IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATE: 20.12.2018

CORAM:
THE HONOURABLE MRS.JUSTICE V. BHAVANI SUBBAROYAN

W.P.No.13338 of 2008

KSM Metullurigcal Ltd.,
(Formerly JSM Copper Recycling Ltd)
Rep. by its Director
63 Kathivakkam High Road
Chennai 600 021. ..Petitioner

Vs.

1. The Comissioner of Customs,
   Customs House,
   16 Rajaji Salai,
   Chennai 600 001.

2. The Assistant Commissioner of Customs (Bonds)
   Custom House,
   16 Rajaji Salai,
   Chennai 600 001.

3. Tamil Nadu Mercantile Bank
   Rep by its Manager,
   53(20) GA Road,
   Old Washermanpet,
   Chennai 600 021. .. Respondents

Prayer:- Writ Petition has been filed under Article 226 of Constitution of India, praying to issue a Writ of Certiorarified Mandamus, calling for the proceedings of the second respondent made in Order No.1 of 2008 dated 16.04.2008, quash the same and consequently direct the second respondent to adjust the payment remitted by the petitioner to the Department towards the MOT charges for 8 shipments and refund the balance amount to the petitioner by considering the representation of the petitioner dated 03.01.2002 and 20.02.2008.

For Petitioner : Mr.S.Guna Sekaran
For Mr.S.Sankaravadivelu

For R1 and R2 : Mr.A.Srinivas

For R3 : Mr.M.Kamalanathan

ORDER

This Writ Petition is filed challenging the order of the second respondent made in Order No.1 of 2008 dated 16.04.2008 and to quash the same and consequently, direct the second respondent to adjust the payment remitted by the petitioner to the Department towards the MOT charges for 8 shipments and refund the balance amount to the petitioner by considering the representation of the petitioner dated 03.01.2002 and 20.02.2008.

2.The brief facts leading to the present case is that the petitioner company is an 100% Export Oriented Unit (EOU) and has been doing import and export business in the field of metal scrap waste management as approved by the Development Commissioner, Madras Export Processing Zone (MEPZ) dated 04.12.2000 in the Private Bonded Site approved by the Customs Department.

3.The petitioner would submit that Export Oriented Units are liable to pay 100% Cost Recovery Charges to the Customs Department towards the charges of the officer in charge of bonded warehouse, who supervise imports and exports by the unit. The petitioner claims that though they had obtained approval from the Madras Export Processing Zone (MEPZ) and Customs Department, they did not function immediately due to non-availability of raw materials and machineries.

4.The Chief Account Officer of the Customs Department had issued a notice dated 13.12.2001 calling the petitioner to pay a sum of Rs.2,41,231/- towards the Cost Recovery Charges. The petitioner's company has sent a reply dated 03.01.2002 and 06.05.2002 contending that due to non-operation of warehouse, the petitioner's company did not request the department to Post an Officer in charge of the said warehouse.

5.The petitioner has contended that they have effectively commenced operation only after 01.06.2002 and requested the respondent to withdraw the demand of Cost Recovery Charges. Thereafter, on 19.06.2002 the petitioner has paid a sum of Rs.41,004/- towards the three months Cost Recovery charges from July, 2002 to March, 2003 in three installments for a total sum of Rs.1,23,012/- vide Demand Draft No.126331 dated 19.06.2002 for Rs.41,004/-; Demand Draft No.126580 dated 17.07.2002 for Rs.41,004/-; and Demand Draft No.129579 dated 01.02.2003 for Rs.41,004/- and also requested the second respondent to waive the Cost Recovery Charges up to 30.06.2002. However on 01.07.2002, the Chief Accounts Officer, Customs Department, issued notice calling the petitioner to pay a further sum of Rs.3,23,239/- towards the Cost Recovery Charges. The Customs Department enhanced the Cost Recovery Charges of the quarter as Rs.57,180/-.

6.The second respondent, by his proceedings dated 08.03.3007, issued a notice calling an explanation from the petitioner for non-payment of Cost Recovery Charges. Since, the petitioner representation dated 03.01.2002 was pending before the Customs Department with regard to waiver of Cost Recovery Charges up to May 2002. The officials of the petitioner company personally visited the office of the 2nd respondent. However, when the waiver petition was pending, the second respondent issued a communication to the third respondent Bank herein, directing the bank authorities to realize the Bank Guarantee given by the petitioner company.

7.The petitioner issued a reply notice dated 20.02.2008 to the first respondent with regard to the claim of CR charges waiver made by the petitioner in view of non-operation of the warehouse and further, requested the first respondent to extend the benefits of CBEC Circular 31/2003 dated 07.04.2002 and levy Merchant Overtime(MOT) Charges on actual hourly basis instead of Cost Recovery Charges. However, the request was pending and the first respondent insisted the banking authorities to enforce the bank guarantee, against which, the petitioner has filed W.P.No.5504 of 2008, in which, the Court passed an order dated 05.03.2008, directing the second respondent herein to pass orders on merits on the waiver application made by the petitioner.

8.The petitioner further contended that the second respondent without replying to the queries raised by the petitioner and without providing an opportunity of personal hearing as requested by the petitioner, passed an impugned order dated 16.04.2008 mechanically, thereby, rejecting the claim of waiver of Cost Recovery Charges for the period from 12.03.2001 to 31.12.2004. As against which, the petitioner has filed this writ petition.

9.The learned counsel for the petitioner argued that to switching over the Merchant Overtime Charges scheme from 01.01.2005 which was allowed on Merchant Overtime fee as per the request and they may be continued to do so. But, the Customs authorities on 08.03.2005 has allowed the case of Merchant Metallurgical Limited to switching Merchant Overtime fees, at request, the unit has not given an option to come out Cost Recovery Charges scheme up to 31.12.2004. The Merchant Overtime Charges was considered and allowed by the department only from 01.01.2005 it is mandatory on the part of the unit to remit the Cost Recovery Charges to the officer working as a bond officer as per the approval of ministry up to 31.12.2004. The bond officer already permitted against the Cost Recovery Charges will not revert back and still continue to function in the same post till the officer get promotion against the permanent vacancy in their wood cadre as per the ministry require. The amount of Cost Recovery Charges demanded their unit was already incurred by the department towards the pay and allowances for the one post of bond officer to create the service of unit holder as per the request or undertaking from this. It is clear where the service officer exclusively utilize by the unit or which is not possible to consider the request of the unit the petitioner to dispense with the post when they do not require such services, that is why the scheme of created post of Cost Recovery Charges advance was envisaged for the benefit of 100% EOU holders. Hence the request of the petitioner considering this issue cannot be accepted.

10.The respondents have filed a detailed counter and contended that M/s J.S.M Copper Recycling Limited, GNT Road Puzhal, Chennai - 600066 (at present known as M/s K.S.M Metallurgical Limited herein after called as unit) was issued with a Privated Bonded warehouse License No.E-261 dated 09/12.03.2001, and valid up to 08.03.2002, and renewed thereafter under Section 58 of Customs Act, 1962, and In-bond Manufacturing License under Section 65 of Custom Act, 1962 after verifying the Letter of Permission No. PER:A/2000/104/EOU-TN dated 04.12.2000 issued by the Development Commissioner, Madras Export Processing Zone, Chennai for setting up of 100% Export Oriented Unit. While applying for warehouse facilities, they have agreed vide their letter dated 23.02.2001 to pay Cost Recovery Charges for the officer allocated to their Unit as prescribed by the Department which has to be paid in advance.

11.As per the undertaking given by the unit, a letter dated 13.12.2001, was issued by the Chief Accounts Officer of Customs to the Unit to pay the Cost Recovery Charges for a sum of Rs.2,41,231/-. On receipt of the letter the petitioner's company requested for waving the earlier demand of Cost Recovery Charges prior to May 2002. They have paid towards the Cost Recovery Charges for the period from July, 2002 to March, 2003 for a total sum of Rs.1,23,012/- in three equal installments. Thereafter, the petitioner's company by their order dated 08.03.2005, has requested the department to levy Merchant Overtime Charges in lieu of Cost Recovery Charges to which the department permitted the petitioner's company to pay Merchant Overtime Charges with effect from 01.01.2005.

12.The respondents further submits that the transactions had been taken during the period form 23.09.2002 to 15.09.2005. Therefore, the audit conducted at the Unit on 28.12.2006, and based on the observation of the Central Audit Authorities which was intimated to the petitioner on 08.03.2007 and received by them on 10.03.2007 to pay the Cost Recovery Charges to the tune of Rs.5,28,259/- from January 2003 to

December 2004 and Rs.4500/- for the period from January 2005 to November 2006 for Merchant Overtime Charges. Despite the reminder, the petitioner did not make the payment of Cost Recovery Charges which force the department to enforce the Bank guarantee for realization of the Cost Recovery Charges by transactions a copy to the Unit as far as the waiver for the initial period from July 2000 to May 2001 which is still under consideration.

13.Heard the learned counsel for the petitioner and learned counsel for the respondents and perused the available materials on record.

14.The learned counsel for the petitioner contends that since the petitioner's unit was not function effectively till 31.05.2002 and was commenced their operation only after 01.06.2002. The Cost Recovery Charges impugned by the Customs Department towards the officer in charge of the bonded waiver house as to be waived as there was no effective operation in the unit till 31.05.2002. The respondents without passing an order for more than five years in a waiver petition the action of the respondents to invoke the bank guarantee is unreasonable. The petitioner was not afforded an opportunity, despite the request for before passing an order in the waiver petition which is the impugned order herein and as such the principles of natural justice has not been followed by the respondents by passing the impugned order.

15.Apart from that, the petitioner's counsel had also contended that the petitioner's company has imported only 8 shipments from July 2002 to August 2004 and the claim of levy of Cost Recovery Charges is highly arbitrary and prayed for quashing the impugned order passed by the respondents.

16. In contra, the learned counsel for the respondents vehemently contended that the petitioner's unit who had undertaking the letter as early as the 23.03.2001, wherein, while applying for warehouse facilities, the petitioner agreed to pay Cost Recovery Charges for the officer allocated to their unit as prescribed by the department and having accepted the time of commencement. The petitioner cannot plead without they were not in operation till 31.05.2002 and they have effectively started operating unit only from 01.06.2002 till December 2004 during which period they imported only 8 consignments of goods is not a matter for the respondents as such one officer is allocated to the prescribed unit by their department and having agreed to pay Cost Recovery Charges for the officer allocated the petitioner is bound to pay Cost Recovery Charges. In compliance to the order passed by this Hon'ble Court in W.P.No.5504 of 2008 in the waiver petition, an order was passed as per the regulation, as such, the petitioner neither in his representation nor orally had sought for any personal hearing.

17.Apart from that, the learned counsel for the respondents would vehemently contend that as against the impugned order a statutory appeal lies with the Commissioner of Customs (Appeals), and as such as the Writ Petition has to be dismissed and there is an efficacious alternative remedy available.

18.This Court has considered the arguments and the documents verified by the counsels and it could be seen that it is not in dispute that the petitioner approached the respondent after having provided company license renewed periodically under Section 58 of the Customs Act 1962, and in-bond manufacture license under Section 65 of the Customs Act 1962 have agreed by their letter dated 23.02.2001 to the Cost Recovery Charges for the officer allotted to the unit, as prescribed by the department. No doubt, the petitioner has sought waiver of the Cost Recovery Charges, on the ground that the petitioner's unit was not function effectively till 31.05.2002 and commenced their operation only after 01.06.2002. However, the said claim made by the petitioner cannot be a ground to seek waiver as such having sought for appointment of an officer under the in-bond Manufacturing License. The petitioner is bound to pay the Cost Recovery Charges, even if the petitioner's company claims that no activity was commenced till 31.05.2002. The allocation of the officer to pay the Cost Recovery Charges for the officer allocated to the unit does not have any relation to the operational capacity of the petitioner's company. The petitioner's company is liable to pay the Cost Recovery Charges from the date of granting license and from the date on which, the officer was allocated to their unit to supervise the activities of the petitioner's unit.

19.With regard to the orders passed by the second respondent that the impugned order herein has to be sustained, as the amount of Cost Recovery Charges demanded from the petitioner as the same as also incurred by the department towards the pay of allowance of one post of bond officer created for the service of the petitioner's unit as per their request it is also clear that it is not for the petitioner to dispense with the allocated bond officer when they do not require such services.

20.Under these circumstances, this Court finds no infirmity in the orders passed by the second respondent and the second respondent order is a well reasoned one and there is no perversity as alleged by the petitioner. Next point to be considered regarding the issue of alternative remedy available as argued by the learned counsel for the respondents is power relating to alternative remedy is never a rule of law despite the existence of alternative remedy within a jurisdiction of description of this High Court to grant relief under Article 226 of the Constitution of India, since the petitioner has pleaded the jurisdictional error. The High Court empowered to grant relief under Article 226 of the Constitution of India even if there is alternative efficacious remedy is enumerated under the statue is some body approaches this High Court they availing an alternative remedy provided he has to make out a strong case that their exists to good ground to invoke the extraordinary jurisdiction of this Court. In the present case, the petitioner has not made out any extraordinary circumstances for bypassing efficacious alternative remedy available and to grant relief under Article 226 of the Constitution of India. The order of the respondents is sustained and the writ petition is pending for the last ten years and it may not be appropriate to direct the petitioner to file before the Commissioner of Customs Appeal.

21.Under these circumstances the order passed by the second respondent is sustained and the writ petition is also dismissed. Consequently, the interim order is passed by this Court in M.P.No.2 of 2008 in W.P.No.13338 of 2008 stands vacated. No Costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

raja/vji

To

1.The Comissioner of Customs,
Customs House,
16 Rajaji Salai,
Chennai 600 001.

2.The Assistant Commissioner of Customs (Bonds)
Custom House,
16 Rajaji Salai,Chennai 600 001.

3.The Manager,
Tamil Nadu Mercantile Bank
53(20) GA Road,
Old Washermanpet,
Chennai 600 021.

+1cc to Mr.S.Sankaravadivelu, Advocate, S.R.No.131
+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.89083
+1cc to Mr.M.Kamalanathan, Advocate, S.R.No.89245

W.P.No.13338 of 2008

rrs 06/03/2019