IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.10.2017

Date of Reserving the Order	*Date of Pronouncing the Order*
09.10.2017	**20.10.2017**

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.Nos.26261 to 26263 of 2017 &
W.M.P.No.27929 to 27931 of 2017

1.M/s.Jai Bhawani Steel Enterprises Ltd.,
Rep., by its Director Mr.Pramod Kumar Saraf,
No.2/221, GNT Road,
Panjetty, Ponnery Taluk,
Thiruvallur District – 601 204.

2.Shri.Pramod Kumar Saraf,

3.Smt.Sangeetha Saraf.

4.Shri.Piyush Saraf. ... Petitioner in W.P.No.26261/2017

1.M/s.DDS Steel Rolling Mills Ltd.,
Rep., by its Director Mr.Pramod Kumar Saraf,
No.2/220A, GNT Road,
Panjetty, Ponnery Taluk,
Thiruvallur District – 601 204.

2.Shri.Mansaram Goenka ... Petitioner in W.P.No.26262/2017

1.M/s.SDS Steels Private Ltd.,
Rep., by its Director Mr.Pramod Kumar Saraf,
No.2/220A, GNT Road,
Panjetty, Ponnery Taluk,
Thiruvallur District – 601 204.

2.Shri.Pramod Kumar Saraf, ... Petitioner in W.P.No.26263/2017

Vs.

The Principal Commissioner of Customs
Chennai-V, Office of the Commissioner of
Customs, Custom House,
No.60, Rajaji Salai, Chennai – 600 001. ... Respondent in all W.Ps.,

Prayer in all W.Ps: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, calling for the records of the respondent culminating in Order-in-Original No.54566/2017, dated 31.03.2017, issued from File No.S.Misc.154/2010 and 155/2010-SIIB-CAU and quashing the same direct the respondent to provide sufficient opportunity to the petitioners herein submit their reply and appear for a hearing within a time as may be fixed.

For Petitioner : Mr.S.Murugappan

For Respondent : Mrs.R.Hemalatha Senior Panel Counsel

COMMON ORDER

Heard Mr.S.Murugappan, learned counsel for the petitioner and Mrs.R.Hemlatha, learned Senior standing counsel for the respondent.

2. The petitioners have filed these Writ Petitions challenging the Order-in-Original No.54566/2017, dated 31.03.2017, passed by the respondent.

3. The Principal Commissioner of Customs, Commissionerate No.III, Special Intelligence and Investigation Branch (SIIB), Chennai, issued show cause notice, dated 22.08.2016, to the petitioners in these Writ Petitions. The petitioners in W.P.No.26261 of 2017, were arrayed as noticees No.1,5,6 & 7. The petitioners in W.P.No.26262 of 2017 were arrayed as noticees No.4&8. The petitioners in W.P.No.26263 of 2017, were arrayed as noticees No.2 & 5. Apart from the petitioners, there were two more noticees, namely, M/s.SLO Industries and its Director Mr.Anil Kumar Ojha, who were arrayed as noticees 3 & 2. These two noticees are not parties to the Writ Petitions.

4. The gist of the allegation against the petitioners is that they have diverted the goods bonded in their private bonded private warehouses without payment of duty.

5. Mr.S.Murugappan, learned counsel for the petitioner submitted that the petitioners are not canvassing the merits of the matter, but are before this Court on the ground that the petitioners did not have sufficient opportunity before the respondent, before confirming a huge demand as proposed in the show cause notice, dated 22.08.2016 and imposing heavy penalty on the petitioners, one of whom is a lady Director of the company who had no role to play in the day to day activities of the company. Therefore, it is submitted that the impugned order may be set aside and the matter may be remanded to the respondent for fresh consideration giving adequate opportunity to the petitioners.

6. The petitioners M/s.Jai Bhawani Steel Enterprises Ltd.,(Jai Bhawani) and M/s.SDS Steels Private Ltd., (SDS), had their factory premises in Ponneri Taluk, Thiruvallur District, and were issued private bonded warehouse licences valid till 13.06.2011 and 04.02.2011 respectively under Section 58(1) of the Customs Act, 1962. The petitioners were permitted to warehouse materials such as light melting scrap, heavy melting scrap, re-rollable scrap etc. The private bonded warehouses of Jai Bhawani and SDS were inspected by the officers of the SIIB on 02.11.2010, and certain discrepancies were

noted by the Inspecting Officers. The office premises of these two companies and the residential premises of the Directors of both the companies could not be searched as the same were locked. Mr.Pramod Kumar Saraf (Mr.Saraf) is one of the Directors of Jai Bhawani as well as SDS, who was summoned to appear on 11.11.2010, but did not appear and again he was summoned on 18.11.2010, but expressed his inability on the ground of illhealth. Again, he was summoned on 26.11.2010, but did not respond to the summon and the other Director of SDS, though summoned twice also did not appear. Mr.Saraf apprehending arrest, moved this Court for grant of Anticipatory Bail in Crl.O.P.No.26975 of 2010, which was dismissed by order dated 15.12.2010. Search and seizure operations were conducted in the factory premises and statement was recorded from the former General Manager, former Accounts Manager, Supervisor and Manager of both the companies. Subsequently, statements were recorded from the third petitioner in W.P.No.26261 of 2017, the spouse of Mr.Saraf and from his son on 16.04.2012 & 17.04.2012 respectively. On 25.09.2012, Mr.Saraf, landed at the Chennai Airport and was arrested by the CBI and remanded to Judicial custody on 28.09.2012 and released on bail, on 31.10.2012. On summons being issued by the SIIB, Mr.Saraf appeared before the Department, on 22.11.2012 and a statement was recorded from him under section 108 of the Act. Further, the statements were recorded on 26.11.2012, 27.11.2012 & 29.11.2012. The investigation lead to the *prima facie* belief that the quantity of scrap, which was to be available in both the warehouses, was not available and the bonded goods have been illegally removed from the premises without payment of customs duty and without proper permission, clearance from the proper officer in violation of Section 71 of the Customs Act and conditions of licence issued under Section 58. This lead to the issuance of the show cause notice calling upon the noticees to show cause to the respondent as to why the quantity of goods, which were removed from the warehouse premises in contravention of Section 71 of the Act and in violation of the Licence Condition should not be held liable for confiscation under Section 111(j) of the Act; why customs duty should not be demanded along with applicable interest; why penalty should not be imposed under Section 112 of the Act and why penalty should not be imposed under Section 114AA of the Act. The noticee directors were called upon to show cause as to why personal penalty should not be imposed on them.

7. As prefaced in the preceding paragraphs, the challenge to the impugned Order-in-Original is on the ground that the petitioners did not have adequate opportunity to put forth their submissions. The correctness of the stand is to be examined on the materials available on record. Mr.Saraf vide letter dated 28.09.2016, acknowledged the receipt of the show cause notice and requested for grant of 60 days time to submit their reply. This request was considered and opportunity of personal hearing was re-scheduled for 28.11.2016, 30.11.2016 and 02.12.2016. The said communication was sent to Jai Bhawani and SDS. The letters appear to have returned with postal endorsement "company gate closed". One of the noticees Mr.Anil Kumar Ojha, Director of M/s.SLO Industries, who did not join with the petitioners challenging the impugned order, responded to the show cause notice and submitted his reply on 01.12.2016. The petitioners did not submit their reply nor responded to the notice for personal hearing. It is seen that on 23.12.2016, one more communication was sent to Jai Bhawani and SDS to appear for personal hearing on 28.12.2016, as they failed to appear on earlier dates, namely, 09.12.2016 & 21.12.2016. These letters were returned undelivered with postal endorsement "company closed". It is stated that since there was no response to the earlier notices, the Department followed

the procedure under the Customs Act and notices are stated to have been displayed in the notice board of the customs house main building for 15 days. Mr.Ojha, the Director of M/s.SLO Industries, sent a fax message to the Department stating that they are in the process of collecting some more documents and requested for deferment of personal hearing and accordingly, the same was deferred to 31.03.2017, on which date, he appeared along with his counsel and made his submissions. The sum and substance of the stand taken by Mr.Ojha is that they are neither the importer of the goods nor the warehouse keeper and he is an independent owner of his business having transaction with several parties including Jai Bhawani and SDS and produced certain records to substantiate his stand and requested for dropping the proceedings against his company and himself.

8. On 04.01.2017, Mr.Saraf, sent a letter to the Department stating that he was in Kolkata and he was not well and requested 30 days time to submit his reply to the show cause notice and appear for a personal hearing. This request was accepted by the Department and a letter was sent to him intimating that personal hearing was scheduled on 31.01.2017 at 12.30 p.m. Once again by another letter dated 31.01.2017, Mr.Saraf requested for another 25 days time to submit their reply to the show cause notice and appear for a personal

hearing. This was also considered and personal hearing was fixed on 27.02.2017 and duly intimated to Mr.Saraf. Subsequently, Mr.Saraf was intimated that the personal hearing is re-scheduled to 28.02.2017, instead of 27.02.2017. However, Mr.Saraf did not respond and therefore, the respondent proceeded with the adjudication of the show cause notice and passed the impugned order.

9. In the given facts and circumstances, it has to be seen as to whether the case on hand is one where there has been violation of principles of natural justice or whether the petitioners were afforded reasonable opportunity to put forth their defence. The facts clearly demonstrate that the Department had afforded sufficient and more than adequate opportunity to the petitioners. The conduct of Mr.Saraf clearly would show that he had been avoiding the proceedings. Prima facie it appears that but for the arrest and detention by CBI, he would not have cooperated with the department in giving the statements under Section 108 of the Act. Thereafter, he has failed to cooperate in the adjudication process. The plea of violation of principles of natural justice, not being afforded an adequate opportunity, has been raised before this Court to by-pass the alternate remedy available to the petitioners. We are examining a case arising under the Customs Act.

The charge being diversion of bonded goods without payment of appropriate customs duty. The charge is a serious charge and if the petitioners were totally innocent and if they had not committed any violation, they ought not to have avoided the adjudication. Thus, the facts clearly show that the petitioners failed to avail the opportunity granted to them. Therefore, the plea that the petitioners did not have adequate opportunity is a plea to be rejected.

10. Thus, for all the above reasons, I hold that the Writ Petitions are not maintainable and the petitioners have to necessarily avail the alternate remedy provided under the Act by preferring an appeal to the CESTAT.

11. In the result, the Writ Petitions are dismissed as not maintainable, leaving it open to the petitioners to avail the alternate remedy. No costs. Consequently, connected Miscellaneous Petitions are closed.

20.10.2017

Index:Yes/No
pbn

Note: Registry is directed to return the original impugned order after substituting the same with the certified copy.

To

The Principal Commissioner of Customs
Chennai-V, Office of the Commissioner of
Customs, Custom House,
No.60, Rajaji Salai, Chennai – 600 001.

T.S.SIVAGNANAM, J.

pbn

Pre-Delivery Order in
W.P.Nos.26261 to 26263 of 2017 &
W.M.P.No.27929 to 27931 of 2017

20.10.2017