Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 7124 OF 2014

Nayasa Exports Pvt. Ltd., through Director Mr. Imran Mithwani & Ors. ...Petitioners

Versus

The Union of India, through Central Government Advocates, Dedicated Legal Cell (Customs) & 2 Ors. ...Respondents

Mr. Prakash Shah, with Mr. Jas Sanghavi & Ms. Neha Ahuja, i/b Mr. Yogesh Rohira, for the Petitioners.
Mr. Pradeep S. Jelty, for the Respondents.

CORAM: S.C. DHARMADHIKARI & G.S. PATEL, JJ.
DATED: 11th January 2016

PC:-

1. Heard. **Rule.** By consent, rule made returnable forthwith and heard finally.

2. The Petitioners are aggrieved and dissatisfied by the order passed by the Commissioner of Customs (Appeal). That order dismisses the Petitioners' Appeal for want of compliance of the condition of pre-deposit of Rs. 14,50,00,000/- within three weeks from the receipt of the order dated 18th June 2014.

3. Since the Petitioners could not comply with this condition, their statutory Appeals should be dismissed.

4. Mr. Shah appearing on behalf of the Petitioners raised threefold contentions. His first contention is that the Additional Commissioner of Customs (Export) could not have passed the impugned order.

5. The argument is that an officer of customs in exercise of powers can discharge duties conferred or imposed under the act on another officer of Customs who is subordinate to him. In the present case, the Additional Commissioner adjudicates a show cause notice issued by an officer of the higher rank, namely, the Commissioner of Customs. The second contention is that there is no compliance with the principles of natural justice while passing the adjudication order.

6. The next submission is that the Petitioners had preferred Appeals against the orders in original dated 30th January 2014. The statutory Appeal was placed before the Commissioner of Customs (Appeals). The Commissioner of Customs was seized of and thereafter heard an application for stay. On the said application for stay/interim relief, the Commissioner of Customs (Appeals) made a cryptic and virtually unreasoned order. He failed to apply his mind as to how a *prima facie* case is either made out or not made out. The balance of convenience lies in whose favour and whether the pre-deposit order will cause financial hardship to the Petitioner. There is no application of mind to all the vital aspects and hence, the impugned orders imposing a condition of deposit of Rs.

14,50,00,000/- is not sustainable. In the order in original, it was held that duty drawback of Rs.22,11,84,917/- has been availed of though inadmissible. It is in these circumstances, that the Petitioners approached the Appellate Authority in Appeal and by directing that Rs.14,50,00,000/- would have to be deposited, the Petitioners have been virtually be non suited. The condition imposed cannot be said to be reasonable by any standards.

7. Reliance is placed by Mr. Shah on a Judgment of a Division Bench of this Court *Ambar Aniruddha Mufti vs Commissioner of Customs (Appeals),* reported in 2013 (295) E.L.T. 509 (Bom.). On the other hand, Mr. Jetly appearing on behalf of the Respondents would support the impugned order. He would say that it has been found as to how the duty drawback was inadmissible. The FOB value of Rs.13,71,51,751/- which was declared within the shipping bills has been rejected. The same is directed to be redetermined and thereafter all the consequential orders would indicate that this was not a simple case of any irregularity but of gross illegality. For these reasons he would submit that none of the orders require interference in writ jurisdiction and the Petition be dismissed.

8. We have heard both sides. At the outset we express no opinion on the contentions of Mr. Shah that the adjudication has been initiated by the Commissioner of Customs but the order passed on a Show Cause Notice initiated by him has been passed not by him, but by the Additional Commissioner of Customs who can by no stretch of imagination be held to be at par with him. That is a ground which can be raised and in Appeal. We are concerned here with an order passed at an interlocutory stage on an application for waiver on the condition of pre-deposit and stay of recovery during the pendency of the statutory Appeal. We are not in agreement with Mr. Shah when he reads the interim order of the Appellate Authority in parts and not as a whole. The Appellate Authority not only had in paragraphs 1 to 6 referred to the allegations in the Show Cause Notice and a response thereto of the present Petitioners. The Adjudicating Authority's order is of recovery of duty drawback of Rs.22,88,99,909/- from the Appellant under Section 75A(2) of the Customs Act, 1962.

9. After referring to these allegations, the grounds of Appeal and the contents of the application seeking interim stay, the Commissioner noted that financial hardship and an excellent case on merits are is the essential pleas on which the interim protection and of complete waiver is sought. However, he found on an application of mind and as revealed from paragraph 10 that this was not a case of complete waiver. The *prima facie* case is not found to that extent and in favour of the Petitioners. The *prima facie* finding of misleading declaration and over-valuation of the goods exported to avail the benefit of drawback in DEPB credit is commented upon. Thus, a *prima facie* is not as projected is the conclusion. Further with regard to financial hardship no material was placed before the Commissioner of Appeals. It is, in these circumstances, that he determined a sum of Rs.14,50,00,000/- as the amount, on deposit of which the Appeal would be disposed of on merits.

10. As the compliance was not reported the adjudication on merits of the Appeal would not take place.

11. After having given our anxious consideration to these findings and the arguments of Mr. Shah, we are of the view that interest of justice would be served if the amount of Rs.14,50,00,000/- is reduced. On instructions, Mr. Shah states that a bank guarantee in the sum of Rs. 1,68,00,000/- and as reflected in the order of adjudication has been encashed and appropriated. Further sum of Rs.25,00,000/- is the condition of deposit imposed on the Directors. Taking an overall view of the matter, we are of the view that in the event the Petitioner No. 1 Company deposits a sum of Rs. 5,00,00,000/- without prejudice to its rights and contentions with the Revenue, the further steps to recover the amount of duty drawback as directed shall remain stayed during the pendency of the Appeal. If compliance is reported of deposit of Rs.5,00,00,000/- by Petitioner No. 1, then the insistence by the Commissioner (Appeals) on deposit of separate sums by the Directors is dispensed with. We grant two months time to the Petitioners to comply with this condition. For a period of two months, any coercive measures to recover the sums as directed in the adjudication order shall not be initiated. If the compliance is reported then the Appeals shall be heard on their own merits and in accordance with law uninfluenced by any tentative and prima facie findings either of the Commissioner (Appeals) or of this Court. Needless to state that if compliances are not reported, all consequences in law shall follow. The orders under challenge are modified to this extent. The Petition is disposed of accordingly. There will be no order as to costs.

(G. S. PATEL, J.) **(S. C. DHARMADHIKARI, J.)**