BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 02.08.2018
CORAM:
THE HONOURABLE MR.JUSTICE M.GOVINDARAJ
W.P.(MD)No.9942 of 2018
and
W.M.P.(MD)Nos.9110 and 9111 of 2018

M/s.Joe & Co.,
Represented by its Proprietor Mr.J.Emmanuel,
No.93C/84/52, Palai Road West,
Rajiv Nagar 6th Street,
Tuticorin - 628 008. : Petitioner

Vs.

1.The Commissioner of Customs,
Custom House, New Harbour Estate,
Tuticorin - 628 004.

2.The Commissioner of GST & Central Excise (Appeals),
Coimbatore @ Trichy,
No.1, Williams Road, Cantonment,
Trichy - 620 001.

3.The Additional Commissioner of Customs,
Custom House, New Harbour Estate,
Tuticorin - 628 004. : Respondents

PRAYER: Writ Petition - filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari, calling for the records of the second respondent / Commissioner of GST & Central Excise (Appeals), Trichy, made in Order-in-Appeal No.08/2018, dated 09.01.2018 in A.No.35 / 2017-TTN(CUS), in confirming the order of the third respondent / Additional Commissioner of Customs, Tuticorin, made in Order-in-Original Order No.82/2015 in C.No.VIII/10/150/2015-Adjn., dated 20.11.2015, and quash the same as arbitrary and illegal.

For Petitioner : Mr.A.K.Jayaraj
For Respondents : Mr.R.Aravindan

ORDER

The petitioner is an importer of Cement. He imported cement from Pakistan under four bill of entries on 09.11.2010, 27.12.2010, 28.04.2011, 28.04.2011. As per Counter Veiling Duty (CVD) under Serial No.1A(i) of Notification No.4/2006-CE, dated 01.03.2006 as amended, the petitioner's MRP was at Rs.190/- per 50 kg., bag. There are certain conditions imposed under the notification dated 01.03.2006 for availing the exemption of Counter Veiling Duty (CVD).

The petitioner has complied with the conditions and filed for exemption. However, by show cause notice dated 15.07.2015, the respondent called upon the petitioner to show cause as to why the concession availed by him should not be denied and recovery of duty with interest and penalty of the duty with interest and penalty should not be imposed. The petitioner submitted a detailed reply dated 27.10.2015 to the show cause notice. At the time of filing his reply, he was not in a position to explain the documents pertaining to the bill of entries, but, found complete set of sales invoices and sales tax return files. The respondents, vide Order-in-Original in Order No.82 of 2015 dated 20.11.2015 confirming the demand of differential duty made by him with an appropriate interest under Section 28 (AA) (1) and (2) of the Customs Act, 1962 [hereinafter referred to as "the Act"] and imposed a penalty of Rs.5,37,998/- under Section 114 (A) of the Act. Against which, the petitioner preferred an appeal in order in Appeal No.8 of 2018, which culminated the impugned order dated 09.01.2018. The appellate authority has dismissed the same as it is barred by limitation specified under Section 128 (1) of the Act. Aggrieved over the the order, the petitioner is before this Court.

2. The petitioner has challenged the Order in Original and as well as the Order in Appeal on the ground that the order passed by the original authority is without application of mind and without taking into consideration the relevant materials. It is stated that the consignments are imported a long back ago and therefore, he was not in a position to produce the invoices as well as the bill of entries questioned by the authority. But, now, the petitioner traced those bill of entries and complete set of invoices with regard to the disputed amount. Further, the authority has also failed to furnish the relevant materials and the procedure adopted by him was not transparent. In view of the notification issued by the respondent in Notification No.4/2006-CE dated 01.03.2006, the petitioner is fully eligible to avail the exemption. The parameters influence the MRP price and in view of the material evidence produced by the petitioner, the demand of differential duty under Section 28 (4) of the Act does not arise at all and penalty cannot be imposed under Section 114 (A) of the Act.

3. As seen above, the appellate authority has rejected the petitioner's appeal on the technical ground of limitation. It is submitted that the relevant documents could not be produced before passing orders and the original authority has also not considered the materials produced before it at the time of passing orders.

4. In such circumstances, the High Court of Gujarat at Ahmedabad [Larger Bench] in the case of Panoli Intermediate (India) Pvt. Ltd., vs. Union of India, reported in 2015 (326) E.L.T 532 (Guj.) held as under:

> (A) The petition under Article 226 of Constitution of India can be preferred for

> challenging the order passed by the original adjudicating authority in following circumstances that -
>
> (A.1) The authority has passed the order without jurisdiction and by assuming jurisdiction which there exist none, or
>
> (A.2) Has exercised the power in excess of the jurisidiction and by overstepping or crossing the limits of jurisdiction, or
>
> (A.3) Has acted in flagrant disregard to law or rules or procedure or acted in violation of principles of natural justice where no procedure is specified.
>
> (B) Resultantly, there is failure of justice or it has resulted into gross injustice.
>
> We may also sum up by saying that the power is there even in aforesaid circumstances, but the exercise is discretionary which will be governed solely by the dictates of the judicial conscience enriched by judicial experience and practical wisdom of the judge."

5. The above decision made by the larger bench of the High Court of Gujarat at Ahmedabad clearly held that when an order is passed in violation of principles of natural justice, without considering the relevant materials, which ought to have been considered and where resulted in gross injustice, this Court, under Article 226, can interfere with the order passed by the authority.

6. In the instant case also, the petitioner says that the authority has passed orders without considering all the bill of entries and complete set of invoices. Now, the petitioner has traced those documents. Therefore, non consideration will lead to failure of justice and gross injustice will be done to the parties.

7. The Hon'ble Supreme Court, in very many cases, has held that instead of rejecting the matter on the ground of technicalities, it shall be seen that substantial justice is done on merits of the matter. Here is the case, there are materials, which should have been considered by the authority, which are now available before the Court. Consideration of these materials evidences may change the cause of the order. Non consideration will cause grave hardship and irreparable hardship to the petitioner. In the interest of justice, the original authority shall be directed to consider the available materials and decide afresh.

8. This Court, in judgment passed in the case of Raagam Exports vs. Assistant Commissioner of Customs, Tirupur, reported in 2017 347 ELT 249 has held that where factual position is not considered, merely because the original authority has passed an ex-parte order, it cannot operate as estoppel to reconsider to establish by the petitioner before the Court.

9. In such circumstances, the orders passed in Order-in-Appeal No.08/2018, dated 09.01.2018 confirming the order passed Order-in-Original Order No.82/2015 and the order passed Order-in-Original Order No.82/2015 in C.No.VIII/10/150/2015-Adjn., dated 20.11.2015 are set aside. The matter is remitted back to the original authority for fresh consideration on the basis of the material evidences produced by the petitioner.

10. In the result, the writ petition is disposed of with the above observations. No costs. Consequently, the connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(WRITS)

/True Copy/

Sub Assistant Registrar(CS-IV)

TO
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Copy To:
The Section Officer,
E.R Section,
Madurai Bench of Madras High Court,
Madurai.
+1CC TO MR.R.ARAVINDAN, ADVOCATE IN SR.NO.76888.
SM/TK
DS SV SAR-4 05.10.2018 4P/6C