IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.10.2018

CORAM

THE HON'BLE MR. JUSTICE K.RAVICHANDRABAABU

W.P.Nos. 6492, 6493 & 14365 of 2018
in
W.M.P.Nos.8439 & 16794 of 2018

M/s.PPN Power Generating Company Pvt.Ltd.
Represented by its Managing Director
Mr.P.Karthik Anand Reddy
Corporate Office
- "Sunny Side" West Block - I Floor,
No. 8/17, Shafee Mohammed Road,
Thousand Lights,
Chennai - 600 006. ..Petitioner in all the W.Ps

vs.

1. The Commissioner of Customs,
Chennai II Commissionerate
Custom House
60 Rajaji Salai,
Chennai-600 001

2. The Assistant Commissioner of Customs,
(Group 6 & Project Import)
Custom House,
60 Rajaji Salai,
Chennai-600 001 .. Respondents in all the W.Ps

Writ Petition No.6492 of 2018 filed under Article 226 of the Constitution of India praying to issue a Writ of Mandamus directing the respondents to finalise the assessments pertaining to all imports made by the petitioner under the project import scheme in F.No.S37/11/99 Gr.6 within a reasonable time.

Writ Petition No.6493 of 2018 filed under Article 226 of the Constitution of India praying to issue a Writ of Mandamus directing the respondents to refund the security deposit of Rs.84,00,000/- made by the petitioner along with interest, return the bank guarantees executed by the petitioner for an amount of Rs.13.28 crores and cancel the bond executed by the petitioner for an amount of Rs.6,38,05,72,000/-.

Writ Petition No.14365 of 2018 filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus to call for the records pertaining to the impugned show cause notice dated 22.05.2018 in F.No. S.Misc. 69/2018-Group 6 issued by the second respondent and quash the same and direct the second respondent to and refund the security deposit of Rs.84,00,000/- made by the petitioner along with interest, return the bank guarantees executed by the petitioner for an amount of Rs.13.77 crores and cancel the bond executed by the petitioner for an amount of Rs.6,38,05,72,000/- after finalizing the provisional assessments.

For Petitioner in all the W.Ps : Mr.Hari Radhakrishnan

For Respondents in W.P.Nos. 6492 & 6493 of 2018 : Mr. M.Santhanaraman, Senior Standing Counsel

For Respondent in W.P.No.14365 of 2018 : Mr.G.M.Syed Nurullah Sheriff, Standing Panel Counsel

C O M M O N O R D E R

W.P.No.6492 of 2018 is filed for a Mandamus, directing the respondents to finalise the assessments pertaining to all imports made by the petitioner under the project import scheme in F.No.S37/11/99 Gr.6 within a reasonable time.

W.P.No. 6493 of 2018 is filed for a Mandamus, directing the respondents to refund the security deposit of Rs.84,00,000/- made by the petitioner along with interest, return the bank guarantees executed by the petitioner for an amount of Rs.13.28 crores and cancel the bond executed by the petitioner for an amount of Rs.6,38,05,72,000/-.

W.P.No.14365 of 2018 is filed challenging the proceedings dated 22.05.2018 in F.No.S.Misc. 69/2018-Group.6 issued by the second respondent with consequential direction to the second respondent to refund the security deposit of Rs.84,00,000/-, return the bank guarantees executed by the petitioner for an amount of Rs.13.77 crores and cancel the bond executed by the petitioner for an amount of Rs.6,38,05,72,000/- after finalizing the provisional assessments.

2. The case of the petitioner in all these writ petitions is as follows:

(i) The petitioner has set up a power plant in Pillaiperumalnallur, Thirukadayur Post, Nagapattinam District. The Government of TamilNadu, on recommendation by the Tamil Nadu Electricity Board, has certified the list of items which were required to set up the power plant and had also recommended concessional rate of duty for the goods to be imported by the petitioner under the project import scheme. The petitioner had registered their project under the Project Import Regulations, 1986, for the purpose of claiming concessional rate of duty on imports of all goods required to set up the power plant. The Assistant Commissioner of Customs (Grade VIII) registered the project of the petitioner and accorded File No.S37/11/1999-Gr.6. The petitioner executed bond for Rs.6,38,05,72,000/- and also deposited an amount of Rs.84,00,000/- on 26.03.1999. In addition, the petitioner also executed bank guarantee for Rs.13.77 crores. All the imports made by the petitioner were provisionally assessed in terms of the mandate contained in the Project Import Regulations, 1986. The petitioner imported all the goods required to set up the power plant under the project import scheme and after import, the goods were installed at the power plant site. After making the plant operational, the petitioner requested the second respondent to finalise the assessments of all the imports made by them through letter dated 17.06.2003, 10.07.2003, 09.02.2004. The petitioner also submitted a detailed letter dated 29.11.2003 clarifying some of the queries raised orally by the Assessing Officer. Further reminder was sent on 17.03.2004 and 27.03.2004. The petitioner met the second respondent in person on 13.05.2004. During the course of the meeting, the second respondent informing the petitioner that they needed proof regarding the installation of the imported goods. The petitioner enquired the date on which the chartered engineer was to visit the site of the power plant of the petitioner. Thereafter, there is no response from the second respondent.

(ii) The counsel for the petitioner Company made a detailed submission dated 28.05.2004. The second respondent fixed the personal hearing on any day from 14.06.2004 to 18.06.2004 during office hours. The representative of the petitioner company appeared before the first respondent on 16.06.2004. The queries raised during the personal hearing were clarified vide the petitioner counsel's letter dated 02.07.2004. The second respondent fixed yet another personal hearing on 15.09.2004. The queries raised by the second respondent were answered. All the required documents were given to the respondents. The provisional assessment had not been done even after a long period. Therefore, the petitioner preferred W.P.Nos.6492 and 6493 of 2018 seeking for the relief as stated supra. While the said writ petitions are pending, the respondent issued a show cause notice dated 22.05.2018 on an entirely new ground that the value of the imported equipment were lesser than the suppliers' purchase price. The said notice was issued after 15 years. The said notice is challenged in W.P.No.14365 of 2018.

3. The respondents filed a common counter affidavit in W.P.Nos.6492 and 6493 of 2018 and a separate counter affidavit is filed in W.P.No.14365 of 2018.

4. The case of the respondents in short is as follows:

The petitioner has set up a power plant on the recommendation of the Tamilnadu Electricity Board, for which, imported goods were cleared under CTH 9801 under the Project Import Regulations, 1986. After making the plant operational, the petitioner has requested to finalise the provisional assessments made through letters dated 17.06.2003, 10.07.2003, 09.02.2004, 29.11.2003, 17.03.2004 and 27.02.2004. They also attended personal hearing and clarified the queries raised during the personal hearing. They also sent letters dated 15.02.2017, 25.02.2017 and 05.03.2018 requesting to finalise the assessment and to return the cash security deposit and bank guarantees in terms of CBEC instructions and Circulation No.22/2011-Cus dated 04.05.2011. However, in the year 2007, the Directorate of Revenue Intelligence (DRI), vide letter dated 04.10.2007, informed, based on specific information, that the petitioner has grossly mis-declared the value of the imports from M/s. Marubeni Corporation, in order to evade appropriate payment of customs duty. The investigation report by DRI, interalia, observed that the procurement price of M/s. Marubeni Corporation, Japan, from M/s. Mitsubishi Heavy Industries and M/s. Kier Internationa, UK are less than M/s. Marubeni's invoice price to the petitioner which is a normal trade practice, whereas the procurement price of M/s. Marubeni Corporation, Japan, from M/s.Stone & Webstar Engineering Corporation, USA, is higher than M/s. Marubeni's invoice price to the petitioner, which is not a normal trade practice. The evidence for the higher procurement price during investigation is the chart recovered and seized from the computer available in the office premises of M/s. Marubeni Corporation, Chennai, along with CPU. The executives of the petitioner as well as M/s. Marubeni Corporation have admitted the value difference between the procurement prices of M/s. Marubeni from M/s. Stone and Webstar and the prices declared in M/s. Marubeni's invoices to M/s. PPN, viz., the petitioner herein. The Managing Director of the petitioner was enquired under section 108 of the Customs Act and during the course of such enquiry, he interalia stated that he took full responsibility about the customs duty and if the invoice value is less than the actual value, the petitioner will be benefited. When specifically enquired as to who will be liable to pay the differential duty arising out of the discrepancy, the Managing Director stated that the petitioner will be liable to pay the same. Hence, the total differential duty payable by the petitioner works out to Rs.9.54 crores under section 18 of the Customs Act, 1962.. Based on the investigation report which has come to the notice now, a letter dated 22.05.2018 (impugned in W.P.No. 14365 of 2018) was issued to the petitioner giving an opportunity to explain their case regarding levy of differential duty and applicable interest under the provisions of the Customs Act, 1962. The present impugned proceedings in W.P.No.14365 f 2018 is only a letter issued by the Department and not a show cause notice as alleged by the petitioner.

5. Mr.Hari Radhakrishnan, learned counsel appearing for the petitioner in all these writ petitions submitted that the petitioner has completed the project as early as in the year 2002 and also submitted all the necessary documents before the respondents for completing the provisional assessment. It is not fair on the part of the respondents in prolonging the matter for more than 16 years without even completing the provisional assessment. He further submitted that the impugned notice, which is nothing but a show cause notice, issued after a period of 16 years is barred by limitation, in view of CBEC instructions in Circular No.22/2011-Cus dated 04.05.2011. Under the said Circular, the respondents are not entitled to insist for renewing the bank guarantees in respect of project imports on completion of a period of six months from the date of submission of necessary documents as proof of utilization/installation of goods for the finalization of the contract. The petitioner is not at fault either by not submitting any documents as required by the respondents or by not participating in the proceedings as and when they are called upon to appear. It is only the respondents who failed to make the provisional assessment in time and dragged on the matter all these years which has resulted in heavy financial constraint to the petitioner Company, since the bank guarantees given to the tune of Rs.13.77 Crores is being periodically renewed by incurring heavy bank charges for such renewal. He further submitted that Circular No.22/2011-Cus dated 04.05.2011 was considered by the Bombay High Court in a case reported in 2015(321) E.L.T. 616 (Bom.) West Coast Paper Mills Ltd. v. Deputy Commissioner of Customs) and found that if the assessment is not completed within a period of six months, the authority will not insist upon the renewal of bank guarantee in view of the said circular. He also relied upon 2007(217) E.L.T. 325 (SC) (State of Punjab vs. Bhatinda District Co.op. Milk P.Union Ltd.), 1989 (42) E.L.T. 515 (SC) (Government of India vs. Citedal Fine Pharmaceuticals) to contend that even though there is no time limit for making the provisional assessment, the same has to be done within a reasonable time. Therefore, he contended that the prolonged

period taken by the respondents in completing the provisional assessment, had made the petitioner to suffer all along, that too, when their bank guarantees are being renewed continuously from the date of its issuance. Thus, the learned counsel submitted that even though the respondents are entitled to make the provisional assessment, they are not entitled to retain the bank guarantees or insist upon the petitioner to renew the same further. Thus, he sought for return of the bank guarantees as well as the cash deposit made by the petitioner.

6. Per contra, learned counsel appearing for the respondents submitted as follows:

(a) Insofar as W.P.Nos.6492 and 6493 of 2018 are concerned, in view of the communication issued by the second respondent dated 22.05.2018, the petitioner is not entitled to seek for a Mandamus as prayed for and on the other hand, they have to furnish their reply to the said letter dated 22.05.2018 and co-operate for the completion of the provision assessment proceedings.

(b) Insofar as W.P.No.14365 of 2018 is concerned, it is the contention of the respondents that first of all, it is not a show cause of notice and on the other hand, it is a letter calling upon the petitioner to give some clarification. Therefore, it is contended that nothing prevents the petitioner from appearing before the second respondent and give such clarification as sought for in the said communication. They further contended that the basis for issuing the notice dated 22.05.2018 is the DRI report, which in clear and categorical terms refer the under-valuation of the goods and if the same is found to be true, the petitioner is liable to pay a sum of Rs.9.54 cores as differential duty, apart from the applicable interest. It is further contended that the Circular relied on by the petitioner, namely Circular No.22/2011-Cus dated 04.05.2011, cannot be applied to the present case, as the same is applicable only in the normal case and not a case out of the DRI investigation. It is also submitted by the learned counsel that the application of the said Circular would arise only when the proper satisfaction of Officer is arrived based on the document already filed.

7. Heard both sides and perused the materials placed before this Court.

8. It is not in dispute that the two writ petitions filed for mandamus, namely W.P.Nos.6492 and 6493 of 2018, cannot be decided independently without first deciding W.P.No.14563/2018 as the order to be passed in the said writ petition is having a bearing on the prayer sought for in those two writ petitions. Therefore, let me first consider the relief sought for in this Writ Petition No.14563/2018.

9. In Writ Petition No.14563/2018, the petitioner has chosen to challenge the communication dated 22.05.2018 claiming to be a show cause notice. Consequently, the petitioner also seeks for a direction for refund of the security deposit as well as the return of the bank guarantees and to cancel the bond executed by the petitioner for an amount of Rs.6,38,05,72,000/-.

10. There is no dispute to the fact that the whole case revolves around the import of the goods by the petitioner under the Project Import Regulations, 1986. It is stated that after importing those goods, erecting the same in the plant site and after commencing the project and completing the same, the petitioner has approached the respondents and filed all the necessary documents for release of the bank guarantees, cash deposit etc. The petitioner claims that as per the said Project Import Regulations,1986, imported goods were cleared under CTH 9801. However, there is no dispute to the fact that DRI has conducted an investigation and filed a report alleging that the petitioner has undervalued the goods which has resulted in loss of differential duty to the tune of Rs.9.54 crores. The said report is taken as basis for issuing the present impugned communication dated 22.05.2018.

11. Admittedly, the provisional assessment in respect of the goods imported has not taken place so far. There is no dispute to the fact that there is no time limit for making such provisional assessment. No doubt, the report of the DRI dated 04.10.2007 is now taken by the respondents for issuing the impugned communication. Perusal of the said communication would only show that the petitioner was called upon to explain their case regarding levy of differential duty along with applicable interest and personal penalty as discussed in the said communication. In other words, based on the allegation made in the DRI report, the second respondent has called upon the petitioner to give their explanation. Even though, it is not styled as a show cause notice, in effect, it should be construed only as a show cause notice, since the petitioner was called upon to explain regarding the levy of differential duty, applicable interest and personal penalty as alleged in the DRI report. In the absence of any statutory time limit fixed for making the provisional assessment and when the second respondent has issued the impugned communication and called upon the petitioner only to give their explanation, I do not think that this Court, at this stage, is to interfere with such communication or the proceedings pending before the second respondent, since an order of adjudication is yet to be passed. No doubt, there is some delay on the part of the respondents in completing the provisional assessment, at the same time, when the alleged duty evasion is to the tune of Rs.9.54 crores and that too, based on the DRI report, this Court is of the view

that it is for the petitioner to make their reply to the said letter and explain all their stand in detail so that the second respondent will be in a position to finally make the provisional assessment without loss of any further delay. Needless to say that it is open to the petitioner to raise all the contentions as raised in this writ petition before the second respondent as to how the allegation made in the DRI report are factually incorrect. Certainly, the petitioner is entitled to place all the material facts before the second respondent, who in turn, will have to consider the same and pass a final order. As the jurisdiction of the second respondent in issuing such notice is not questioned and as this Court has construed the impugned proceedings as only a show cause notice issued by the competent authority, it is not inclined to interfere with such proceedings, by leaving the matter to be agitated before the second respondent.

12. Learned counsel for the petitioner vehemently contended that in view of the Circular No.22/2011-Cus dated 04.05.2011, once the petitioner has filed the necessary documents, the respondents are not entitled to retain the bank guarantees beyond the period of six months. Therefore, he contended that the bank guarantees are directed to be returned to the petitioner. In support of his contention, he relied on 2015 (321) ELT 616 (West Coast Papers Mill Ltd. vs. Deputy Commissioner of Customs).

13. It is true that Circular No.22/2011-Cus stipulates that the authorities should not insist upon the renewal of bank guarantee if the assessment is not completed within a period of six months. But a careful perusal of the said circular would show that it has not taken into consideration of the situation like the one on hand namely, investigation conducted by DRI and the adverse report filed by them against the petitioner regarding under valuation. Under such circumstances, I do not think that this Court, at this stage, is to consider the effect of the said Circular on the present case and give its finding in any manner. Consequently, the above decision relied on by the petitioner cannot be applied to the facts and circumstances of the present case. The other decisions viz., 2007(217) E.L.T. 325 (SC) (State of Punjab vs. Bhatinda District Co.op. Milk P.Union Ltd.), 1989 (42) E.L.T. 515 (SC) (Government of India vs. Citedal Fine Pharmaceuticals) relied on by the petitioners counsel no doubt indicate that the provisional assessment has to be made within a reasonable time. It is true that the respondents have taken enormous delay in completing the provisional assessment. However, considering the fact that the alleged evasion is to the tune of Rs.9.54 crores, that too, based on a report submitted by the DRI, pursuant to the investigation conducted by them; that there is no statutory time

bar in making such provisional assessment and considering the fact that the present impugned proceedings is issued only calling upon the petitioner to give explanation, this Court is of the view that the above contention raised by the petitioner on the question of delay in making the provisional assessment cannot be construed as fatal to the Revenue.

14. It is true that the petitioner is renewing the bank guarantees for long a number of years by incurring heavy loss. Therefore, the respondents cannot delay the matter further and consequently, they have to take a final decision after hearing the petitioner. As this Court is inclined to direct the second respondent to pass a final order in pursuant to the impugned communication, after hearing the petitioner, the prayer sought for in other two writ petitions viz., W.P.Nos.6492 and 6493 of 2018, cannot be considered, at present. In any event, those prayers were already clubbed with the prayer sought for in W.P.No.14365/2018.

15. Accordingly, all these writ petitions are disposed of in the following terms.

(a) The petitioner shall furnish their reply to the impugned proceedings dated 22.05.2018 within a period of two weeks from the date of receipt of a copy of this order.

(b) On receipt of such reply, the second respondent shall give an opportunity of personal hearing to the petitioner by fixing a date within a period of two weeks thereafter.

(c) On completion of such personal hearing and on perusing the materials placed by the petitioner, the second respondent shall complete the provisional assessment within a period of four weeks thereafter.

(d) If the petitioner succeeds before the second respondent, the cash deposit, bank guarantees and other bond shall be released forthwith.

(e) On the other hand, if the petitioner fails to succeed before the second respondent, the second respondent shall not invoke the bank guarantees within the time prescribed for filing an appeal against the said order.

(f) In that event, it is open to the petitioner to seek appropriate interim relief before the Appellate Authority including for release of bank guarantee by making interim application, after complying with the statutory requirements of pre-deposit.

16. It is made clear that this Court is not expressing any view on the merits of the contentions raised by both parties with regard to the liability of the petitioner to pay the differential duty as alleged by the respondents, as this Court has only remitted the matter back to the second respondent to consider the same, based on the reply submitted by the petitioner. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

vsi/sni

To

1. The Commissioner of Customs,
Chennai II Commissionerate
Custom House, 60 Rajaji Salai,
Chennai-600 001

2. The Assistant Commissioner of Customs,
(Group 6 & Project Import)
Custom House, 60 Rajaji Salai,
Chennai-600 001

+1cc to Mr.Hari Radhakrishnan, Advocate, S.R.No.69373
+1cc to Mr. M.Santhanaraman, Advocate, S.R.No.69554

W.P.Nos. 6492, 6493 & 14365 of 2018

RJI(CO)
CS/12/10/2018