

IN THE HIGH COURT OF BOMBAY AT GOA

MISC. CIVIL APPLICATION NO.739 OF 2019

IN

WRIT PETITION NO.65 OF 2018

Fomento Resources Pvt. Ltd. & Anr.

... Applicants

Versus

Union of India & Ors.

.... Respondents

Mr. S. S. Kantak, Senior Advocate alongwith Mr. Parag Rao and Ms. Swati Kamat Wagh, Advocates for the Applicants (Fomento).

Ms. Asha Desai, Senior Central Government Standing Counsel for Respondent Nos.1 to 3.

Ms. Priyanka Kamat, Standing Counsel for Respondent No.4.

Mr. C. A. Ferreira, Advocate for the original Respondent Nos.6 to 8.

AND

MISC. CIVIL APPLICATION NO.667 OF 2019

IN

WRIT PETITION NO.65 OF 2018

Commissioner of Customs, Marmagoa.

... Applicant

Versus

Fomento Resources Pvt. Ltd. & Anr.

... Respondents

Ms. Priyanka Kamat, Standing Counsel for the Applicant (Customs).

Mr. S. S. Kantak, Senior Advocate alongwith Mr. Parag Rao and Ms. Swati Kamat Wagh, Advocates for the Respondent No.1 (Fomento).

Ms. Asha Desai, Senior Central Government Standing Counsel for the

original Respondent Nos.1 to 3.

Mr. C. A. Ferreira, Advocate for the original Respondent Nos.6 to 8.

***Coram : M.S. Sonak &
Nutan D. Sardesai, JJ.***

Date : 13th August, 2019

Oral Order (Per M. S. Sonak, J)

Heard Mr. S. S. Kantak, learned Senior Advocate alongwith Mr. Parag Rao, for the Applicant (Fomento) in M.C.A. No.739 of 2019 and Ms. Asha Desai and Ms. Priyanka Kamat, learned counsel for the Respondents.

2. Heard Ms. Priyanka Kamat for the Applicant (Customs) in M.C.A. No.667 of 2019 and Mr. S. S. Kantak, learned Senior Advocate alongwith Mr. Parag Rao for the Respondent (Fomento). Ms. Asha Desai appears for the Directorate of Revenue Intelligence (DRI).

3. In M.C.A. No.739 of 2019, Fomento seeks discharge of bank guarantee dated 26.07.2019 and return of the same. There is an additional prayer that the Director of Fomento be relieved of the undertaking furnished to this Court on 29.11.2018 and 12.12.2018.

4. In M.C.A. No.667 of 2019, the Customs seek extension of the aforesaid bank guarantee for further period of three months or disposal of the appeal instituted by Fomento before the CESTAT.

5. Accordingly, learned counsel agree that it is only appropriate that both these applications are disposed of by a common order.

6. Fomento's vessel "*FC Maria Laura*" was seized by the Customs alleging evasion of customs duty. This seizure was challenged by Fomento by instituting Writ Petition No.65 of 2018. This Court, in its order dated 16.01.2018, after observing that the seizure is *prima facie* without jurisdiction granted interim relief to Fomento permitting the use of the vessel for loading/export operations within the jurisdiction of the Customs. This was made subject to Fomento undertaking not to create third party rights in respect of the said vessel or moving the vessel beyond the jurisdictional limits of the Customs.

7. Fomento, on 27.11.2018 took out M.C.A. No.971 of 2018, seeking permission of this Court to take out the said vessel beyond the jurisdictional limits of the Customs for a limited period of 14 days and to bring back the same within 14 days.

8. The aforesaid M.C.A. No.971 of 2018 was disposed of by

order dated 28.11.2018. Leave was granted subject to Fomento's Director furnishing an undertaking about return of vessel and subject to further Fomento furnishing a bank guarantee of a Nationalized bank in an amount of Rs.6 crores, which was to be kept alive for a period of six months.

9. After some marginal delay, the vessel was brought back in the jurisdictional limits of Customs. Fomento then took out M.C.A. No.1052 of 2018 on 18.12.2018 seeking discharge of bank guarantee and undertaking.

10. Since, the hearing in main Writ Petition No.65 of 2018 had already concluded on 12.12.2018 and the matter was reserved for orders, M.C.A. No.1052 of 2018 was directed to be taken up alongwith the main matter.

11. Writ Petition No. 65 of 2018 was disposed of by judgment and order dated 05.04.2019. The seizure was quashed and set aside. However, since the bank guarantee was to remain alive till 29.05.2019, the same was directed to operate. According to us, this later direction was in order to protect the interest of the Customs for limited time, should the Customs desire to challenge the quashing of seizure notice.

12. Since, in the meanwhile, Customs had issued a show cause

notice dated 05.07.2018 to Fomento, Fomento instituted Writ Petition No.400 of 2019 questioning the same on the ground that the main premise of the show cause notice was the same as the main premise of the seizure notice.

13. Writ Petition No.400 of 2019 was disposed of by this Court on 22.04.2019. This Court, accepted the statement of Ms. Kamat on behalf of Customs that the show cause notice would be disposed of after afford of opportunity to Fomento on or before 29.05.2019, which was the date on which the bank guarantee was to otherwise expire.

14. This Court, in its order dated 22.04.2019 further directed that in case any adverse order is passed by the Customs against Fomento, the same shall not be implemented for two weeks from the date of its communication and correspondingly Fomento shall extend the bank guarantee until 30.06.2019.

15. Upon the specious plea that no order was communicated, Fomento permitted the bank guarantee to expire. Customs therefore took out M.C.A. No.614 of 2019 on 27.06.2019, requiring Fomento to renew the bank guarantee and for encashment thereof, since, by order dated 28.05.2019, the demand in the show cause notice had been confirmed.

16. M.C.A. No.614 of 2019 was disposed of by this Court on 28.06.2019 by making the following order :

“This is a Miscellaneous Civil Application of the Commissioner of Customs for extension of a Bank Guarantee furnished by the respondents.

2. Learned Counsel for respondent no.1, after taking instructions from his clients, states that the respondents shall execute a fresh Bank Guarantee on the same terms as the old Bank Guarantee, referred to in the prayer clause of the Miscellaneous Civil Application, valid up to 15/07/2019. Liberty to the respondents to apply for variation of the order dated 22/04/2019. All rights and contentions of the parties on merits in that behalf are kept open. Registry is directed to return the existing Bank Guarantee dated 29/11/2018 to respondent no.1 which anyway has expired.

3. Miscellaneous Civil Application is disposed of in the above terms.”

17. Customs took out further M.C.A. No.667 of 2019 seeking extension of bank guarantee for three months or until disposal of appeal instituted by Fomento before CESTAT. Interim order was made in this M.C.A. on 19.07.2019 and in terms thereof the bank guarantee was extended upto 15.08.2019. Liberty was also granted to Fomento to take out M.C.A. for discharge of bank guarantee.

18. Ms. Kamat and Ms. Desai point out that the issue of bank guarantee is now linked to the demand of over Rs.6 crores which stands

confirmed vide order dated 28.05.2019 which is the subject matter of appeal instituted by Fomento before CESTAT. They submit that this is quite clear from the orders dated 22.04.2019, 28.06.2019 and 19.07.2019. They submit that there is a restraint on Customs to implement these orders and therefore, it is only appropriate that the demand is secured by Fomento by bank guarantee in question. They submit that should Fomento's appeal be dismissed by CESTAT, Customs must be in a position to recover the demand immediately by encashing the bank guarantee. They submit that otherwise, the vessel will continue to remain with Fomento and the Customs will have to commence fresh proceedings for recovery of the demand. For these reasons, they submit that M.C.A. No.667 of 2019 be allowed and M.C.A. No.739 of 2019 be dismissed.

19. Mr. Kantak, on the other hand submits that the bank guarantee was furnished only because Fomento desired to take the vessel beyond the jurisdiction of Customs, even though, the seizure order had not been set aside. He submits that once the vessel was brought within the jurisdiction of the Customs, the bank guarantee was required to be discharged. He submits that Fomento has instituted an appeal before CESTAT after making pre-deposit of 7.5% of the demand. He relies upon Circulars dated 16.09.2014 and 10.03.2017 issued by the Central Government, which provide that no coercive recovery should be made by Customs, pending appeals. He submits that seizure orders have already

been set aside. He submits that Fomento cannot be placed in a position worse than what it was, when the seizure orders were yet to be set aside. He submits, on instructions, that Fomento will even now undertake not to take the vessel beyond the jurisdiction of Customs, pending appeal before CESTAT, without seeking leave from CESTAT. For all these reasons, he submits that M.C.A. No. 667 of 2019 be dismissed and M.C.A. No.739 of 2019 be allowed.

20. Upon due consideration of the rival contentions as well as the various orders made by us in this matter, we are satisfied that the bank guarantee is required to be discharged by accepting undertaking on behalf of Fomento that the vessel will not be taken out of the jurisdiction of the Customs (in Goa) pending Fomento's appeal before CESTAT, without seeking leave from CESTAT. This is because the material on record makes it clear that Fomento was required to give this bank guarantee, in the first place, only because Fomento desired to take this vessel beyond the jurisdiction of Customs, in variation of our interim order dated 16.01.2018. The bank guarantee, was to really operate until Fomento returns the vessel within the jurisdictional limits of the Customs within the time stipulated. There is no dispute that the vessel was returned, though, with some marginal delay which was also deemed to be condoned. The bank guarantee was not immediately discharged, only in order to enable the Customs to challenge our judgment and order dated 05.04.2019, by

which we allowed Writ Petition No.65 of 2018 and set aside the seizure of the vessel.

21. Further, it is not as if this Court directed the extension of the bank guarantee in Writ Petition No.400 of 2019 in the first instance. This Court, merely accepted the statement on behalf of Customs that show cause notice would be disposed of by 29.05.2019, upto which date the bank guarantee was, in any case, to remain alive in terms of our judgment and order dated 05.04.2019 disposing of Writ Petition No.65 of 2018. The later portion of the order had restrained the Customs from enforcing adverse order, if any, against Fomento and correspondingly, bank guarantee was ordered to be extended upto 30.06.2019. This was to protect the Fomento, as otherwise, the bank guarantee might have been encashed by the Customs, no sooner the demand in the show cause were to be confirmed. The purpose of this direction was not to place Fomento in a position, any less advantageous than a similarly placed assessee. This was more so after the Customs seizure notice was quashed by a detailed judgment and order dated 05.04.2019.

22. Today, admittedly, Fomento has appealed the adverse order dated 28.05.2019 by making requisite pre-deposit. In terms of the Circulars dated 16.09.2014 and 10.03.2017, even the Customs does not dispute that the demand pending appeal is not to be recovered by coercive

means. In such a situation, it will not be appropriate to require Fomento to maintain the bank guarantee as a precondition for Customs not initiating coercive proceedings to enforce demand. As noted earlier, the Customs are in no position to take coercive proceedings pending appeal in view of the aforesaid Circulars. Fomento, despite succeeding in Writ Petition No.65 of 2018 and despite returning the vessel to the jurisdictional limits of Customs, cannot be required to maintain the bank guarantee for any further period. Fomento, cannot, despite its success in the Writ Petition No.65 of 2018 and return of the vessel, be foisted with additional liability of keeping the bank guarantee alive until disposal of its appeal before the CESTAT. The same is the position with regard to the undertaking submitted by the Director of Fomento.

23. For all the aforesaid reasons, we dismiss M.C.A. No.667 of 2019 and allow M.C.A. No.739 of 2019. This is however subject to the undertaking given by Fomento through its counsel that the vessel will not leave the jurisdictional limits of Customs (in Goa) without seeking leave from CESTAT. Fomento, is directed to file a formal undertaking of its responsible officer, within seven days from today, in this Court, to the aforesaid effect. There shall be no necessity for any further renewal of bank guarantee dated 26.07.2019, which the registry shall return to Fomento no sooner such undertaking is filed by the Director/responsible officer of Fomento.

24. M.C.A. Nos.667 of 2019 and 739 of 2019 are disposed of in the aforesaid terms.

Nutan D. Sardesai, J

M.S. Sonak, J

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