred by limitation. However, what we have before us is a communication in all the cases and which is referring to a special drive. That drive was undertaken for finalisation of bills of entry which were assessed provisionally. Since for a long period of time they were kept pending and without assessment, a drive was initiated to clear those assessments and the files in relation thereto.

9. What we have found from a perusal of the Judgments relied upon by Mr. Sridharan is that this very fact was before this Court in all the three matters in which the Judgments were delivered. It may be that a special drive is initiated to clear all arrears or old files. It may be that the bills of entry which were assessed provisionally were not thereafter taken up for finalisation or no final assessment orders were passed for a long period of time, resulting in either revenue loss or leakage. However, that is no justification for proceeding in the manner deprecated by various Division Benches. It is not as if such finalisation can be done suddenly and without compliance with the principles of natural justice. Once the Revenue concedes the position, that they have issued a Show Cause Notice, called for certain documents and equally taken on record a written explanation and reply to the charges or allegations in the Show Cause Notice, then, it was incumbent upon it have given a complete opportunity to a party like the petitioner of making oral submissions by relying on the record.

This was possible only at a personal hearing. Thereafter, the Adjudicating Officer should have dealt with all the materials and passed a reasoned order, either upholding the demand or allegations in the Show Cause Notice or dropping the proceedings altogether. If this is how normally an adjudication is understood and this process is followed throughout, then, a shortcut or short-shrift cannot be justified. Merely because these are old files does not mean that they are to be disposed of summarily or by one single communication. In the impugned communications we do not find any reason nor do we find any discussion on how the demand or the allegations in the Show Cause Notice have been upheld. It is not as if the petitioners are not called upon to pay any sums, for what they are called upon to pay is duty short paid, meaning thereby the duty paid by the petitioners was found to be deficient and not discharged in full. It is in these circumstances when amounts with interest are to be tendered, then, the least that is expected is that such demand for money is based on a proper, reasoned order and passed with due application of mind. None of these aspects are to be found

in the impugned communications.

10. Therefore, we cannot agree with Mr. Jetly that this case is distinct from those dealt with by several Division Benches of this Court. We are of the view that the controversy stands covered by the Judgments relied upon by Mr. Sridharan.

11. As a result of the above discussion, the writ petition succeeds. The impugned communications/letters are set aside. The petitioners will have to be given an opportunity of being heard by treating the Show Cause Notice dated 22-2-2010 as pending adjudication. In other words, in the event the respondents desire to proceed, then, they must grant an opportunity of personal hearing to the petitioners and allow them to rely upon the entire records and make detailed submissions. Thereafter, a reasoned order reflecting due application of mind by the respondents should be passed. It is only thereafter that the sums can be recovered and subject to all the legal rights of the petitioners being intact. Once we set aside

the impugned communications, then, it is not necessary to decide the other issue as to whether the appeal of the petitioners could have been entertained by the Appellate Authority or not. The Appellate Authority's order also does not stand because it merely confirms the impugned communications.

12. Once the writ petition succeeds in the above terms, then, all that we clarify is that our order does not mean that we have concluded any factual matter, or issues, or controversy on merits. All contentions in relation thereto of both sides are kept open. We also clarify that while passing orders in furtherance of our direction, the respondents shall not be influenced by the impugned letters or communications nor the affidavit in reply filed in this Court and the contents thereof.

(B.P. COLABAWALLA, J.)

(S.C. DHARMADHIKARI, J.)