IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.12.2016

Date of Reserving the Order	*Date of Pronouncing the Order*
19.12.2016	**22.12.2016**

Coram

The Hon'ble Mr.Justice T.S. SIVAGNANAM

Cont.P.No.2957 of 2016
and W.M.P.No.36401 of 2016
in W.P.No.31734 of 2016

Itspossible Marketing Limited,
(through its Director, Ashishkhetarpal)
Having its registered office at
GN-5, Shivaji Enclave,
New Delhi – 110 027. .. Petitioner

vs

Mr.Mayank Kumar,
Commissioner of Customs, Chennai-II,
Customs House, No.60, Rajaji Salai,
Chennai – 600 001. .. Respondent

WEB COPY

Prayer: Petition filed under Section 11 of Contempt of Court Act to summon the respondent and punish the respondent under the provisions of the Contempt of Courts Act for their wilful disobedience to the paragraph 6 of the order of this Court passed in W.P.No.31734 of 2016 dated 26.10.2016.

https://hcservices.ecourts.gov.in/hcservices/

W.M.P.No.36401 of 2016
in
W.P.No.31734 of 2016

Commissioner of Customs, Chennai-II,
Customs House, No.60, Rajaji Salai,
Chennai – 600 001. .. Petitioner

vs

1.Itspossible Marketing Limited,
(through the Director, Ashishkhetarpal)
GN-5, Shivaji Enclave,
Rajouri Garden,
New Delhi – 110 027.

2.Union of India,
Through the Secretary,
Ministry of Finance, Department of Revenue,
North Block, New Delhi.

3.Additional Department of Revenue
Intelligence,
14, Gopalakrishnaiyer Road,
T.Nagar, Chennai-600 017.

4.Oriental Bank of Commerce,
E.Block, Connaught Place,
New Delhi. .. . Respondents

WEB COPY

Prayer: Petition filed under Article 226 of the Constitution of India to modify the order passed in W.P.No31734 of 2016 dated 26.10.2016 and thus render justice.

https://hcservices.ecourts.gov.in/hcservices/

For Petitioner in Cont P
& Respondents in WMP in WP : Mr.Ankansuri

For Respondent in Cont P
& Petitioner in WMP in WP : M/s.R.Hemalatha
Senior Panel Counsel

ORDER

Heard M/s.R.Hemalatha, learned Senior Panel Counsel appearing for the Department of Customs and Mr.Ankansuri, learned counsel appearing for the contempt petitioner/writ petitioner.

2.In this order, the parties will be referred to as the Department and the petitioner respectively.

3.The contempt petition has been filed by the petitioner alleging wilful disobedience of the order and direction issued in W.P.No.31734 of 2016 dated 26.10.2016. The said writ petition was filed seeking for issuance of writ of Mandamus to direct the Department to release the Bank Guarantee of Rs.85 lakhs; to grant provisional release of the goods covered under the Bill of Entry dated 06.05.2011 and to direct the Department to pay godown charges and compensation for the loss suffered by the petitioner on account of the inaction

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

of the Department. The third relief sought for by the petitioner was not pressed leaving it open to the petitioner to work out the same in accordance with law. So far as the second relief sought for, the Court did not grant the relief as there was no power vested with the authority to grant provisional release by exercising power under Section 110A of the Customs Act as the adjudicating authority has adjudicated the show cause notice and passed the order-in-original dated 16.12.2015. As against the order-in-original, the petitioner has filed an appeal before the CESTAT and therefore, opportunity was granted to the petitioner to move the CESTAT for appropriate relief. With regard to the direction sought for the release of Bank Guarantee furnished by the petitioner as a condition precedent for provisional release of the cargo, the Court took into consideration that the Bank Guarantee which was furnished by the petitioner had expired on 16.01.2015 and it worked itself out and it is a lapsed document and after taking note of the submissions on behalf of the Department, direction was issued to receive a copy of the Bank Guarantee from the petitioner and process the release. This direction was issued in the light of the fact that original files were no longer available with the Department. The petitioner's case is that the Department has not complied with this part of the direction and therefore they are guilty of having committed contempt.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

4.After the contempt petition was filed and notice was accepted by the learned Senior Panel Counsel on 24.11.2016, the Department has filed an application in W.M.P.No.36401 of 2016 for modifying the order dated 26.10.2016 passed in the writ petition. In the light of the same, the petition for modification was directed to be tagged along with the contempt petition and I have heard both the learned counsels elaborately as well as Mr.K.Prashanth Kumar, Deputy Commissioner of Customs.

5.The modification sought for by the revenue is with regard to the direction issued by the Court to release the Bank Guarantee which had already expired. The learned Senior Panel Counsel for the Department as well as the Deputy Commissioner of Customs would contend that at the time when the writ petition was heard by this Court, the respondents were handicapped without the files and were being traced/reconstructed and on oral instructions, it had been stated that if documents pertaining to the Bank Guarantee are furnished, the same shall be considered and released. It is further submitted that in the melee the fact dawned that the Bank Guarantee dated 06.05.2012 which had suffered a huge differential duty of Rs.47,09,381/- along with interest and the balance goods are also not available for seizure as well as Rs.18,48,049/- is left

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

without any safeguard for the revenue. It is further submitted that the order-in-original dated 30.11.2015 stands as on date and mere payment of pre-deposit before the CESTAT cannot absolve the liability of the petitioner. On the above grounds, the revenue seeks for modification of the order passed in the writ petition. Reliance was also placed on the circular of the CBEC dated 16.09.2014. The learned counsel referred to the decision of the Delhi High Court in the case of ***Esson Furnishing Pvt. Ltd. vs Principal C.C. (Import), ICD, Tughlakabad*** reported in ***(2015) 326 ELT 282 (Delhi)***.

6.The learned counsel for the respondent/writ petitioner would contend that the petition for modification is not maintainable and is liable to be dismissed at the threshold. Further, it is submitted that the Department has failed to establish any error or mistake apparent on the face of the record or there was such other material available with the applicant which if not taken into consideration would cause miscarriage of justice. Therefore, it is submitted that if a review petition had been filed on the very same grounds, the same would not have been entertained by this Court. It is further submitted that a party is not entitled to seek a review of the judgment delivered by the Court merely for the purpose of re-hearing and a fresh decision of the case and the finality of the judgment delivered by the Court

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

will not be re-considered except where a glaring omission or patent mistake or grave error has crept in.

7.In support of such contention, reliance was placed on the decision of the Hon'ble Supreme Court in the case of ***Lily Thomas, Etc. vs. Union of India and others*** reported in ***(2000) 6 SCC 224*** and the decision of the Delhi High Court in the case of ***Shri Anil Kumar Jain and another vs. Union of India (UOI)*** reported in ***2005 (82) DRJ 690***. It is further submitted that the circular of CBEC dated 16.09.2014 would have no application to the facts of the present case which is evident from paragraph No.4 of the said circular. Therefore, it is submitted that the officials of the Department are liable to be punished for contempt and the Court may reject the petition for modification and punish the officials for disobeying the direction.

8.The first question to be considered is whether the petition filed by the Department in W.M.P.No.36401 of 2016 to modify the order is maintainable or not? The writ petition has been finally disposed of by order dated 26.10.2016. This application for modification was presented before this Court on 01.12.2016. What is required to be seen is whether on the facts placed by the Department whether the Court is required to modify the order passed in the

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

writ petition. Admittedly, the Department has not pointed out any error or mistake which is apparent on the face of the order passed in the writ petition. In the absence of any such apparent error even a review petition cannot be entertained and therefore, the question of entertaining a petition for modification does not arise. With regard to the grounds which have been pleaded in the affidavit filed in support of the modification petition, the endeavour of the Department is to state that to safeguard the interest of revenue they are entitled to retain the Bank Guarantee. It is not in dispute that the Bank Guarantee was furnished by the writ petitioner as a condition precedent for provisional release of the imported goods. The provisional release has been effected after which the case was adjudicated and order-in-original has been passed on 30.11.2015. This order has been challenged by the writ petitioner before the CESTAT. The writ petitioner has paid 7.5% of the demand in terms of Section 129E of the Customs Act. In terms of the circular dated 16.09.2014 of the CBEC no coercive measures for the recovery of the balance amount i.e. in excess of 7.5% which has been deposited can be made during the pendency of the appeal. The Department does not dispute the fact that the writ petitioner has deposited the said amount.

9.In such circumstances, the question would be whether the Department can refuse to give a letter to release an expired Bank Guarantee which expired

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

on 16.01.2015? In the considered view of this Court, if the Department seeks to retain such an expired Bank Guarantee with a view to secure the interest of the revenue, then the Department should approach the CESTAT for appropriate direction in the appeal filed by the writ petitioner which is now pending. As long as such a direction having not been obtained from the CESTAT, initiation of coercive action to recover the excess amount is barred in terms of the circular of the CBEC dated 16.09.2014. However, the Court is conscious of the fact that the interest of the revenue is required to be protected. In fact, the Deputy Commissioner of Customs who appeared before Court stated that the writ petitioner may be directed to keep the Bank Guarantee alive till the disposal of the appeal before the CESTAT and the Department will not encash the Bank Guarantee. However, such a direction cannot be issued by this Court in this petition which is a petition for modification or review of the order and there is no such jurisdiction vested with this Court to modify the order on the grounds raised. Further, this Court would wish to clarify that the order passed by this Court on 26.10.2016 is an order on merits, the Court has not recorded any concession made by the counsel for the Revenue and has given independent reasons. Further, the Department does not deny the fact that the files relating to the writ petitioner's case are missing. This submission made in the modification petition is in consonance with the submission made by the learned

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

counsel for the revenue during the course of arguments in the writ petition. Thus, in the absence of any error in the order passed in the writ petition, the question of reviewing the order does not arise and the petition for modification cannot be entertained on the grounds raised by the Department.

10.For all the above reasons, W.M.P.No.36401 of 2016 is dismissed. The Department is granted three weeks time to comply with the direction issued in the writ petition. In the light of the fact that the time for compliance of the order is extended by the Court in this order, the contempt petition stands closed. No costs.

SD/
JOINT REGISTRAR(OS)

cse

//Certified to be true copy//

Dated at Madras this the day of 2016.

COURT OFFICER(O.S.)

From 25th Day of September 2008 the Registry is issuing certified copies of the Orders/Judgments/Decrees in this format.

SMI/CO/10/01/2017

To
Mr.Mayank Kumar,
Commissioner of Customs, Chennai-II,
Customs House, No.60, Rajaji Salai,
Chennai – 600 001.

One CC to M/S.R.Hemalatha, Senior Standing Counsel,
SR.16798/2016

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/