IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.12.2019

CORAM

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

W.P.No.34402 of 2012
and
MP.No.2 of 2012

M/s.S.Albert & Company Pvt. Ltd.,
Rep.by its Director,
No.13/1 Whannels Road,
Egmore, Chennai - 600 008. ... Petitioner

Versus

1. The Chennai Port Trust,
   Rep.by its Chariman,
   Rajaji Salai,
   Chennai 600 001.

2. The Traffic Manager,
   The Chennai Port Trust,
   Rajaji Salai,
   Chennai 600 001. ... Respondents

Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, to call for the records relating the proceedings of the second respondent herein bearing No.C2 (a)/242/2006/T, dated 02.09.2010, No.C2 (a)/242/2006/T, dated 22.11.2010 and NO.C2(a)/242/2006/T dated 04.02.2011 and quash the same.

For petitioner : Mr.K.Sivakumar
For respondents : Mr.R.Karthikeyan, (for R1 & R2)

ORDER

This writ petition has been filed challenging the orders of the second respondent bearing No.C2 (a)/242/2006/T, dated 02.09.2010, No.C2 (a)/242/2006/T, dated 22.11.2010 and No.C2(a)/242/2006/T, dated 04.02.2011 and quash the same.

2.It is the case of the petitioner that they are carrying on business as a Clearing and Forwarding Agent and handling Import and Export of Cargo in the Port of Chennai. It is their case that they have been obtaining license from time to time from the respondents to occupy covered spaces or godown in the Port Trust area. According to them, the petitioner had applied for license on 05.01.2010 from the respondents for permitting to use the covered spaces in the Warehouse in the Port Trust area for the purpose of clearing Sugar/Wheat/Rice/Maize and Pulses, which were being imported by their clients. According to them, the license was granted by the respondents to the petitioner to store the aforesaid items for the period upto 31.03.2010, vide proceedings of the first respondent dated 20.03.2010, which was also renewed for further periods.

2.According to the petitioner, they had filed a bill of entry dated 07.01.2010 bearing Nos.402911, 402913, for a quantity of 6,624.796 metric tons and 3,076.882 metric tons of Brazilian Raw Sugar in bulk, which was imported by M/s. Cargil India Pvt. Ltd. According to them, the samples of the Sugar were sent for testing for compliance as per he requirements under the provisions of the Prevention of Food Adulteration Act, 1954. According to the petitioner, the test failed on account of the presence of extraneous matters in the sugar to an extent, which is above the normal limit and the presence of sucrose is at 87.9%, which was below the normal limit. Hence, the commodity was not allowed to be cleared by the customs department by its proceedings dated 05.02.2010. Thereafter, personal hearing appears to have been given to the Importer and the Importer insisted for testing the imported goods in another laboratory at CFTRI, Mysore and pursuant to the order of this Court, according to the petitioner, it appears that the testing of the product in the said laboratory was permitted and the said testing report also was negative and hence, final orders were passed by the Customs Department on 14.09.2010 directing the importer to re-export the Cargo. However, according to the petitioner, since the Importer is a bona-fide importer, who was not at fault for the defective supplies made by the Exporter, penal proceedings were dropped against the importer by the Customs Department.

3.According to the petitioner, during the investigation period, the Cargo was not allowed by the Customs Department to be cleared and only after the order for re-export, the Customs Department allowed the Cargo to be removed for the purpose of re-export. According to them, in view of the above contingency, which was beyond the control of the petitioner, the petitioner was not able to clear the Cargo within a period of 60 days as per the clause (10) of the allotment order issued by the respondents. It is the case of the petitioner that the delay in clearing the Cargo was not due to their fault. It is only due to the reasons stated above which are beyond their control. Hence, according to them, they are not liable to pay any penalty as per clause (10) of the allotment order dated 05.01.2010 issued by the respondents.

4.According to the petitioner, the second respondent passed the impugned orders directing the petitioner to pay the penalty as per clause (10) of the allotment order, which according to the petitioner, they are not liable to pay. Further, it is their case that despite the representations given by the petitioner for waiver of penalty as stipulated under clause (10) of the allotment order, in the impugned orders, the respondents have not considered their representations nor any opportunity was given to the petitioner to place their submissions before passing the impugned orders.

5.A Counter affidavit has been filed by the second respondent and reliance is placed upon clause (10) of the allotment order. According to them, if the Cargo has not been cleared within a period of 60 days, the petitioner is liable to pay the penalty at three times of monthly license fee. Therefore, according to them, only in accordance with the clause (10) of the allotment order, the second respondent has imposed penalty on the petitioner vide the impugned orders.

6.It is also their case that due to the storage of the goods by the petitioner beyond 60 days period, they were unable to allot the space to other parties, who were badly in the need of the same space. According to the respondents, they have suffered losses because of the non-clearance of the Cargo by the petitioner within the stipulated period.

7.Heard Mr.K.Sivakumar, learned counsel for the petitioner and Mr.R.Karthikeyan, learned counsel for the respondents 1 and 2.

8.As seen from the impugned orders, the second respondent has not considered the representation dated 20.10.2010, which was given prior to passing of the impugned orders dated 22.11.2010 and 04.02.2011. It is the case of the petitioner that they are not liable to pay the penalty, since they are not the Importers but only M/s. Cargil India Pvt.Ltd., who had imported the Cargo which did not confirm the specifications as prescribed under the Prevention of Food Adulteration Act,1954 unknowingly.

9.The Commissioner of Customs, vide his order dated 14.09.2010, has also dropped all penal proceedings initiated against the importer with regard to the subject matter in this writ petition. The Commissioner of Customs has taken into consideration the Board Circular letter dated 08.06.1959 in F.NO.18/1/59- Cus(CRC), which states that:-

> "where the goods are shipped contrary to the instructions of importer and the importer intends to re-export the same, the collector may use his

discretion and release the goods on payment of nominal penalty or without any penalty as it deems fit, provided that he is satisfied that the goods have been imported as a result of bona-fide mistake and contrary to the importer's instructions and the same are re-exported. The NOC from the RBI will be required for re-shipment of the goods."

10.The Commissioner of Customs has also taken into consideration another circular of the board bearing No.100/2003, dated 28.11.2003, wherein it is stated as under :-

> "Commissioner may use discretion and allow re-export without the requirement of a NOC from RBI, on payment of a nominal penalty or without any penalty as he deems fit, provided that he is satisfied that the goods have been imported as a result of bona-fide mistake and contrary to the importer's instructions."

11.Based on these circulars, the Commissioner of Customs has given a finding based on the evidence available on record that the importer had committed a bona-fide mistake by importing the goods from the supplier which does not confirm to the specification of the prevention of Prevention of Food Adulteration Act, 1954. The Commissioner of Customs has accepted the contention of the importer M/s. Cargil India Pvt.Ltd., for whom the petitioner had acted as clearing and forwarding agent that only due to bona-fide mistake the said Cargo was imported by them. The Commissioner of Customs has also dropped the action to initiate penal proceedings initiated against the importer M/s. Cargil India Pvt. Ltd., due to their bonafide mistake in importing cargo which does not confirm to the specifications of prevention of Food and Adulteration Act, 1954.

12.As seen from the impugned orders, the respondents have not taken into consideration (a) The representation given by the petitioner for waiver of penalty (b) The order dated 14.09.2010 passed by the Commissioner of Customs dropping all penal proceedings against the importer M/s. Cargil India Pvt. Ltd., due to their bonafide mistake in importing cargo which does not confirm to the specifications of prevention of Food and Adulteration Act, 1954. (c) No personal hearing has been afforded to the petitioner before passing of the impugned orders and (d) As per the allotment order, the monthly license fee payable by the petitioner to the respondents is Rs.65,526/- whereas, the total penalty imposed on the petitioner approximately comes to Rs.72 lakhs. A categorical stand has been taken by the petitioner that the penalty imposed is arbitrary and unreasonable and they are not liable to pay the same.

13.The second respondent ought to have considered the above mentioned factors but as seen from the impugned orders, they have totally ignored the same. This being the admitted position, this case is a fit case for remand to the second respondent for fresh consideration after giving sufficient opportunity to the petitioner in accordance with law.

14.For the foregoing reasons, the impugned orders passed against the petitioner are hereby quashed and the matter is remanded back to the second respondent for fresh consideration and the second respondent shall give sufficient opportunity to the petitioner to place all his submissions and the second respondent shall consider the same and pass final orders in accordance with law, within a period of eight weeks from the date of receipt of a copy of this order. The petitioner shall be afforded an opportunity of personal hearing by the second respondent.

15.With these above observations and directions, this writ petition is disposed of. No costs. Consequently, the connected miscellaneous petition is closed.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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To
1. The Chariman,
   Chennai Port Trust,
   Rajaji Salai,
   Chennai 600 001.

2. The Traffic Manager,
   The Chennai Port Trust,
   Rajaji Salai,
   Chennai 600 001.
+1 CC to Mr.K.Sivakumar, Advocate sr 103570.
+1 CC to Mr.R.Karthikeyan, Advocate sr 103519.

W.P. No.34402 of 2012
and
MP No.2 of 2012

PA(CO)
SP(04/02/2020)