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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 187 OF 2013
IN
WRIT PETITION NO. 871 OF 1994

M/s. Biotor Industries Ltd. … Applicant

vs.

Union of India and Ors. … Respondents

……….

Mr. Pankaj Sawant, Senior Advocate a/w. Mr. V. L. Muralidharan i/b. M/s. Joy Legal Consultants for the Applicant.
Mr. Pradeep S. Jetly for the Respondents.

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CORAM : A.S. OKA & A.K. MENON, JJ.
DATE : 31st OCTOBER, 2017

P. C.

1. The present Notice of Motion is taken out in April 2013 seeking implementation of the following direction issued by the Division Bench of this Court under the Order dated 5th February, 2010:

> *"The Respondents are, therefore, directed to refund duty drawback for the period from 1st June, 1989 to 31st May, 1990."*

2. This Order was challenged by the respondents by filing a Special Leave Petition before the Apex Court which was dismissed on the ground of delay

and merits by order dated 11th November, 2011. An affidavit in reply has been filed by Shri Abhaysinh J. Phalake, Assistant Commissioner of Customs, Export II, Drawback having office at New Custom House, Ballard Estate, Mumbai. In paragraph 3 and 4 of the Affidavit in reply, he has stated thus:

> *"3. I say that Writ Petition No. 871 of 1994 was disposed of by this Honourable court by its order dated 18-09-2009. I say that the above Notice of Motion was filed on 05-06-2013.*
>
> *4. I say that the records pertaining to the above proceedings are not available in this office. I say that the Petitioners were requested to submit documents / records in support of their claim. I say that the Petitioners replied that the same are unavailable with them. I say that the department is therefore unable to examine and process the claim for drawback."*

3. Shri Phalake has conveniently not referred to the order dated 5th February, 2010 which was passed in Review Petition No. 3 of 2010 after hearing the respondents. When the review petition was heard on 5th February, 2010 there was no grievance made that respondents did not have records. The fact that the Special Leave Petition was filed by respondents in the year 2011 shows that record was available with the respondents till 2011.

4. We have perused the averment made in Writ Petition No. 871 of 1994. A chart has been annexed to the said Writ Petition at Exhibit-W giving break up and details of pending draw back claims for the period from 1st July, 1989 to 31st December, 1990.

5. There are specific averments made in paragraph 19 of the Writ Petition mentioning that details of draw back due to the petitioners have been annexed as Exhibit-W. There is a reply filed to the Writ Petition by Mr. S.G. Gawde, Dy. Commissioner of Customs (Drawback),New Custom House, Ballard Estate Mumbai. Paragraph 12 of the said reply deals with paragraph 19 in which there is a specific reliance placed on details given in Exhibit W. The contents of Exhibit-W have not been disputed in the said reply.

6. It is not case made out by the respondents that in terms of the order dated 5th February, 2010 refund of duty drawback has been issued.

7. Thus, the respondents cannot refuse to comply with the order dated 5th February, 2010 which has attained finality. The ground raised that copies of the proceedings are not available in their office is totally unsustainable.

8. Accordingly, we dispose of the Notice of Motion by passing the following order :-

(i) We direct respondents to comply with direction in paragraph 3 of order dated 5th February, 2010 by issuing refund to the petitioners on or before 30th November, 2017;

(ii) Disposed of Notice of Motion shall be placed on **4th December, 2017** under the caption of "**direction**" for reporting **compliance;**

(iii) All concerned to act upon an authenticated copy of this Order.

(A.K. MENON, J.) **(A.S. OKA, J.)**