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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO. 2136 OF 2016

Grant Investrade Ltd. & Anr. ...Petitioners

vs

1. Union of India & 4 Ors. ...Respondents

WITH
WRIT PETITION (L) NO. 2137 OF 2016

Induslnd Media & Communications Ltd. ...Petitioners

vs

1. Union of India & 4 Ors. ...Respondents

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Mr Darius Shroff, Sr. Counsel a/w Mr Gaurav Joshi, Sr. Counsel, Mr Akshay Kolse Patil, Mr. Naishadh Bhatia, Ms. Bulbul Singh – Raj Purohit, Mr Brendon P. i/b M/s Crawford Bayley & Co. for the Petitioners in both petitions.
Mr Pradeep S. Jetly for Respondent Nos. 2 and 3.

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

8 SEPTEMBER, 2016

ORAL JUDGMENT (*PER S.C.DHARMADHIKARI J.)* :

By this petition under Article 226 of the Constitution of India, the petitioners seek a declaration that no Customs Duty is payable on the licence fee paid to the overseas licensor in connection with import of set-top boxes and that the petitioners have been rightly paying service tax on the said licence fee. The petitioners also seek writ of mandamus or any other appropriate writ or orders directing the respondents not to demand Customs Duty on the licence fee paid in connection with import of set-top boxes, except by following the due process of law. The Writ Petition has been amended and prayer clauses c(1) to c(3) read as under:-

> "*(c-1) this Hon'ble Court be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ/order/ or direction calling for the records relating to the seizure of the Petitioners goods on 4th August 2016 and 9th August 2016 under panchanamas at* ***Exhibit "K" to Exhibit "M"*** *respectively hereto and after considering the legality and validity thereof be pleased to quash and set aside the impugned orders of seizure.*
>
> *(c-2) this Hon'ble Court be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ/ order or direction calling for the records calling to the orders for provisional release dated 17th and 18th August 2016 at* ***Exhibit***

"O" and Exhibit "P" *respectively hereto and after considering the legality and validity thereof be pleased to quash and set aside the condition of furnishing of bank guarantee for release of the said seized goods.*

(c-3) this Hon'ble Court be pleased to issue a writ of mandamus or a writ in a nature of mandamus or any other appropriate writ/ order or direction calling the Respondents herein their servants, agents and sub-ordinates to:

(i) *refrain from insisting on any bank guarantee for provisional clearance of the seized goods; and*

(ii) *to permit the petitioners to clear the seized goods only on furnishing a bond of the redetermined value or on such terms and conditions as this Hon'ble Court may deem fit and proper."*

2 It is the case of the petitioners that it is engaged in the business of providing the multi-channel downlinking (reception), distribution and transmission technology. It is the licenced Headend in the sky **(HITS)** operator. Above technology enables all pay channels to be received at the central facility and uploaded by the

operators to its satellite after encryption of the channels. The petitioners have obtained several licences and permission as more particularly enlisted in para 1 of the petition. The petitioners state that the infrastructure was installed and it connects the set-top boxes. The petitioners provide the details of all such steps and then contend that the Union of India through the Directorate of Revenue Intelligence has caused an investigation to be made into certain importations. The petitioners have stated that the said set-top boxes are required to meet certain standards, which have been now evolved and made applicable by the Union of India in terms of its policies. The petitioners had an agreement and for importing the set-top boxes from various vendors. The petitioners in para 12 have pointed out as to how the imported set-top boxes are stored in a bonded warehouse and cleared for home consumption.

3 The petitioners then state that the service tax on the activation / licence fee has been paid and thereafter the petitioners obtained another agreement for transfer of licence acquired by Induslnd Media and Communications Limited ("IMCL"). Thereafter the petitioners entered into an agreement for providing incorporated CAC security system for its development in India to comply with the guidelines issued by the Ministry of Telecommunications. The

petitioners also place reliance on certain clauses of this agreement. The petitioners in paragraph 18 of the Writ Petition point out as to how they are paying applicable Customs Duty on the physical import of the set-top boxes under the relevant chapter headings of the First Schedule to the Customs Tariff Act, 1975, respectively. The petitioners have also been duly discharged from Service Tax liability under reverse charge mechanism, in terms of the Finance Act, 1994, as amended. The petitioners state that at no point of time and earlier to March 2016, any objection has been raised by the respondents.

4 However, during March, April – 2016, there were certain investigations and the petitioners were called upon to furnish the information. The petitioners refer to certain communications and then urge that on 15 June, 2016, they duly submitted the detailed information sought by respondent No.3. The petitioners rely on past practice and state that their consignments of set-top boxes were stored in a custom bonded warehouse. They filed certain bills of entry and the details of all these are to be found in paragraph 22 of the Writ Petition. The petitioners, thereafter, through its representatives personally inquired as to why further steps were not allowed to be taken and it was then revealed that the petitioners' representative was summoned for a statement to be recorded. The

petitioners' representative was asked repeatedly whether the licence fee should be added to the value of the set-top boxes for Customs Duty charges, the representative answered that he was not authorized to give any clarification. The petitioners then state that the other petitioner in Writ Petition No.2137 of 2016, IMCL had also lodged similar Bill of Entry. Thereafter, that petitioner was informed that the consignments would be cleared only after obtaining 'no objection certificate' from respondent No.2. Thereafter, the petitioners' representative visited the office of respondent Nos.2 and 3. It was revealed during this personal visit that there are certain queries and which require to be answered. Similarly, the summons was also issued to the representative of that petitioner. The petitioners herein then point out as to how another representative of the petitioner was summoned for giving a statement in terms of Section 108 of the Customs Act, 1962. The petitioners were also apprehensive that the recovery by coercive means would be made, that is why on that apprehension they moved the Writ Petition in this court.

5 The Writ Petition was amended after the development and events of 3 August, 2016. The petitioners have stated in the memo of this Writ Petition that though the respondents assured this court that they would proceed in accordance with law, when such

statement was made before this court, the officers of respondent No.3 visited the Custom Bonded Warehouse at Kalamboli, Navi Mumbai, where the petitioners' goods were stored. They were about to illegally seize 3.48 lacs set-top boxes valued at Rs.37 crores, and claimed that they are required to draw samples. The respondents proceeded on the footing that these goods were cleared for home consumption after avoiding appropriate payments of the Customs Duty and by giving wrong declarations. In the guise of drawing samples, the named goods stored in the warehouse were seized under two panchanamas dated 4 August, 2016, annexures **"K" and "L"** respectively. Thereafter, on 9 August, 2016, additional 1.40 lacs set-top boxes were seized from another bonded warehouse situated at Uran. Thus a total of 4,88,500 set-top boxes of the value of Rs.52 Crores, were illegally seized by Respondent No.3 on the false ground and reason that these were liable for confiscation under Section 111(m) of the Customs Act, 1962. This was on the ground that these goods were claimed to be cleared by the petitioners for home consumption. The petitioners made an application for provisional release of these goods. They pointed out that the present dispute was a pure valuation dispute, the entire seizure was unreasonable as the disputed additional Customs Duty amounted to only Rs.53,38,212/- in respect of the seized goods, whereas the Customs Department has seized the goods worth Rs.52,79,52,015/-. The set-top boxes were imported with a view to implement the Government policy regarding digitalization of the cable industry in the rural areas. The petitioners, therefore, pray that a provisional release order was to be passed. However, as assured before this Court the orders were made against a bond of the redetermined value of the seized goods and a Bank Guarantee of 25 % of the redetermined value which include the licence fee @ US$ 0.525 per unit of set-top boxes without exemption benefit. It is, this provisional order, which now is challenged in these proceedings.

6 It is the case of the petitioners that by these orders, though provisional release of the seized set-top boxes is permitted, the condition imposed for such release is arbitrary, unreasonable and unfair. Now, the condition imposed is of furnishing 25 % Bank Guarantee of the re-determined value of Rs.54.55 crores. That means the bank guarantee would be of Rs.13.63 Crores though the differential duty claimed is only in the sum of Rs.54 Lacs. It is, therefore, urged by Mr Shroff, learned Senior Counsel appearing for the petitioners that the orders are harsh, arbitrary and unreasonable. The petitioners were ready and willing to pay the full duty on the redetermined value of the set-top boxes at the time of

clearance for home consumption, however, the petitioners are not agreeable to the above conditions and as clarified by them in their advocate's letter dated 26 August, 2016.

7 Mr Shroff has taken us through the petition and annexures thereto. He submits that at page Nos.109 to 111 of the paper book, there are three communications of April 2016, wherein the petitioners clarified that though imported set-top boxes are intended for retail sale, they availed of 4 % Special Additional Duty ("SAD") exemption, but as against the Bills of Entry in respect of which this exemption was availed of, the petitioners do not wish to take it. They wish to pay 4 % SAD and as detailed in said letters. Essentially, the contention of Mr Shroff is that the Deputy Director and particularly the Directorate of Revenue Intelligence (for short "DRI") has completely taken over the functions of the authorities under the Customs Act, 1962, as far as this seizure is concerned. The Customs Officials are acting at the behest of the Directorate. It is the Directorate, who is undertaking the task of redetermining the value. It is not permissible for that Directorate as it is the duty and the function of the Customs Authorities while assessing Customs Duty, if any payable to take into consideration all such materials. Mr Shroff has taken through the affidavits filed in reply.

8 He would submit that in the first affidavit in reply, which has been filed on 16 August, 2016, it has been stated by the respondents, and particularly, DRI that the investigations are going on. The investigation though going on, according to these respondents, the petitioners have evaded Customs Duty. They have disclosed completely their stand on merits. It is, in these circumstances that the Writ Petitions, according to Mr Shroff, are maintainable. Our attention is invited by him to certain paragraphs of the letter dated 6 August, 2016 addressed by DRI, Mumbai Zonal Unit to the Commissioner of Customs.

9 Our attention is also invited to the additional affidavit in reply to the amended petitions and particularly paragraph 9 thereof. Mr Shroff would submit that his contentions as noted above, stand supported by this stand of the respondents, in particular DRI. For these reasons, he would submit that the Writ Petitions be allowed and the nominal condition which has been imposed in several such instances by Delhi High Court and Punjab & Haryana High Court, be imposed. Mr. Shroff has also relied upon an order passed by the Honourable Supreme Court of India in the case of **Navshakti Industries Pvt. Ltd. Vs. The Commissioner**[1] which upholds

1 2011(267) ELT Case Law Times, 483

the view taken by Delhi High Court in a LPA. That SLP is disposed of on 4 May, 2011 being Civil Appeal No.3940 of 2011.

10 Mr Jetly appearing on behalf of the respondents would submit that the petitioners' request is premature. This court cannot decide the issue on merits and at the stage of provisional assessment or provisional release of goods. Mr Jetly justifies imposing of the conditions by submitting that the petitioners while availing the benefit of the exemption notification urged that the goods are meant for retail sale. The petitioners were availing exemption, and therefore, not required to pay 4 % Special Additional Duty. In the trade there is no retail sale of set-top boxes. The petitioners were aware of this, yet they indulged in this act resulting in evasion of taxes. It is urged by Mr Jetly that the provisional release of seized goods has already been granted. The conditions imposed are for safeguarding the interest of revenue. The values declared at the time of assessment of the bills of entry for warehousing does not take into consideration the licence fee etc. Hence, the payment of Service Tax which is a independent issue cannot control the exercise of jurisdiction by the authorities under the Customs Act. For these reasons and when there is *prima facie* material establishing evasion of duty, this Court should not interfere in writ jurisdiction with the

order of provisional release. He submits that the Writ Petitions be dismissed. Mr Jetly submits that no orders passed and relied upon by Mr Shroff can be taken as a binding principle for exercise of writ jurisdiction by this Court. The discretion has to be exercised on case to case basis and no general rule can be laid down insofar as imposing of conditions is concerned.

11 With the assistance of Mr Shroff and Mr Jetly, we have perused the Writ Petitions and all annexures thereto. Now what is before us is the order of provisional release of the goods. That order was passed pursuant to the request made by the petitioners themselves. The petitioners are really aggrieved by the conditions imposed. It is submitted that the release is ordered provisionally on the condition of furnishing of Bond for re-determined value and Bank Guarantee of 25 % of redetermined value.

12 At the outset, we must record the statement made by Mr Shroff, on instructions, namely, that the petitioners have no objection for furnishing the Bond. They have also no objection insofar as making the payment of the differential duty. The petitioners thus state that the differential duty on licence fee, as computed by them, namely, Rs.53,38,212/- approximately would be paid as and when

the goods are cleared for home consumption. Thus the petitioners would pay the full Customs Duty, differential duty on licence fee pro-rata and Additional Customs Duty also pro-rata, as and when the goods are cleared.

13 The petitioners would also be ready and willing to furnish the Bank Guarantee of 30 % on the differential duty of licence fee. The petitioners are aggrieved and dis-satisfied with the condition of furnishing the Bank Guarantee of 25 % of the re-determined value which include licence fee if paid / payable @ 0.252 % of the set-top boxes with exemption benefit under Notification No. 21 of 2012 dated 17 March, 2012. In that regard it is not necessary to express any final opinion at this stage. The Writ Petitions are filed at the stage of provisional release of seized goods. It would not be appropriate, therefore, on our part to express any opinion on the rival contentions, though the parties have addressed us extensively.

14 The petitioners have, after amendment of the petitions, also filed additional / further affidavits. The petitioners complain that in the garb of drawing samples, the entire consignment at Kalamboli and Uran have been seized. The consignment is of set-top boxes which are valued Rs.4 Lacs and above. They are required for

fulfilling the obligation and in terms of policies of the Central Government. The petitioners have also submitted that in the past, the said consignments were cleared and at that stage the issues raised in the petitions were not raised.

15 We are not expressing any opinion and particularly when the investigations are still in progress, the Directorate of Revenue Intelligence has relied upon several materials including the rules which are applicable for valuation. They submit that there are reasons to believe that the petitioners have resorted to wrong declarations for evading payment of Customs Duty, that is why the goods were seized under the panchanamas. They also refer to all the events. They assure yet that due process of law will be followed. It is, under these circumstances, that we are not inclined to accept the arguments of Mr Jetly that the court must sustain the conditions as imposed. We are clear in our mind that it would be ultimately for the customs authority to take into consideration the issues on merits.

16 On 6 August, 2016, the investigation into the import of Conditional Access System ("CAS") embedded card-less set-top boxes by the petitioners were investigated. The preliminary investigations were carried out. The DRI was of the *prima facie* opinion that the

petitioners are indulged in mis-declaration of value, they are not including the value of the licence fee paid/ payable separately to a third party in respect of CAS software in the imported set-top boxes. The DRI seems to be of the opinion that the licence fee is required to be added in the transaction value of the set-top boxes in terms of Rule 10(1) Clause (c) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. The petitioners are also, according to DRI, wrongfully claiming exemption from payment of Special Additional Duty. The notification in that regard could not have been relied upon and availed of the exemption. Thus, the preliminary investigation revealed, according to the DRI that, though the petitioners urged that these set-top boxes are imported in “Ready to Sale” package condition to mismatch the original price printed on the boxes, they are not entitled for retail sale, but they are provided to the subscribers for use only. As such, no central or state taxes or levies payable at the time of retail sale, are being incurred / paid by the Importer Retail Seller during the course of trade. If none of these set-top boxes are meant for retail sale, then, huge quantity of the set-top boxes, stored at these Customs Bonded Warehouse were seized and that is how the DRI became aware of the alleged illegal activities.

17 We are of the firm opinion that it is only on the

investigation being concluded and appropriate steps taken, that the authorities can issue a show cause notice and demanding amounts now styled as a Customs Duty on the licence fee. That payment, according to the petitioners, cannot be taken into account. The petitioners are relying on the principle that what is really embedded and as claimed, are not goods but it is intellectual property services. They are relying on the payment of Service Tax and in that regard, we do not think that the DRI could have proceeded on the footing and in the facts and circumstances of the present case that there is a definite evasion. It is their duty to bring such cases of alleged evasion to the notice of the customs, which they have after the outcome of the investigation, whenever they are concluded. It is thereafter for the Commissioner of the Customs and all authorities under the Customs Act to take appropriate steps and measures. At this stage we would assume, as Mr Jetly would urge on the basis of the detailed affidavits that, there is a evasion but both affidavits are filed on behalf of the Directorate of Revenue Intelligence. Once these only contain a *prima facie* opinion based on the investigations conducted till date, then all the more it would not be appropriate to accept this as a final version and determine on that basis that any further amounts are payable by the petitioners.

18 In the facts and circumstances of this case and without prejudice to the rights and contentions of the parties, interest of justice would be served if we modify the order of provisional release of the goods in the following terms:

(i) We direct the petitioners to furnish a Bond for securing differential duty payable, if any, on the licence fees and Special Additional Duty so as to secure the redetermined value. That would secure the sum of Rs.54 Crores. Let this be done within two weeks from today;

(ii) We also direct the petitioners to furnish a Bank Guarantee to the extent of 25 %, to secure the amount of the alleged differential duty, on licence fees. This would be in addition to the payments pro-rata detailed particularly in para 12 above. This amount would be paid as and when the goods are cleared. This would be also an condition incorporated in the provisional release order;

(iii) In addition to this and when the petitioners are going to pay Special Additional Duty pro-rata, we do not think that there is any justification for imposing of condition of furnishing the Bank Guarantee of 25 % to secure the redetermined value and as arrived at by the Directorate of Revenue Intelligence and communicated to the Commissioner of Customs. The imposition of that condition in the provisional release order being not justified, we quash and set aside that condition. To that extent the provisional release order is modified;

(iv) The Writ Petitions are disposed of in these terms.

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