IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1869 OF 2016

Rupin Bankar .. Petitioner
Vs.
The Union of India & Ors. .. Respondents

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Mr. Sanjay Kantawala a/w. Mr. Brijesh Pathak, Advocate for the Petitioner.
Mr. Pradeep S. Jetly, Advocate for the Respondents.

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CORAM : S.C. DHARMADHIKARI AND PRAKASH D. NAIK, JJ.

DATED : APRIL 10, 2017.

P.C. :

This writ petition under Article 226 of the Constitution of India challenges a show-cause notice dated 26th August, 2015, copy of which is Annexure – A to the petition.

2 The petitioner seeks a declaration that this show-cause notice is not maintainable for the simple reason that it is issued '*ex-fecie*' without jurisdiction.

3 Firstly, we notice certain undisputed facts.

4 The Petitioner does not dispute that he is a Indian citizen and businessman of repute. He was associated in the capacity of Director of one Terrapolis Commercz Pvt. Ltd.

5 The first respondent is the Union of India whereas the second and third respondents are the Commissioner and Additional Commissioner of Customs respectively exercising powers under the Customs Act, 1962.

6 A show cause notice dated 14th May, 2013 was issued by the third respondent to the above private limited company. The statement of the petitioner dated 13th December, 2012 recorded during investigation was relied upon. That show-cause notice was adjudicated and an Order-in-Original dated 5th June, 2013 was passed by the respondent.

7 Aggrieved and dissatisfied with this order, the private limited company preferred an Appeal before the Commissioner (Appeals). That came to be dismissed as the condition of pre-deposit was not complied with. Though there was an application for review and pending, that was not considered. Subsequently, the Appeal itself was dismissed on 27th June, 2014.

8 Further aggrieved, the company carried the matter to the CESTAT. The CESTAT on 1st September, 2014 allowed the company's Appeal. It set aside the order of the first appellate authority as also the adjudication authority. The matter was to be adjudicated afresh. However, the second respondent in this petition made an application seeking to rectify the order passed by the Tribunal dated 1st September, 2014. At his request, the matter was remanded not to the adjudicating authority but to the appellate authority. That application for rectification was allowed on 13th February, 2015. The matter stood remanded to the Commissioner (Appeals) and is pending.

9 The petitioner does not also dispute that a similar show-cause notice was issued after conducting investigation by the very adjudicating authority to one Merill Tradecom Pvt. Ltd. (for short "Merill"). During the course of investigation as against that company, the statement of petitioner was recorded. That was relied upon. The show-cause notice against M/s. Merill was also adjudicated, an order of adjudication was passed on 5th June, 2013 and that company as well preferred an Appeal to Commissioner (Appeals). A conditional order was passed on the

stay application by the Commissioner (Appeal) which was sought to be modified, but, subsequently, what transpires is that a modification application was preferred by M/s. Merill. That modification application is still pending. A personal hearing was fixed on 18th August, 2015, but none knows the fate of this modification application.

10 In the meanwhile, a show-cause notice was issued (impugned show-cause notice dated 26th August, 2015) and that is against the petitioner. Section 112(a) of the Customs Act, 1962 has been relied on insofar as the petitioner is concerned. That is for imposition of penalty for improper importation of goods. Then reliance is placed on the statement of the petitioner recorded during the course of investigation against the above companies. That statement according to the petitioner was recorded on 13th December, 2012.

11 Now, at this belated stage when the substantive show-cause notices were adjudicated, Orders-in-Original and in Appeal were passed, implicating and involving the petitioner is impermissible in law. Now, the petitioner's fate is sealed and no impartial adjudication is possible. The petitioner's fate will be

decided together with that of the private limited company. In the circumstances, after a gross delay of three years and more this show-cause notice could not have been issued. Secondly, it could not have been issued when at the first instance the revenue did not deem it fit and proper to implicate and involve the petitioner. Lastly, the same set of allegations and the same statements being relied upon would mean that the petitioner was deliberately not chosen for issuance of a show-cause notice, but, now the Revenue proceeds against him belatedly. There are no valid grounds or reasons which can be found from reading of the show-cause notice itself so as to proceed against the petitioner.

12 Mr. Kantawala, learned counsel appearing for the petitioner reiterated the above grounds in the Writ Petition. He submitted that this is a case akin to those dealt with by the Hon'ble Supreme Court of India and several High Courts, namely, a second show-cause notice is not maintainable on the same allegations and when on earlier show-cause notice, there was an adjudication order already passed. Therefore, once a statutory authority applied its mind and formed an opinion as regards the liability or otherwise of the petitioner, then, on a second thought it cannot issue a show-cause notice. The show-cause notice

issued on the same set of allegations according to Shri Kantawala, in the present case is, therefore, not tenable.

13 He places reliance on the following judgments:

(1) ***Siemens Ltd. Vs. State of Maharashtra***[1]***;***
(2) ***Dee Kay Exports Vs. Union of India***[2]***;***
(3) ***Twenty First Century Steels (L) Ltd. Vs. Commr. Of C. Ex., Chandigarh***[3]***;***
(4) ***Accurate Chemicals Industries Vs. Union of India***[4]***;***
(5) ***Union of India Vs. Vicco Laboratories***[5]

14 Upon a reading of petition and its enclosures including the subject show-cause notice, we are unable to agree.

15 The show-cause notices, issued earlier are under Section 124 of the Customs Act, 1962 (for short "The Act"). They are dated 14th May, 2013 and issued firstly to M/s. Terrapolis and secondly to M/s. Merill Tradecom. As far as the show-cause notice to M/s. Terrapolis is concerned, in paragraph 3 there was a statement that summons was issued to M/s. Merill Tradecom Pvt.

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1 2007(207) E.L.T. 168 (S.C.)
2 2011 (264) E.L.T. 366 (P & H)
3 2010 (255) E.L.T. 524 (P & H)
4 2015(324) E.L.T. 453 (All)
5 2007 (218) E.L.T. 647 (S.C.)

Ltd. A statement of the petitioner was recorded. That was a statement in which he *inter-alia* stated that Terrapolis belongs to his cousin one Mr. Ravasia. He is new to international trade and, therefore, the petitioner being a close relative, arranged the sales transaction for them without any monetary consideration. The show-cause notice sets out paragraph-wise as to how each of the acts of omission and commission amount to violation of the statue, the rules and regulations. The goods valued were to be confiscated and even penalty was to be imposed on the private limited company.

16 An Order-in-Original was passed on this show-cause notice dated 5th June, 2013. The goods were confiscated, redemption was permitted on payment of redemption fine and equal penalty was imposed on the private limited company.

17 Aggrieved and dissatisfied with this order, the matter was carried in Appeal. The office of the Commissioner of Customs (Appeals) was of the opinion that the private limited company was aggrieved and dissatisfied with an Order-in-Original and that was in the aforesaid terms. Therefore, unless a pre-deposit is made of the amounts stipulated in Commissioner (Appeals) order, the

Appeal cannot be heard. The stay application was heard on 3rd October, 2013, directing the Appellants to deposit the penalty imposed by the lower authority and to submit proof. That period ended on 1st November, 2013. Surprisingly, instead of making payment, a Miscellaneous Application for modification of interim order was filed on 21st October, 2013. On this application, the Commissioner passed an order and rejected it. After having rejected it, he found that there is no compliance with the interim order. Once the terms and conditions of the interim order were not complied with and the miscellaneous application was dismissed, the Appeal itself did not survive and stood dismissed accordingly.

18 Against such a dismissal, the Tribunal was approached and on 1st September, 2014, the Tribunal expressed an opinion that instead of insisting on a pre-deposit and because the goods imported are still under the custody of customs, that is sufficient security. Merely because the amount of penalty as directed has not been deposited, that should not result in a dismissal of the Appeal without adjudication on merits. That is why the Tribunal made the following order:

> *"4.1 Inasmuch as the goods under importation are still in the custody of the Customs pending re-export, the interest of the Revenue is secure. Therefore, as held by the Hon'ble Apex Court in the case of Bhavya Apparels Pvt. Ltd. Vs. UOI – 2007 (216) ELT 347 (SC) there is no need to make any pre-deposit of dues adjudged. Accordingly, we grant waiver from pre- deposit of dues adjudged against the appellant and remand the matter back to the adjudicating authority for decision on merits. Thus, the appeal is allowed by way of remand. Stay petition is also disposed of."*

In such circumstances, firstly the matter was remanded to the adjudicating authority on merits but, later on this mistake was corrected and the matter was relegated/remanded to the first appellate authority. The first appellate authority was therefore to pass an order.

19 We, therefore, do not see how the judgment of the Supreme Court of India relied upon can have any application to the facts and circumstances of the present case. The show-cause notice which was adjudicated earlier but the adjudication order is challenged in Appeal and the Appeal is still pending. Therefore, it

is not as if a show-cause notice duly adjudicated and resulting in a finding or a final conclusion against the petitioner before this Court. In the case before the Hon'ble Supreme Court a second show-cause notice on the same set of allegation came to be issued against those very parties in respect of whom a final order is passed. That is why Hon'ble Supreme Court held that the show-cause notice issued subsequently is without jurisdiction. Such is not the case before us. The adjudication in the show-cause notice is yet to reach finality.

20 Our conclusion as above reinforce the fact that as far as M/s. Merill is concerned, a show-cause notice was issued on 14th May, 2013. The petitioner being the Director of Merill, his statement was recoded. A specific role is attributed to the petitioner inasmuch as in the show-cause notice there are allegations as to how the petitioner facilitated the importation. The show-cause notice refers to the summons issued to the petitioner, his statement and from that carving out a specific role. An Order-in-Original was passed on this show-cause notice in Merill as well. M/s. Merill moved an Appeal.

21 In that Appeal a stay application was filed by M/s.

Merill. On 8th October, 2013 that application was filed and after a detailed hearing on the same, the Commissioner of Customs (Appeals) rejected the same. The entire penalty was to be deposited within 30 days. This order was passed by the Commissioner (Appeals). The modification application was filed seeking a modification of the order dated 8th October, 2013. This modification application is dated 21st October, 2013 but, till date no final orders are passed.

22 It is in the teeth of all this that on 26th August, 2015, the authorities realized that for the sake of completeness and since both are private limited companies, but the associates of the same having not specifically named, for technical grounds, the show-cause notice and the adjudication should not fail. That is why the impugned show-cause notice dated 26th August, 2015 not only refers to the statements of the petitioner and one Rajanya Ravasia but alleges that as far as Rupin Bankar is concerned, he is one of the Directors of the firm M/s. Bankar Corporation Ltd. U.K. The wife of Rupin, Meenakshi was also a Director. Thus, Rupin Bankar is the mastermind in this total operation of import of these bogus memory cards and he hatched this conspiracy of import from his own country. These are the

prima facie allegations against the petitioner. Now, the petitioner is specifically proceeded against. We do not see why in the teeth of the above factual position can a specific show-cause notice not be addressed to the petitioner. That show-cause notice is addressed admittedly before the adjudication against the two private limited company reaching any finality. Therefore, this is not an afterthought or a mere change of opinion. Secondly, this is not a case like before the Supreme Court or other High Courts where the earlier show-cause notices were adjudicated, findings were recorded, conclusions were reached and yet on the same set of allegations, the second show-cause notice was issued to the same parties. We do not see how in the present facts and circumstances and peculiar to the petitioner before us he can claim that this is a second show-cause notice. This is a first and substantive show-cause notice to the petitioner. His role has already been set out in the show-cause notices issued to the private limited companies. It is only with a view to get over any technical objections that a separate show-cause notice has been issued to the petitioner. There is, therefore, no impediment in an adjudication of the show-cause notice issued to the petitioner.

24 However, in order to take care of the apprehensions

of Mr. Kantawala and in the facts peculiar to the petitioner's case, we direct that let the appellate authority decide the matter, namely, the appeal preferred by the M/s. Terrapolic and the modification application by M/s. Merill and, thereafter, the adjudication into the show-cause notice against the petitioner be taken up by the adjudicating authority. In the event the petitioner claims any benefit from the orders passed in the case of the Private Limited Companies, the observations and findings therein can be utilized by the petitioner by incorporating them in his reply to the show-cause notice. The show-cause notice against the petitioner be adjudicated in this order. We clarify that we have not expressed any opinion on the rival contentions as far as the allegations in the show cause notice.

25 All observations made in this order shall be treated as *prima facie* and tentative. The Writ petition is disposed of as above. No order as to costs.

(PRAKASH D. NAIK, J.) **(S.C. DHARMADHIKARI, J.)**