

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 28.07.2016

Pronounced on : 14.09.2016

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

W.P.No.17968 of 2016

Hafizulla Davoobhaigari ... Petitioner

Vs.

The Assistant Commissioner of Customs,
Air Admin /Ware House,
Air Customs, Airport,
Anna International Terminal,
Chennai International Airport,
Tirusoolam,
Chennai. ... Respondent

Prayer: Petition is filed under Article 226 of the Constitution of India, directing the respondent to release the goods detained in O.S.No.02 of 2015 Air by implementing and give effect to the Order-in-Appeal viz., C.Cus-I No.782 of 2015 in C4-I/589/O/2015 Air dated 30.11.2015 AIR within a reasonable time frame.

For Petitioner : Mr.A.Ganesh

For Respondent : Mr.V.Sundareswaran

ORDER

The above writ petition has been filed for the issuance of a writ of Mandamus directing the respondent to release the goods detained in O.S.No.02 of 2015 Air by implementing and give effect to the Order-in-Appeal viz., C.Cus-I No.782 of 2015 in C4-I/589/O/2015 Air dated 30.11.2015 within a reasonable time frame.

2. The case of the petitioner is that when the petitioner came from Kuwait on 04.01.2015 and landed at Chennai International Airport, he was intercepted by the Customs at the arrival hall and inventorised the goods and detained the goods viz., 500 grms of Gold valued Rs.14,90,623/- for Adjudication in O.S.No.2 of 2015-Air. Thereafter, the case was adjudicated by the Joint Commissioner of Customs, Airport, Customs House, Chennai, and the said Joint Commissioner confiscated the goods valued at Rs.14,90,623/- under Section 111(I) of the Customs Act read with Section 3(3) of the Foreign Trade (Development &

Regulation) Act, 1992. However, the Joint Commissioner has allowed the petitioner to redeem the goods on payment of Redemption fine of Rs.5,50,000/- and imposed a penalty of Rs.1,50,000/- under Section 112(a) of the Customs Act by its order, dated 30.04.2015.

3. Against the said order, the respondent had filed an appeal before the Commissioner of Customs (Appeals), Customs House, Chennai, in C4-I/589/0/2015-Air. On hearing both sides, the Commissioner of Customs (Appeals)-I was pleased to reject the appeal as devoid of any merit by order made in C.Cus-I No.732/2015 dated 30.11.2015.

4. The further case of the petitioner is that though the order of the appeal was delivered to him on 26.12.2015, the respondent has not implemented the order of the Commissioner of Customs (Appeals) Air, Chennai. The petitioner came to know that there was no revision filed by the respondent before the revisional authority and not obtained any order of the stay against the order of the Commissioner. Therefore, the respondent is bounden duty to implement the order of the Commissioner of Customs, since the respondent is working within the jurisdiction. The principles of judicial discipline require that the order of the appellate authority should be followed unreservedly by the subordinate authorities. Even after his repeated representations and reminders requesting the respondent to implement the order of the Commissioner of Customs, but the respondent has failed to implement the order of the appellate authority dated 30.11.2015. In support of his contention, the learned counsel for the petitioner produced the following decisions:-

- (i) Union of India vs. Kamalakshi Finance Corporation reported in 1991(55) ELT 433 SC.
- (ii) W.P(MD)No.24495 of 2011 in M/s Supra Bio Tech vs. The Chief Commissioner of Customs.
- (iii) W.P.No.9284 of 2006 (Pushpanjali Silks Private Ltd., vs. CC of Customs and another.)
- (iv) Collector of Customs, Bombay vs. Krishna Sales (P) limited reported in AIR 1994 SC 1239.
- (v) W.P(MD)No.18536 to 18538 of 2016 (Mohamed Ansar Abdul Gafoor vs. The Assistant Commissioner of Customs).
- (vi) Rabiya Bee vs. The Principal Commissioner of Customs (Airport) and others (W.P.No.19960 of 2016 batch dated 17.06.2016).

5. The case of the respondent is that though the Commissioner of Customs has passed the order on 30.11.2015, against which, the respondent has filed a revision along with stay petition under Section 129DD of the Customs Act, 1962 before the revisional authority, the same is pending till date. To support his contention, he has given a list of dates for filing revision for the 14 cases including this case. Therefore, the respondent

argued before this Court that once he filed a revision against the order of the Commissioner of Customs, the petitioner ought to have approached the revisional authority or he should wait till the order passed by the revisional authority and the writ petition filed by the petitioner is not maintainable. Therefore, this writ petition is liable to be dismissed.

6. Heard Mr.A.Ganesh, learned counsel appearing on behalf of the writ petitioner and Mr.V.Sundareswaran, learned counsel appearing on behalf of the respondent.

7. Admittedly, the respondent has filed the revision before the revisional authority, but counsel for the respondent has not produced any particular that when the revisional authority has issued the notice to the petitioner? and what was the date fixed by the revisional authority for hearing and dispose of the case?

8.Once the appellate authority, namely, the Commissioner of Customs has passed the order on 30.11.2015 and without obtaining any order of the stay of the appeal, the respondent should not keep themselves by disobeying the order passed by the appellate authority.

9.Since the Appellate Authority (Commissioner (Appeals)), after taking into consideration the facts and circumstances granted a partial relief to the Petitioner while declining to interfere with the order for redemption for re-export be reducing the redemption fine and personal penalty. It appears that the Department has not accepted the order and has filed revisions under Section 129DD of the Customs Act, 1962. However the proof of filing such revision has not been readily placed before this Court though it has been stated that the date of filing of the Revision Petition in case to case varies and revisions have been preferred on 16.12.2015. While considering a similar situation, this Court in W.P.No.18536 to 18538 of 2016 has passed the following order:

"6. As pointed out earlier, in the instant case there is no proof to show that the revision petitions have been taken on file and no proof has been produced to show that notice has been ordered to the petitioner. That apart, the order of the Commissioner was passed on 30.06.2015 and the revisions are said to have been presented only on 16.02.2016/05.03.2016. In any event, as on date, the orders which have been passed by the Commissioner (Appeals-I) almost one year back has not been either set aside or modified. Therefore, this Court is of the view that the respondent should comply with the direction subject to certain conditions.

7.In the light of the above, these Writ Petitions are disposed of by directing the respondent to release the Gold Jewellery for the purpose of re-export subject to the petitioner complying with the conditions imposed in the order passed by the Commissioner (Appeals-I) i.e., payment of redemption fine for re-export and

personal penalty and also giving an undertaking to comply with the Order in Original, in the event the Department succeeds in the revision. The above directions shall be complied with by the respondent within a period of three weeks from the date of receipt of a copy of this order. Consequently, connected miscellaneous petitions are closed. No costs."

10. The Hon'ble Apex Court in the case of Union of India vs. Kamalakshi Finance Corporation reported in 1991(55) ELT 433 SC has clearly held that the respondent failed to respect the order of the Apex Court and failed to implement the order shows contempt of Court. Further in the abovesaid order, the Hon'ble Apex Court held as follows:-

6. The High Court has, in our view, rightly criticised this conduct of the Assistant Collectors and the harassment to the assessee caused by the failure of these officers to give effect to the orders of authorities higher to them in the appellate hierarchy. It cannot be too vehemently emphasised that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The Principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is the subject matter of an appeal can furnish on ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to assessment and chaos in administration of tax laws.

7. The impression or anxiety of the Assistant Collector that, if he accepted the assessee's contention, the department would lose revenue and would also have no remedy to have the matter rectified is also incorrect. Section 35E confers adequate powers on the department in this regard. Under sub-section (1), where the Central Board of Excise and Customs (Direct Taxes) come across any order passed by the Collector of Central Excise with the legality or propriety of which it is not satisfied, it can direct the Collector to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be

specified by the Board in its order. Under sub-section (2) the Collector of Central Excise, when he comes across any order passed by an authority subordinate to him, if not satisfied with its legality or propriety, may direct such authority to apply to the Collector (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Collector of Central Excise in his order and there is a further right of appeal to the department. The position now, therefore, is that, if any order passed by an Assistant Collector or Collector is adverse to the interest of Revenue, the immediately higher administrative authority has the power to have the matter satisfactorily resolved by taking up the issue to the Appellate Collector or the Appellate Tribunal as the case may be. In the light of these amended provisions, there can be no jurisdiction for any Assistant Collector or Collector refusing to follow the order of the Appellate Collector or the Appellate Tribunal, as the case may be, even where he may have some reservations on its correctness. He has to follow the order of the right appellate authority. This may instantly cause some prejudice to the Revenue but the remedy is also in the hands of the same officer. He has only to bring the matter to the notice of the Board or the Collector so as to enable appropriate proceedings being taken under S.353(1) or (2) to keep the interests of the department alive. If the officers view is the correct one, it will not doubt be finally upheld and the Revenue will get the duty, though after some delay which such procedure would entail".

In this case on hand, there is no stay as on date. Therefore, the above Judgment is squarely applicable to the case on hand.

11. Apart from that, this Court in W.P(MD)No.24495 of 2011 (M/s Supra Bio Tech vs. The Chief Commissioner of Customs, has held as follows:-

16. on a perusal of the documents available, this Court is of the considered view that the respondent Department ought to have given effect to the order of the Commissioner of Customs (Appeals), Chennai, the appellate authority, dated 16.9.2011, made in C.Cus.No.655 and 656 of 2011, in order to maintain judicial discipline, as held in the decision cited supra.

17. The mere filing of an appeal against the order of the appellate authority, and the pendency of the said appeal, cannot be shown as sufficient grounds for not giving effect to the order of the Commissioner of Customs (Appeals), dated 16.9.2011. Even though the National Centre for Mass Spectrometry, Indian

Institute of Chemical Technology, Hyderabad, had by its communication, dated 9.12.2010, had opined that the samples of the goods imported sent to it, did not show any presence of pesticides or Oxyimtrine, the refusal of the respondents to release the goods in question cannot be held to be valid in the eye of law.

18. It cannot be said that the mere filing of an appeal, against the order of the appellate authority, would not empower the respondents to deny the release of the goods in question. No proper explanation had been given by the respondents, as to why no stay order had been obtained against the order of the Commissioner of Customs (Appeals), Chennai, dated 16.9.2011, even though the said order is said to have been challenged by way of a further appeal. Further, the petitioner cannot be made to suffer due to the detention of the goods in question, which had been imported by the petitioner, under Tariff Heading 1302 1990 of the Customs Tariff Act, 1975, without having proper reasons to do so.

19. The long delay in the release of the goods would, no doubt, reduce its potency, as pointed out by the learned counsel for the petitioner, and its market value would deteriorate to the detriment of the petitioner. The respondents ought to have taken urgent steps to obtain a stay order against the order of the Commissioner of Customs (Appeals), Chennai, dated 16.9.2011, if they had intended to detain the goods in question. However, in the present case, nothing has been shown on behalf of the respondents to substantiate their claim that necessary steps had been taken to obtain the interim order of stay against the order of the appellate authority, dated 16.9.2011.

20. As such, the prolonged detention of the goods in question can only be held to be arbitrary and illegal. It is also noted that an amount of Rs.12,00,000 had already been paid by the petitioner, as duty, in respect of the goods in question.....

12. In yet another case in W.P.No.9284 of 2006 (Pushpanjali Silks Private Ltd., Vs. CC of Customs and another), this Court has held as follows:-

"14. Considering the above submissions made by the learned counsel for the petitioner as well as the Additional Solicitor General, I am of the view that the third respondent is duty bound to implement the orders passed by the Appellate Authority and he cannot flout the orders by not releasing the goods covered by the Bill of Entry in question. As laid down by the Hon'ble Supreme Court in 1991 (55) E.L.T. 433 judicial discipline would require that the authorities are bound by the decision of the Tribunal or the Appellate Authority. Admittedly, though the CESTAT

pronounced Final Order No.174/2006 dated 20.3.2006, the Revenue has not so far obtained any order from the CESTAT suspending the operation of the said order. It is not the case of the Revenue that the order of the CESTAT has been stayed by the Hon'ble Supreme Court of India. Therefore, I am of the view that the principle laid down by the Apex Court of the land in 1991 (55) E.L.T. 433 has to be applied and the third respondent should follow unreservedly the orders of the CESTAT, Chennai. Therefore, the third respondent is directed to release the Mulberry Raw Silk imported under Bill of Entry No.875 113 dated 15.9.2005 as per Sales Contract No.IE/PSR-RS03/2005, dated 17.2.2005 in terms of the Final Order No.174/2006 dated 20.3.2006 of the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

15. Accordingly, the Writ petition is allowed. The third respondent shall release the above said goods covered by the said Bill of Entry on or before 7.4.2006.

13. In another decision of the Hon'ble Supreme Court in the case of Collector of Customs, Bombay vs. Krishna Sales (P) Ltd., reported in AIR 1994 SC 1239, it was held as follows:-

"If the authorities are of the opinion that the goods ought not to be released pending the Appeal, the straight forward course for them is to obtain an Order of Stay or other appropriate direction from the Tribunal or the Supreme Court, as the case may be. Without obtaining such an Order they cannot refuse to implement the Order under Appeal. As is well-known, mere filing of an Appeal does not operate as a Stay or suspension of the Order appealed against. Moreover, such detention is likely to create several complications relating to the demurrage charges besides the possible deterioration of the machinery and goods. We hope and trust that the Collector of Customs, Bombay shall appropriately revise the said public notice in the light of the observations made herein. If he does not do so, there is a likelihood of the Customs Authorities being themselves made liable for demurrage charges in appropriate cases"

The Hon'ble Apex Court Judgment clearly states that inspite of filing appeal does not operate as stay and therefore, the goods detained should be released as per the appellate order.

14. Further, this Court also in W.P.Nos.18536 to 18538 of 2016 dated 07.06.2016, (Mohamed Ansar Abdul Gafoor vs. The Assistant Commissioner of Customs), has held as follows:-

"6. As pointed out earlier, in the instant case

there is no proof to show that the revision petitions have been taken on file and no proof has been produced to show that notice has been ordered to the petitioner. That apart, the order of the Commissioner was passed on 30.06.2015 and the revisions are said to have been presented only on 16.02.2016/05.03.2016. In any event, as on date, the orders which have been passed by the Commissioner (Appeals-I) almost one year back has not been either set aside or modified. Therefore, this Court is of the view that the respondent should comply with the direction subject to certain conditions.

7. In the light of the above, these Writ Petitions are disposed of by directing the respondent to release the Gold Jewellery for the purpose of re-export subject to the petitioner complying with the conditions imposed in the order passed by the Commissioner (Appeals-I) i.e., payment of redemption fine for re-export and personal penalty and also giving an undertaking to comply with the Order in Original, in the event the Department succeeds in the revision. The above directions shall be complied with by the respondent within a period of three weeks from the date of receipt of a copy of this order. Consequently, connected miscellaneous petitions are closed. No costs."

15. The above Judgments are squarely applicable in this case. The Hon'ble Apex Court and this Court in various cases very categorically held that the order of the Joint Commissioner of Customs and the Commissioner of Customs (Appeal) clearly shows that the petitioner has not committed any violation, therefore, they should implement the order of the Commissioner of Customs in a true letter and dispute. Therefore, in my considered opinion that the petitioner is entitled to get release of the gold, since the long delay in release of the goods would, no doubt, reduce its potency and its market value would deteriorate to the detriment of the petitioner. In this case, there is nothing has been shown on behalf of the respondent to substantiate their claim that necessary steps had been taken to obtain interim order of stay against the order of the authority dated 30.11.2015.

16. I am also convinced that mere filing of the revision against the order of appellate authority would not empower the respondent to deny release of the goods in question and the respondent have not given any proper explanation as to why no stay order has been obtained against the order of the Commissioner of Customs (Appeals) dated 30.11.2015, even though the said order said to have been challenged by way of further appeal. Therefore, in my considered opinion that the petitioner cannot be made to suffer due to detention of the goods in question, which had been imported by the petitioner, hence, the

petitioner is entitled to get release of the goods. Accordingly, the writ petition is liable to be disposed of directing the respondent to release the goods (gold) for the purpose of re-exporting subject to the petitioner complying with the conditions imposed in the order passed by the Commissioner (Appeals) i.e., payment of redemption fine for re-export and personal penalty and also giving an undertaking to comply with the Order in Original, in the event the Department succeeds in the revision.

17. Accordingly, I am inclined to pass the following orders:-

(a) The Writ Petition is disposed of directing the respondent to release the goods (gold) for the purpose of re-export subject to the petitioner complying with the conditions imposed in the order passed by the Commissioner (Appeals) i.e., payment of redemption fine for re-export and personal penalty and also giving an undertaking to comply with the Order in Original, in the event the Department succeeds in the revision, within a period of two weeks from the date of receipt of a copy of this order.

(b) In the event there is no stay in the Revision Petition that has been preferred by the respondent, then it is hereby directed that the main revision petition shall be disposed of within a period of eight weeks from the date of receipt of a copy of this order. No costs.

Sd/-
Assistant Registrar (CS VII)

//True Copy//

Sub Assistant Registrar

skn

To

The Assistant Commissioner of Customs,
Air Admin /Ware House,
Air Customs, Airport,
Anna International Terminal,
Chennai International Airport,
Tirusoolam, Chennai.

1 cc to Mr.A.Ganesh, Advocate, sr.52318

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