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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) 5368/2016 & CM APPL 22387/2016

M/s. J B OVERSEAS

..... Petitioner

Through: Mr. Tarun Gulati with Mr. Kishore
Kunal, Mr. Manish Rastogi, Mr. Shashi
Mathews and Mr. Rony O. John, Advocates.

versus

UNION OF INDIA & ORS

..... Respondents

Through: Mr. Sanjeev Narula, CGSC with
Mr. Ajay Kalra, Advocate for R-1, 2, 3,4 & 6.
Ms. Pooja Bhaskar, Advocate for Mr. Satish
Aggarwala, Senior standing counsel for R-5.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE ASHUTOSH KUMAR

ORDER

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08.07.2016

1. This petition was originally listed on 7th July 2016, which was declared a holiday on account of Id-ul-Fitr. The petition is, with the consent of parties, taken up for final hearing today.

2. This is the second round of litigation by the Petitioner, M/s. J.B. Overseas. The first round culminated in a judgment dated 26th April 2016 delivered by this Court in *The Bullion and Jewellers Association (Regd.) v. Union of India 230 (2016) DLT 38*. By the said judgment, which was common to the writ petition filed by M/s. J B Overseas being W.P. (C) No. 936 of 2016, the Court quashed a Circular dated 6th October 2015 issued by the Central Board of Excise and Customs ('CBEC') stating *inter alia* that the gold jewellery imported by the members of the said Association from Indonesia do not satisfy the criteria and should be

denied the benefit of preferential custom duty. The said Circular directed the Assessing Authority to disregard certificates issued by the statutory authorities in Indonesia and the confirmation given by the government-owned companies in Indonesia. This Court also quashed a consequential order dated 20th January 2016 issued by the Assistant Commissioner of Customs (Respondent No. 2 herein) requiring importers of gold jewellery from Indonesia to furnish *inter alia* a bank guarantee ('BG') for 100% of the duty differential for provisional clearance of the goods. Thirdly, the Court also quashed a the letter dated 22nd January 2016 issued by Respondent No. 2, by which M/s. J B Overseas was asked to furnish a BG for 100% of the duty differential involved for the clearance of gold jewellery in terms of the directions given by the CBEC in its Circular dated 20th January 2016.

3. On the very next day after the above judgment was pronounced, i.e., 27th April 2016, the Petitioner submitted a letter to Respondent No. 2 seeking release of the consignment of gold jewellery imported by it from Indonesia without being asked to furnish a BG for 100% of the differential duty. Thereafter the Petitioner sent reminders on 10th, 19th, 20th and 29th May 2016. Despite this, the consignment of gold jewellery imported by the Petitioner from Indonesia under Bill of Entry ('B/E') No. 3970620 dated 20th January 2016 and the further consignment imported under B/E No. 4138435 dated 3rd February 2016 were not released to it. In the above circumstances, the present writ petition was filed seeking directions to the Respondents to release the above consignments consistent with the judgment of this Court.

4. At the first hearing of this petition on 1st June 2016 the Court was informed by Mr. Satish Kumar, learned counsel for the Customs, that

they were contemplating to file an appeal in the Supreme Court against the above judgment dated 26th April 2016 of this Court. The Court then observed in its order that “while that is a possible course of action for the Customs Department to take, the fact remains that as of date, it is incumbent on Respondent No. 2 to process the requests of the Petitioner for release of the imported consignments in accordance with the law as explained by this Court in its judgment dated 26th April 2016.” Today, Mr. Sanjeev Narula, learned counsel for the Customs, informs the Court that an appeal is yet to be filed in the Supreme Court.

5. This Court in its order dated 1st June 2016 issued the following specific directions:

“5. It is, therefore, directed that Respondent No. 2 will pass appropriate orders forthwith on the requests of the Petitioner for release of the consignment of gold jewellery imported by it under B/E No. 3970620 dated 20th January 2016 and B/E No. 4138435 dated 3rd February 2016 and report compliance to this Court on the next date of hearing.

6. The Court would like to add that the excuse that an appeal is contemplated and therefore, no action has been taken to implement the aforementioned judgment of the Court is not legally tenable in view of the decision of the Supreme Court in ***Union of India v. Kamlakshi Finance Corporation Limited*** AIR 1992 SC 711.”

6. Pursuant to the above order, on 2nd June 2016 the Petitioner wrote to Respondent No. 2 *inter alia* making out a case for unconditional release of the consignments. The Petitioner contended that since this Court had in its judgment pronounced on the genuineness of the Country of Origin (‘COO’) Certificates, the benefit of exemption could not be denied to it.

7. Pursuant to the Court's order dated 1st June 2016, the Deputy

Commissioner of Customs Group-III, IV & VI passed the following order of provisional release of the goods in question on 8th June 2016:

“With regard to above subject, it is informed that as ordered by Hon’ble high Court dated 1st June 2016 your Bills of Entry No. 3970620 dated 20th January 2016 and 4138435 dated 3rd February 2016 has been assessed provisionally on 7th June 2016 without having any influence of any circular, directions with PD Bond of an amount equal to the difference between the duty that may be finally assessed or; reassessed, and provisional duty of the value of the goods and getting deposit 20% of provisional duty in terms of Regulation 2 of Customs (PDA) Regulations, 2011 and Bank Guarantee of 50% of differential duty in terms of Regulation 4 of Customs (PDA) Regulations, 2011 till the finalization of the matter. As there is no option in EDI System to deposit cash in terms of Regulation 2 of aforesaid Regulations. Hence, you may submit the deposit and security in total i.e., 70% of provisional duty in the shape of Bank Guarantee.”

8. When the present petition was listed before the Vacation Bench on 13th June 2016, learned counsel for the Petitioner sought to impugn the aforesaid communication/order dated 8th June 2016 by amending the petition. By the subsequent order dated 24th June 2016, the application seeking amendment was allowed and the amended petition was taken on record.

9. This Court has heard the submissions of Mr. Tarun Gulati, learned counsel for the Petitioner and Mr. Sanjeev Narula, learned counsel for the Respondents.

10. A preliminary objection has been raised by Mr. Sanjeev Narula that the impugned communication/order dated 8th June 2016 is appealable before the Commissioner of Customs (Appeals) and, therefore, this Court should not entertain the present writ petition.

11. As far as the above preliminary objection is concerned, this Court

finds that the legal issue involved in the present petition has already been elaborately discussed by this Court in its judgment dated 26th April 2016. Specific directions were also issued. All that was required to be done was for the Respondents to implement the said directions. The Court instead finds that the impugned communication/order dated 8th June 2016 has failed to comply with the said directions in letter and spirit. Despite the goods having been imported more than five months ago, they have still not been released, even on provisional basis. The Court is therefore of the view that relegating the Petitioner at this stage to the alternative remedy of a statutory available would further delay the matter and multiply litigation. The preliminary objection is therefore overruled.

12. On merits, reliance was placed by Mr. Narula on a collective reading of Regulation 2 (2) of the Customs (Provisional Duty Assessment) Regulations, 2011 [‘CPDA Regulations’] with Regulation 4 thereof. For easy reference, the said Regulations read as under:

“2. Conditions for allowing provisional assessment –

(1) Where

(a) an importer or an exporter, as the case may be, is unable to make self-assessment under sub-section (1) of Section 17 of the Customs Act, 1962 (52 of 1962) and makes a request in writing to the proper officer for assessment; or

(b) the proper officer on account of any of the grounds specified in sub-section (1) of Section 18 of the said Act, is not able to verify the self-assessment or make re-assessment of the duty on the imported goods or the export goods, as the case may be,

he shall make an estimate of the duty to be levied (hereinafter referred to as the provisional duty).

(2) If the importer or the exporter, as the case may be, executes a bond in an amount equal to the difference between the duty that

may be finally assessed or reassessed and the provisional duty and deposits with the proper officer such sum not exceeding twenty per cent of the provisional duty, as the proper officer may direct, the proper officer may assess the duty on the goods provisionally at an amount equal to the provisional duty.

...

4. Surety or security of the bond. -

The proper officer may require that the bond to be executed under these regulations may be with such surety or security, or both, as he deems fit.”

13. As far as Regulation 2 (2) is concerned, it only talks of the importer having to execute a bond for an amount “equal to the difference between the duty that may be finally assessed and re-assessed and the provisional duty” and deposit such sum not exceeding 20% of the provisional duty. As far as Regulation 4 is concerned, it provides that the proper officer ‘may require’ that apart from the bond, i.e, the importer being asked to furnish ‘surety or security, or both, as he deems fit.’ In the above context, its judgment in *The Bullion and Jewellers Association (Regd.) v. Union of India* (*supra*) observed as under:

"55. As far as the circular dated 20th January 2016 is concerned, Regulation 2 (2) of the CPDA Regulations provides for a maximum payment of only 20% of duty differential in the case of a provisional assessment. The insistence on a bank guarantee for the entire differential duty appears to be contrary to Regulation 2 (2). The Court is unable to accept the plea of Mr Dubey that the above Circular emerges from the Regulation 4 and is intended to adequately secure the Revenue and ensure uniformity of provisional assessments across all ports. The said Circular does not leave the issue of what conditions should be imposed for provisional assessment to the concerned customs officer. It requires the officer to demand 100% bank guarantee even in respect of those B/Es which have been provisionally assessed under Section 18 of the Act. It certainly is contrary to proviso (a) to Section 151 A inasmuch it dictates to the customs officer in what manner he should complete a provisional assessment. The consequent

impugned letter dated 22nd January 2016 came to be issued to M/s. J.B. Overseas only on the basis of the said Circular.

56. The Court, therefore, holds that the impugned Circulars dated 6th October 2015 and 20th January 2016 are ultra vires Section 151 A of the Act and unsustainable in law."

14. It is sought to be urged by Mr. Narula that in requiring the Petitioner to furnish, in addition to the bond and deposit of 20% of the provisional duty, a BG/cash deposit for 50% of the provisional duty, the officer concerned was only exercising his discretionary power under Regulation 4. On the other hand, it is pointed out by Mr. Tarun Gulati for the Petitioner that the gold jewellery was imported from the same Indonesian Supplier- PT Antam owned by the Government of Indonesia. The COO Certificate issued by the said PT-Antam, verifying that the jewellery had been made using gold mined in Indonesia, had been accepted as genuine and sufficient by this Court and as fulfilling the condition for availing the benefit of exemption as far as payment of customs duty was concerned. It is, therefore, submitted that the Petitioner is in fact entitled to unconditional release. By way of a demurer, Mr Gulati submits that the Petitioner is willing to provide the bond and deposit in terms of Regulation 2 (2) of the CPDA Regulations. However, Mr. Gulati contends that there is no justification for requiring the Petitioner to also make a further deposit or furnish a BG for 50% of the provisional duty as a condition for provisional release of the goods in question.

15. In the first place, it requires to be noted that the order/communication dated 8th June 2016 does not give the reasons for requiring the Petitioner to deposit or to furnish a BG for 50% of the provisional duty for release of the goods pending finalization of the assessment.

16. Mr. Narula sought to suggest that although the order dated 8th June 2016 does not set out the reasons, the notings on the file, prepared by the same officer who passed the above order, state that on account of the financial condition of the Petitioner it is necessary to seek as security 50% of the provisional duty.

17. The Court is unable to appreciate the above submission. The impugned order dated 8th June 2016 which requires that in addition to the bond and deposit of 20% of the provisional duty, the Petitioner should either deposit or furnish a BG for 50% of the provisional duty, must itself set out the reasons for such a decision. In other words, the requirement of the law is not satisfied if the reasons are not contained in the order communicated to the Petitioner but in the file notings which are not communicated. The inescapable conclusion is that the impugned order dated 8th June 2016 to the extent of requiring the Petitioner to furnish a BG for 50% of the provisional duty in terms of Regulation 4 of the CPDA Regulations is without reasons and therefore unsustainable in law.

18. Even otherwise, there appears to be no legal justification for insisting on the Petitioner furnishing as security a BG for 50% of the provisional duty. The power under Regulation 4 of the CPDA Regulations is a discretionary one and has to be exercised for valid reasons, where there is a real apprehension of non-compliance with the requirements for availing the exemption. It is not a power that can be exercised mechanically. In the context of the conditions imposed for provisional release of imported goods under the CPDA Regulations, the Supreme Court in ***Commissioner of Customs v. Navshakti Industries Pvt. Ltd.*** 2011 (269) ELT A146 (SC) modified this Court's order and permitted provisional release on the importer furnishing a BG for 30% of the differential duty. In ***Zest***

Aviation Pvt. Ltd. v. Union of India 2013 (289) ELT 243 (Del), this Court modified the conditions imposed for provisional release of imported aircraft by requiring the importer to furnish a bond for 100% of the value of the aircraft and a BG for 30% of the differential duty. This was later followed by the Court in *Spirotech Heat Exchangers Pvt. Ltd. v. Union of India 2016-TIOL-344 HC-Del-Cus* and *Daya Enterprises v. The Commissioner of Customs (Export) 2016-TIOL-695-HC-Del-Cus*.

19. As far as the present case is concerned, the Petitioner appears to have fulfilled the basic condition for availing the exemption viz., furnishing the COO certificate from PT-Antam as required by law. The decision of this Court in *The Bullion and Jewellers Association (Regd.) v. Union of India (supra)* supports the case of the Petitioner in this regard. Although the Petitioner may be justified in insisting on unconditional release of the goods in question, considering that the Respondents intend filing an appeal against the said judgment and the Petitioner has by way of a demurer agreed to furnish a bond for 100% of the differential duty and deposit 20% of the provisional duty for the provisional release of the goods, the Court considers it appropriate to modify the impugned order dated 8th June 2016 only to the extent of deleting the condition that the Petitioner should additionally deposit or furnish a BG for 50% of the provisional duty.

20. Accordingly the Court modifies the impugned order dated 8th June 2016 by deleting the condition that the Petitioner should additionally deposit or furnish a BG for 50% of the provisional duty in terms of Regulation 4 of the CPDA Regulations. The goods in question imported under B/E No. 3970620 dated 20th January 2016 and B/E No. 4138435 dated 3rd February 2016 shall be released to the Petitioner, not later than

one week from today, upon the Petitioner furnishing a PD bond equivalent to 100% of the differential duty and making a deposit or furnishing a BG for a sum equivalent to 20% of the provisional duty.

21. The writ petition and the pending application are disposed of in the above terms.

22. Order be given *dasti* under the signature of the Court Master.

