IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 09.04.2019

CORAM:

THE HONOURABLE MR. JUSTICE SENTHILKUMAR RAMAMOORTHY

W.P.No.47079 of 2006
and
M.P.No.1 of 2007

Khader Nawaz
Proprietor, M/s.Mayoora Enterprises,
Flat No.T-3, Malligai Apartments,
No.43, 1st Avenue, Indira Nagar,
Adyar, Chennai-600 020. ... Petitioner

Vs.

1.The Customs and Central Excise
Settlement Commission,
2nd Floor, Narmada Block,
Customs House,
No.33, Rajaji Salai,
Chennai - 600 001.

2.The Commissioner of Customs(Sea Port),
Customs House,
No.33, Rajaji Salai,
Chennai - 600 001. ... Respondents

PRAYER: Writ Petition is filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus quashing the order of the First Respondent No.27/2006 dated 17.11.2006 and direct the First Respondent to admit and dispose of the Application filed by the Petitioner.

For Petitioner : Mr.S.S.Radhakrishnan

For Respondents: Mrs.S.Seethalakshmi
Standing Counsel for
Customs and Central Excise

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O R D E R

This Writ Petition has been filed for a Writ of Certiorari cum Mandamus to quash the Order of the First Respondent bearing No.27/2006 dated 17.11.2006 and to direct the First Respondent

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to admit and dispose of the Application filed by the Petitioner.

2.The case of the Petitioner is that he is a trader in DEPB licence. In the course of business, the Petitioner states that Mr.J.Kaviyarasan, Manager(Imports) of M/s.Sabari Logistics, Chennai approached the Petitioner in February,2003 for DEPB licences on behalf of M/s.Sri Devi Extractions Pvt Ltd, Namakkal. Pursuant to the said request, the Petitioner arranged for the following DEPB licences: No.0410036789 dated 18.02.2003 for Rs.1,85,654/- and No.0410036790 dated 18.02.2003 for Rs.6,79,900/- pertaining to M/s.Five Star Marine Exports. The payment for the said two licences was received in the name of M/s.Five Star Marine Exports. Subsequently, Mr.J.Kaviyarasan approached the Petitioner with another cheque drawn in favour of the Petitioner's concern, namely, M/s.Mayoora Enterprises for an amount of Rs.22,53,532/- and explained that Ms/.Sri Devi Extractions Private Limited, Namakkal had issued the cheque wrongly in favour of the Petitioner's concern and requested for encashment of the same for the reason that the return of the cheque would delay the payment for the licence already supplied to the importer, namely, M/s.Sri Devi Extractions Private Ltd.

3.The Petitioner further states that Mr.J.Kaviyarasan specifically stated before the Investigating Officer that Sri Khader Nawaz of Mayoora Enterprises is not aware that the encashed amount of Rs.22,53,532/- should be given to Sri Vijay Jhaver who was the supplier of the controversial licence in this case. Therefore, the Petitioner states that he had no role in the matter either in respect of procuring the controversial DEPB licence No.0410034788 or representing to anybody as if the said licence is a genuine one. The Petitioner further states that the importer, namely, Sri Devi Extractions Private Ltd filed an application for settlement of the case before the Settlement Commission and accepted the duty liability of Rs.26,12,205/-. On coming to know about the said Application, the Petitioner also filed a Settlement Application before the Settlement Commission and the said Application was numbered as C.No.VIII/10/143/2006-SC. However, the Settlement Commission, by Order No.27/2006-Cus. dated 17.11.2006, rejected the Application of the Petitioner on the ground that the Petitioner did not satisfy the conditions specified under Section 127(B)(1) of the Customs Act,1962. The said Order dated 17.11.2006 is impugned in this Writ Petition.

4.The case of the Respondents is that the Show Cause Notice dated 10.05.2006 was issued to the Petitioner for the limited purposes of imposing penalty under Section 112(A) of the Customs Act and that such demand for penalty does not come within the scope of Section 127(B)(1) of the Customs Act. In addition, the Respondents submit that the Petitioner did not reply to the Show

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Cause Notice and approached the Settlement Commission without exhausting the remedy. In addition, the Respondents state that the other co-noticee approached the Settlement Commission along with the primary Applicant whereas the Petitioner admittedly approached the Settlement Commission after the Settlement Commission proceedings in respect of the primary Applicant and the co show cause noticee were settled. Accordingly, the Respondents submit that the Application for Settlement is not maintainable.

5.When the case was taken up for hearing, the learned counsel appearing for the Petitioner submitted that the Petitioner is a trader in DEPB licences and that such lincences are issued by the Director General of Foreign Trade(DGFT) and used for the purposes of availing customs duty exemptions. The learned counsel for the Petitioner further submitted that the Petitioner was not complicit in the creation of forged DEPB licences and that the main party involved in the controversy had submitted an Application for settlement, which was accepted. He referred to the Show Cause Notice dated 10.05.2006 which was issued in common to M/s.Sri Devi Extractions Private Limited, Sri Vijay Jhaver, Sri J.Kaviyarasan and the Petitioner, namely, Khadar Nawaz. On that basis, he submitted that the issue arises out of a common Show Cause Notice. He, therefore, referred to the Impugned Order dated 17.11.2006 wherein it is stated that the main noticee, M/s.Sri Devi Extractions Private Limited, Salem filed an Application for settlement and that the said Application was admitted and settled vide Admission-cum-Final Order No.52/2006-Cus. dated 28.08.2006. He further referred to paragraph 5 of the Impugned Order wherein the Settlement Commission recorded that the Applicant filed the Application independently of the main noticee and that he has not made any disclosure of additional revenue and also not filed a Bill of Entry. Accordingly, the Settlement Commission rejected the application. The learned counsel appearing for the Petitioner also referred to the following judgments in support of his contentions.

(1) IN RE: RAJDOOT ROAD CARRIERS P. LTD. in 2016(338) E.L.T. 686 (Mad.)

(2) MAHARAJA CARGO Vs. CUS. & C. EX. SETTLEMENT COMMISSION, CHENNAI in 2016 (338) E.L.T. 686(Mad.).

(3) IN RE; B.M.RAKESH, in 2018 (364) E.L.T. 734 (Sett.Comm.)

On the basis of the said judgments, the learned counsel contended that this Court permitted the co-noticee also to maintain the Settlement Application because it arose out of the same cause of action. In fact, in the above mentioned judgment of the Settlement Commission it was held that when the Application of the main Applicant is admitted by the Commission,

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the Application of the co-noticee should also be entertained so as to avoid multiplicity of proceedings.

6.In response, the learned counsel appearing for the Respondents submitted that the Petitioner does not satisfy the requirements of Section 127(B)(1) of the Customs Act in as much as the Petitioner did not disclose any additional duty or file necessary documents such as Bill of Entry. The learned counsel further referred to paragraph 9 of the counter affidavit wherein it is stated that the Petitioner did not reply to the Show Cause Notice dated 10.05.2006. In addition, the learned counsel for the Respondents referred to Paragraph 11 of the counter affidavit to point out that this is not a case where the co-noticee had joined the main Applicant and filed the Settlement Application. Instead the said application was filed independently without enclosing relevant documents. As such, the rejection of the Application cannot be questioned.

7.The affidavit, counter affidavit, relevant documents on record and oral submissions of the parties, were carefully considered.

8.It is clear that a common show cause notice dated 10.05.2006 was issued to M/s.Sri Devi Extractions Private Limited, Sri Vijay Jhavesr, Sri J.Kaviyarasan and Khader Nawaz, namely, the Petitioner herein. It is also the admitted position that the primary Applicant and other co-noticee approached the Settlement Commission and the said Application was admitted and settled vide Admission-cum-Final Order No.52/2006-Cus. dated 28.08.2006.

9.In view of the aforesaid position, the judgments relied upon by the learned counsel appearing for the Petitioner are squarely applicable and it is just and necessary that the Application of the Petitioner for settlement should also be taken up for hearing and decided on merits. Accordingly, the Impugned Order dated 17.11.2006 is liable to be quashed.

10.In the result, this Writ Petition is allowed and the Impugned Order dated 17.11.2006 is quashed. Consequently, the First Respondent is directed to consider the Settlement Application filed by the Petitioner and dispose of the same on merits by a speaking order, after providing a reasonable opportunity, including a personal hearing to the Petitioner, within a period of three months from the date of receipt of a copy of this order. There shall be no order as to costs. Consequently, connected M.P. is closed.

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Sd/-

Assistant Registrar (AD-IV)

//True Copy//

Sub Assistant Registrar

rrg

To

1.The Commissioner of Customs(Sea Port),
Customs House,
No.33, Rajaji Salai,
Chennai - 600 001.

+1cc to Mr.Hari Radhakrishnan, Advocate, S.R.No. 35228
+1cc to Mr.S.Seethalakshmi, Junior Standing Counsel for Customs and Central Excise, S.R.No. 35691

W.P.No.47079 of 2006

SPD (CO)
GN(20/05/2019)

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