R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10138 OF 2018

M/s. Masumi Overseas Pvt Ltd & Anr. .. Petitioners

Versus

Commissioner of Customs-Export (NS-II) & Ors. .. Respondents

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- Dr. Sujay Kantawala a/w Harihar Bhave, Rupa Bhave, Sanjeev Rawat, Kartik Vig, Divya Menon, Aishwarya Kantawala & Poorva Patil i/by Bhave & Co for the Petitioners
- Mr. Vijay Kantharia a/w Mr. Ram Ochani for the Respondents

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CORAM : AKIL KURESHI &
M.S. SANKLECHA, JJ.

DATE : DECEMBER 6, 2018.

P.C.:

1. The petitioner has prayed for multiple reliefs. During pendency of this petition, however, certain developments took place. These developments are bought on record through amendments. Presently, the petitioner's grievance relates to following three issues:-

(i) The action of the respondents – Authorities in passing prohibitory order in relation to personal properties of the director of petitioner - company which is in the nature of residential property i.e B/4, Shreyas Apartment, 1082, Ganesh Khind Road, Pune 411 016;

(ii) Freezing petitioner's six bank accounts details of which are as under:-

Name of the Bank & Branch	Account No.
Bank of India, Fort Branch, Mumbai	030120110000150
UCO Bank, Fort Branch, Mumbai	00030210004319
ICICI Bank, Fort Branch, Mumbai	623505382349
ICICI Bank, Shivaji Nagar, Pune	624005016337
ICICI Bank, Shivaji Nagar, Pune	624001066125
ICICI Bank, Shivaji Nagar, Pune	167305000061

(iii) Retention of sum of Rs. 1.50 crores deposited by the petitioner with the respondents.

These grievances arise in following factual background:-

The petitioner had made export under 53 shipping bills of 'Gas Injected Co-Axial Cable' (hereinafter referred to as "**the goods**") sometime in the year 2015. The petitioner was further in the process of exporting the goods for which 15 shipping bills were filed in June 2016. The department intercepted at that stage on the prima facie belief that the petitioner had made mis-declaration of the value of the goods. Pending show cause notice and further investigation, the Department not only stopped the export but also took following three steps:-

(i) Addressed a letter to the Sub-Registrar, Haveli, Pune within whom jurisdiction the immovable property of the director of the petitioner company was situated not to alienate the same in the interest of the Revenue;

(ii) Attached six bank accounts, details of which are already recorded earlier;

(iii) Retained a sum of Rs. 1.50 Crore which was deposited by the petitioner with the respondents. According to the petitioner, this was done under protest and possible coercion. According to the department, this was voluntarily made by the petitioner.

2. The department subsequently issued a show cause notice dated 20.12.2016 calling upon the petitioner why certain actions should not be taken. The contents of the said show-cause notice are as under:-

(i) The declared FOB value of Rs. 23,07,06,784/- (Rupees Twenty Three Crore Seven Lakhs Six Thousand Sven Hundred Eighty Four Only) of the subject 15 Shipping Bills (mentioned at Table-I above), should not be rejected under Rule 8 of the CVR, 2007, and re-determined at Rs. 32,24,286/- (Rupees Thirty Two Lakhs Twenty Four Thousand Two Hundred Eighty Six Only) under Rule 6 of the CVR, 2007, in terms of value ascertained (as detailed at Annexure-B annexed hereto);

(ii) The total drawback amount claimed should not be rejected and re-determined to Rs. 64,486/- (Rupees Sixty Four Thousand Four Hundred Eighty Six Only) under provisions of Section 75(2) of Customs Act, 1962, which would be eligible only after physical export of the goods;

(iii) The total MEIS amount claimed should not be rejected and re-determined to Rs. 64,486/- (Rupees Sixty Four Thousand Four Hundred Eighty Six Only) on the re-determined FOB value;

(iv) The goods declared as 'Gas Injected Co-Axial Cable' covered under the subject 15 shipping Bills, mentioned at Table-I above and having declared value of Rs. 23,07,06,784/- (Rupees Twenty Three Crore Seven Lakhs Six Thousand Seven Hundred Eighty Four Only) should not be confiscated under Section 113(i), Section 113(ii) & 113 (h) of the Customs Act, 1962.

3. The adjudicating Authority passed the final order of adjudication pursuant to the said show cause notice, the operative portion of which reads as under:-

"(i) I reject the declared FOB value of Rs. 23,07,06,784/- (Rupees Twenty Three Crore Seven Lakhs Six Thousand Seven Hundred Eighty Four Only) of the subject 15 Shipping Bills (mentioned at Table-I above), under Rule 8 of the CVR, 2007, and re-determine FOB value of Rs. 32,24,286/- (Rupees Thirty Two Lacs Twenty Four Thousand Two Hundred Eighty Six Only) under Rule 6 of the CVR, 2007, in terms of value ascertained (as per Annexure-B of SCN).

(ii) I reject the total drawback claim amounting to Rs. 45,49,648/- and re-determine the same to Rs. 64,486/- (Rupees Sixty Four Thousand Four Hundred Eight Six Only) based on the re-determined FOB value under provisions of Section 75(2) of Customs Act, 1962 which would be admissible only after physical export of the goods.

(iii) I reject the total MEIS Claim amounting to Rs. 45,49,650/- and re-determine MEIS amount to Rs. 64,486/- (Rupees Sixty Four Thousand Four Hundred Eighty Six Only) based on the re-determined FOB value, which would be admissible only after physical export of the goods.

(iv) In order to confiscate the goods declared as 'Gas Injected Co-Axial Cable', covered under the subject 15 shipping Bills, mentioned at Table-I of SCN and having declared value of Rs. 23,07,06,784/- (Rupees Twenty Three Crore Seven Lakhs Six Thousand Seven Hundred Eighty Four Only) under Section 113(i), Section 113(ii) & 113(h) of the Customs Act, 1962.

This order is issued without prejudice to any other action that may be taken against the Noticeee(s) or any other person(s) concerned with the said goods under the Customs Act, 1962 or any other law for the time being in force in India."

4. Perusal of this order would show that the Adjudicating Authority, after having rejected the assesse's valuation of the export consignment and having substituted the same by his own computation, reduced the assessee's drawback claim on the basis of such reduced valuation. He further confiscated the goods in question without offering the option of redemption. Since there was no proposal for imposition of penalty in the show-cause notice, obviously, no penalty was imposed. Effectively, this order, therefore merely resulted into absolute confiscation of goods which according to the department was of the value of Rs. 45,49,648/-. Whatever be the reason, the petitioner has not prayed for redemption fine in lieu of the confiscation.

5. Be that as it may, the show-cause notice having been adjudicated, no monetary demand has been raised against the petitioner in the order of adjudication. Under the circumstances, we do not find it appropriate that the department should continue to put the restriction orders against the immovable property of the director of the petitioner company or continue to attach the petitioner's bank account. The revenue authorities may have power to pass prohibitory orders in order to protect the interest of the revenue. However, the same cannot be done without valid reasons and at least some prima facie material against the assessee. So far, only the show-cause notice issued against the petitioner, as noted, upon completion of adjudication, has resulted into no money demand from the petitioner. The contention of the learned counsel for the departament that the petitioner's past exports under 53 different shipping bills are also under investigation and therefore, the attachment /

seizure order must be allowed to operate, cannot be accepted. The exports were made in the year 2015. Nearly four years have been passed since then. The department has so far not produced any material prima facie suggesting that there is likelihood of demand for recovery of money from the petitioner. Learned counsel for the department also pointed out that the show-cause notice was issued without prejudice to the penal action which may be taken later on. We are neither preventing the department from further investigation into the petitioner's past export and if found necessary, to issue show-cause notice in that respect nor are we preventing the department from taking any further action with respect to the later exports, if otherwise available under the law. At this stage, however, there being no further material on record, the prohibitory orders must be rescinded.

6. Regarding the deposit of Rs. 1.50 Crores, though the learned counsel for the petitioner had submitted before us that the same was made under protest, learned counsel for the department has placed on record a letter dated 16.5.2017 written by the petitioner to the Dy. Commissioner of Customs in which it was clarified that in the past, it was mentioned that different amounts were deposited under protest, however, the petitioner stated that the same was made voluntary and not under protest. Whether the said amount was deposited under protest or voluntarily, the department cannot appropriate the same unless a legal demand is crystallized against the assessee. Admittedly, no such demand has been raised. Under the circumstances, at this stage, we would direct the respondents to refund such amount to the petitioner, however, by imposing a condition of providing bank guarantee of matching amount to safeguard the interest of the department if any such demand arises in future. Under the circumstances, the petition is disposed of with following directions:-

(i) The communication by the respondents to the Sub-Registar, Haveli, Pune preventing transfer of the property is set aside.

(ii) The attachment of the petitioner's six bank accounts, details of which are found in paragraph 1 above of this order, is set aside.

(iii) The respondents shall refund a sum of Rs. 1.50 Crores to the petitioner upon the petitioner providing a bank guarantee of matching amount of any nationalized bank which shall be kept alive till 31.12.2019.

It is clarified that if by the such date, no further show-cause notice of recovery or penalty is issued by the department to the petitioner, after such date, it will not be necessary to extend the bank guarantee. On the other hand, if such show-cause notice is issued, the bank guarantee will be kept alive till adjudication is over or on the petition filed by the petitioner , this Court modifies such orders.

[M.S. SANKLECHA, J.] **[AKIL KURESHI, J]**