IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.01.2017

CORAM:

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER

W.P.NO.341 OF 2017
AND WMP NO.379 OF 2017

M/s.Brite Garments
No.2, Bridgeway Colony Extn.,
Tirupur – 641 607.
Represented by its Proprietor
Shri R. Doraiswamy ...Petitioner

Vs.

1. The Assistant Commissioner of Customs
   Revenue Recovery Unit
   Custom House
   No.60, Rajaji Salai,
   Chennai – 600 001.

2. The Assistant Commissioner of Customs
   (EPCG)
   Custom House
   No.60, Rajaji Salai,
   Chennai – 600 001. ...Respondents

PRAYER: Petition filed under Article 226 of the Constitution of India for the issuance of Writ of Certiorari, to call for the records of the respondents in F.No.RRU 05/2015-EPCG dated 05.08.2016 and F.No.S45/523/2001-EPCG leading to issuance of Order-in-Original No.15762/2011 dated 25.04.2011 and quash the same.

For Petitioner : Mr.S.Krishnanandh
For Respondents : Ms.Hema Muralikrishnan

O R D E R

1. On the previous date, i.e., 06.01.2017, I had asked Ms.Hema Muralikrishnan, to ascertain as to whether or not, the contention of the petitioner that he had fulfilled export obligation, was correct.

1.1. Ms.Hema Muralikrishnan, has reverted with instructions.

1.2. Learned counsel says that the petitioner's contention that he had fulfilled export obligation is correct.

2. Therefore, the only defence, which has been put forth by Ms.Hema Muralikrishnan, in opposition to the reliefs sought in the writ petition, is that, the petitioner has slept over his rights, and therefore, the action should be dismissed in limine.

3. On the other hand, learned counsel for the petitioner says that not only the action of the Department in encashing the Bank Guarantee, equivalent to the value of Rs.3,55,000/-, on the earlier occasion, was illegal, but, the impugned recovery order, would also not be sustainable in law, as the entire matter proceeded on a mistake of fact, which is, that the petitioner had not fulfilled the Export Obligation.

3.1. It is the contention of the learned counsel for the petitioner that the petitioner could be mulcted with duty, only if he had failed to fulfill the obligation undertaken by him in that behalf. Since, the conditions of the bond, according to the petitioner, stood fulfilled, as was evident upon perusal of Export Obligation Discharge Certificate (E.O.D.C.) dated 29.07.2013, the action of the respondents in seeking to recover duty both in the past and present was in violation of the provisions of Article 265 of the Constitution.

3.2. In other words, it is the petitioner's case that the respondents could not unjustly enrich themselves, when there was no infraction of law, merely on account of the fact that the petitioner did not avail of the statutory remedy, available to him, within the time prescribed.

4. Briefly, the background in which, the present writ petition, has come to be filed, is as follows:

4.1. The petitioner was issued a EPCG Licence No.3230000887, dated 24.09.2001, by the Joint Director General of Foreign Trade, for import of capital goods. Accordingly, import of capital goods was made, albeit, under Notification No.49/2000. The Notification permitted the petitioner to import capital goods, without payment of duty, upon fulfillment of Export Obligation stipulated, via the aforementioned notification. As per the notification, the petitioner was required to fulfill the stipulated Export Obligation, within the time frame given therein.

4.2. It appears that the Department had issued a demand notice, dated 15.07.2010, to the petitioner, for payment of customs duty, with applicable rate of interest, based on a mistake, that the Export Obligation imposed on the petitioner, had been fulfilled.

4.3. As a matter of fact, it appears that the petitioner was called for hearing, on 30.07.2010, and thereafter, on two other occasions. The petitioner, appears to have not participated in the hearing, convened by the Adjudicating Authority.

4.4. Consequently, the Adjudicating Authority, vide order dated 25.04.2011, confirmed the demand of duty, amounting to Rs.7,09,000/-. In addition, a direction was issued to pay interest on the said sum, as per the applicable rate of interest, as indicated in the aforementioned notification.

4.5. By the very same order, the Adjudicating Authority, also had directed encashment of Bank Guarantee, as indicated above, equivalent to a value of Rs.3,55,000/-, towards adjustment of duty demanded of the petitioner. Importantly, a copy of this order was marked to the D.G.F.T.

5. It appears that even though the copy of the order dated 25.04.2011, was marked to the D.G.F.T., no corrective action was taken by the Department. Furthermore, the petitioner was not issued an EODC by the concerned authority.

6. The record shows that EODC was issued in favour of the petitioner, on 29.07.2013. The said certificate, as indicated right at the beginning, clearly, holds that the petitioner had fulfilled his Export Obligation, within the stipulated EO period, albeit, to the extent of 99.65%, and since, the fulfillment of Export Obligation was above 95%, as per the provisions of para 5.12 of Handbook of Procedures, relevant for the period 2009-2014, the Export Obligation, stood substantially fulfilled.

7. It appears that the Department, somehow, woke up to the fact (and that too after more than five years) that the Order-in-Original, had not been completely, given effect to, though, in ignorance of the fact that petitioner had fulfilled his export obligation.

7.1. It is in these circumstances, that the impugned recovery notice, dated 05.08.2016, was served on the petitioner, seeking to recover a sum of Rs.3,54,000/-.

8. As indicated above, the sustainability of the recovery notice, and the Order-in-Original, is assailed by the petitioner, on the ground that, the entire edifice of the two impugned orders, is based on a mistake of fact. It is the case of the petitioner that, since he had fulfilled the Export Obligation, there was no breach of the conditions of the bond and therefore, necessary consequential actions of either encashing the Bank Guarantee on the earlier occasion, or issuing the impugned notice, could not have followed.

9. As noted above, the Department does not dispute the fact that the EODC dated 29.07.2013 is in order, and is a genuine document. Therefore, quite clearly, both the petitioner, as well as the Department, seem to have, for the reasons best known to them, allowed the matters to lie. The Department did not enforce the Order-in-Original, dated 25.04.2011. Similarly, the petitioner did not move to challenge the said order. Therefore, the issue, which arises for consideration before this Court is : should the Court allow the State, to continue to hold on duty, which should not have, otherwise, come to its kitty. Furthermore, based on the impugned recovery, should the State be allowed to collect duty, which is, clearly, not payable, but for the failure on the part of the petitioner to challenge the Order-in-Original.

10. Concededly, the petitioner has allowed, by his own admission, the Department, to continue to hold on to duty, which was illegally collected. Since, admittedly, he had fulfilled his export obligation, in my opinion, both the issues have to be answered in favour of the petitioner.

10.1. Article 265 of the Constitution mandates that no tax can be levied or collected without the authority of law.

11. Admittedly, the Department has committed a mistake in passing the Order-in-original dated 25.04.2011, based on a error that the petitioner had not fulfilled its export obligation. This mistake should have come to the notice of the Department, as the Order-in-original dated 25.01.2011, as alluded to above, was marked to the DGFT.

11.1. The information with regard to the fulfillment of the export obligation was, consequently, available in the DGFT's office.

11.2. As a matter of fact, the EODC, issued to the petitioner, on 29.07.2013, established this fact beyond doubt. Therefore, the encashment of the Bank Guarantee furnished by the petitioner equivalent to a sum of Rs.3,55,000/-, was, clearly, unlawful.

11.3. The more recent action of issuing the impugned recovery notice dated 05.08.2016, to my mind, only compounds the illegality.

11.4. As correctly pointed out by the learned counsel for the petitioner, both the Order-in-original and the recovery notice proceed on an erroneous basis that the petitioner had violated the obligations reflected in the bond executed by him.

12. The State, in my view, cannot, thus, levy, retain or collect duty from the petitioner, which is based on an

erroneous premise that the petitioner had not fulfilled his export obligations.

13. However, given the fact, as noticed above, that the petitioner had slept over his rights, the best way forward, according to me, would be that, while, the State's action in forfeiting the sum of Rs.3,55,000/-, will have to be declared as illegal, the petitioner should, in my view, pay costs for not approaching the court in time.

14. Therefore, I am inclined to quash the order-in-original dated 25.01.2011, as also, the consequential notice dated 05.08.2016, subject to the petitioner paying cost, in the sum of Rs.1,00,000/- (Rupees one lakhs only). The Revenue would adjust the cost at the time of refunding the amount, due to the petitioner. The costs so adjusted would be deposited with the Consumer Welfare Development Fund.

15. With the aforesaid directions, the writ petition is disposed of. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

TK Sub Assistant Registrar

To

1. The Assistant Commissioner of Customs
   Revenue Recovery Unit
   Custom House
   No.60, Rajaji Salai,
   Chennai - 600 001.

2. The Assistant Commissioner of Customs
   (EPCG)
   Custom House
   No.60, Rajaji Salai,
   Chennai - 600 001.

+1cc to Mr.Sathish Sundar, Advocate, S.R.No.4822
+1cc to Mr.Hema Muralikrishnan, Advocate, S.R.No.4663

ALA(CO)
RS(22/02/2017)