IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 21.08.2017
CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.22083 of 2017
and
W.M.P.No.23150 of 2017

Chakrapani Vyapar Pvt.Ltd.,
represented by Mr.Alok Sethia, Director,
Plot Nos.36 and 37, 3rd Cross,
Kamalam Nagar, Reddiarpalayam,
Pondicherry-605 010. .. Petitioner

Vs

1.The Commissioner of Customs,
Chennai IV Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai-600 001.

2.The Principal Additional Director General,
Directorate of Revenue Intelligence, Mumbai Zonal Unit,
13, Sir VitthalDas Thackersey Marg,
New Marine Lines, Mumbai-400 020.

3.The Additional Director General (Adjudication),
Directorate of Revenue Intelligence,
New Custom House, Second Floor,
Ballard Estate, Mumbai-1. .. Respondents

Petition filed under Article 226 of the Constitution of India, praying for issuance of a Writ of Prohibition to prohibit the adjudication proceeding commenced against the petitioner by issue of Show Cause Notice in F.No.DRI/MZU/NS/ENQ-02/2265 dated 30.09.2016 and note in F.No.DRI/MZU/NS/ENQ-02/2016/2508 dated 03.11.2016 by the second respondent, with a direction to show cause to the third respondent, as the same is without jurisdiction, issued with a pre-meditated mind, contrary to the provisions of the Customs Act, 1962 and hence invalid and illegal.

For Petitioner : Mr.Joseph Prabakar
For Respondents : Mr.A.P.Srinivas,
Senior Panel Counsel for R1
Mr.V.Sundareswaran,
Senior Panel Counsel for R2 and R3

ORDER

Heard Mr.Joseph Prabakar, learned counsel for the petitioner, Mr.A.P.Srinivas, learned Senior Panel Counsel appearing for the first respondent and Mr.V.Sundareswaran, learned Senior Panel Counsel appearing for the second and third respondents.

2.The petitioner has impugned a show-cause notice issued by the second respondent on the ground that it has been issued with a pre-meditated mind, contrary to the provisions of the Customs Act, 1962 and therefore it is without jurisdiction, invalid and illegal.

3.The case of the petitioner is that the second respondent has arbitrarily impleaded the petitioner as a party to the proceedings without any investigation or enquiry and therefore, continuance of the proceedings under the impugned notice will result in oppression and harassment to the petitioner. It is further submitted that Section 28-AAA of the Customs Act, 1962 cannot be invoked against the petitioner in view of the prohibition available in the said provision itself and therefore, the impugned notice is without jurisdiction. Further, the impugned notice is vague and arbitrary and does not state which part of Section 28 is made applicable to the petitioner, which shows the hesitation on the part of the second respondent to proceed against the importers.

4.The learned counsel for the petitioner, by referring to Section 28-AAA of the Customs Act, 1962, submitted that the said provision would be attracted only in cases where an instrument issued to a person has been obtained by him by means of collusion or wilful misstatement or suppression of facts, for the purposes of the Customs Act or the Foreign Trade (Development and Regulation) Act, 1992 by such person or his agent or employee and such instrument is utilised under the provisions of the Customs Act or the rules or notifications issued thereunder, by a person other than the person to whom the instrument was issued, the duty relatable to such utilisation of instrument shall be deemed never to have been exempted or debited and such duty shall be recovered from the person to whom the said instrument was issued. Thus it is submitted that if at all duty is recoverable, it shall be only from such person to whom the instrument was issued, which is not the petitioner, but the exporter in whose favour the “Focus Product Scheme” scrips and “Merchandise Export from India Scheme” scrips were issued.

5.Further, referring to the proviso to Section 28(1), it is submitted that the action relating to recovery of duty under Section 28-AAA against a person to whom the instrument was issued shall be without prejudice to the action against the importer under Section 28. The impugned show-cause notice does not clearly state the provision in Section 28 and a reference to Section 28-AAA and in the absence of any allegation made by the exporter in any of the statements recorded by the investigating authorities implicating the petitioner, the question of invoking the said provision of the Act does not arise. Further it is submitted that if the legal position is so, invoking of Section 114-A of the Customs Act, 1962, also would not arise in the light of the plain language of the said provision. Thus, the endeavour of the learned counsel for the petitioner is to establish before this Court that in the absence of any allegation against the petitioner such as collusion, fraud or misstatement with that of the exporter in whose favour scrips were issued, the question of invoking Section 28-AAA would not arise and therefore, the show-cause notice is without jurisdiction. Further it is submitted that if such is the factual position, the question of invoking extended period of limitation also does not arise and it is one more ground to hold that the impugned show-cause notice is without jurisdiction.

6.Heard the learned counsels for the respondents on the above submissions.

7.At the outset, it has to be pointed out that the impugned proceedings is only a show-cause notice and not an order. The points which are canvassed by the petitioner to state that the impugned show-cause notice is without jurisdiction as against the petitioner, is not purely a question of law, but mixed questions of fact and law. It is relevant to note that the petitioner is not the only noticee, but there are 156 other noticees to whom the impugned show-cause notice has been issued. The petitioner's case is that nowhere it has been alleged in the impugned show-cause notice that the petitioner has committed any fraud by any exporter. The impugned show-cause notice contains 284 pages and on a cursory reading of the impugned show-cause notice, it is seen that extensive investigation has been conducted by the Directorate of Revenue Intelligence, Mumbai Zonal Unit, Mumbai. The question as to whether there has been any allegation against the petitioner made by the exporters or not and whether the petitioner has acted bonafidely in having purchased scrips from the exporters are all questions of fact which can be agitated only before the adjudicating authority and not before this Court under Article 226 of the Constitution of India.

8.The question as to whether Section 28 or Section 28-AAA would stand attracted, is also not a pure question of law, but involves adjudication into facts. Therefore, at this juncture, this Court does not propose to interfere with the impugned show-cause notice as if it is done, it would be doing so at the very threshold, which is impermissible. The petitioner has been granted sufficient opportunity to place all the materials and it is well open to the petitioner to raise the legal issues which according to them, are wholly in their favour, and also contest the jurisdictional point before the adjudicating authority by submitting a reply. Hence, this Court is not inclined to entertain the writ petition and quash the show-cause notice at the very threshold.

9.For all the above reasons, the writ petition is held to be not maintainable. Accordingly, the writ petition is dismissed, leaving it open to the petitioner to submit their reply to the impugned show-cause notice raising all factual and legal issues and contest the matter before the adjudicating authority. No costs. Consequently, the connected miscellaneous petition is closed.

sd/
ASSISTANT REGISTRAR

/TRUE COPY/

SUB-ASSISTANT REGISTRAR

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To

1.The Commissioner of Customs,
Chennai IV Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai-600 001.

2.The Principal Additional Director General,
Directorate of Revenue Intelligence, Mumbai Zonal Unit,
13, Sir VitthalDas Thackersey Marg,
New Marine Lines, Mumbai-400 020.

3. The Additional Director General (Adjudication),
Directorate of Revenue Intelligence,
New Custom House, Second Floor,
Ballard Estate, Mumbai-1.

+1 CC to Mr. Joseph Prabakar, Advocate Sr.No.60127
+1 CC to Mr. A.P. Srinivas, Advocate Sr.No.60325
+1 CC to Mr. V. Sundareswaran, Advocate Sr.No.60086

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W.M.P.No.23150 of 2017

SK (CO)
TA-27/09/2017