IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 14.06.2019

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

W.P.No.16141 of 2019
and
W.M.P.No.15883 of 2019

A.L.Enterprises
Rep. By its Managing Director
Shri.Mohammed Bilal Sattar
No.102, V-Block, 2nd Floor
Flat No.6, 5th Main Road
Anna Nagar, Chennai - 600 040 .. Petitioner

vs.

The Joint Commissioner of Customs
Chennai IV Commissionerate
Customs House, 60 Rajaji Salai
Chennai - 600 001 .. Respondent

Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari, by calling for the records of the impugned show cause notice dated 24.08.2018 in F.No.S.Misc/159/2018-DRI read with corrigendum dated 28.02.2019 issued by the respondent and quash the same.

For Petitioner : Mr.Hari Radhakrishnan

For Respondents : Mr.A.P.Srinivas
Senior Standing Counsel

O R D E R

Mr.Hari Radhakrishnan, learned counsel on record for writ petitioner is before this Court. Mr.A.P.Srinivas, learned senior Standing Counsel accepts notice on behalf of the sole respondent i.e., official respondent.

2. Though this matter is listed under the caption 'FOR ADMISSION' in the motion list, with the consent of learned counsel on both sides, the main writ petition itself is taken up, heard out and is being disposed of.

3. This writ petition has been filed assailing a 'Show-cause Notice' ('SCN' for brevity) being show-cause notice dated 24.08.2018 bearing reference F.No.S.Misc/159/2018-DRI issued by the respondent (hereinafter 'impugned SCN' for brevity) together with a corrigendum to the impugned SCN being corrigendum dated 28.02.2019.

4. Short facts shorn off unnecessary particulars and details or in other words, short facts which are imperative for appreciating this order, are as follows:

a) writ petitioner is engaged in the business of export of garments to various countries;

b) In the course of business, writ petitioner had filed 26 shipping bills in the period between June 2009 and December 2009 (on eight occasions) and a drawback claim of Rs.65,08,939/- through Chennai port was made. This drawback was sanctioned by the Customs Department.

c) Sometime in August 2012, on investigation carried out by 'Directorate of Revenue Intelligence' ('DRI' for brevity), the Customs Department states that they realized that the proceeds of exports in respect of aforesaid 26 shipping bills are under a cloud as according to DRI the consignments that were sought to be exported had never arrived at Inland Container Depot (ICD) or Container Freight Stations (CFS).

d) It is the further case of Revenue that during the course of investigation at the instance of officers of DRI, writ petitioner had paid a sum of Rs.49,00,000/- on various dates. To be noted, this Rs.49,00,000/- paid is out of total drawback of Rs.65,08,939/- which is in issue.

e) Under the aforesaid circumstances, respondent issued the impugned SCN inter alia calling upon the noticee/writ petitioner to show-cause as to why the drawback of Rs.65,08,939/- should not be demanded from them under Rule 16A of 'The Customs, Central Excise Duties and Service Tax Drawback Rules, 1995' ('said Rules' for brevity), why an amount of Rs.49,00,000/- already paid by them should not be appropriated towards this demand, why interest on the above mentioned drawback should not be levied, why the consignments mentioned in the aforementioned shipping bills should not be held liable for confiscation and as to why penalty should not be imposed on the writ petitioner under Section 114AA of 'The Customs Act, 1962' ('said Act' for brevity).

e) The writ petitioner sent a reply dated

10.10.2018 being reply to the impugned SCN. Post interim reply, respondent issued a corrigendum to impugned SCN being corrigendum dated 28.02.2019 wherein the respondent invoked Rule 18 of 'The Customs, Central Excise Duties and Service Tax Drawback Rules, 2017' (hereinafter 'said new Rules' for brevity). In other words, now the impugned SCN is under Rule 16A of said Rules and Rule 18 of said new Rules also owing to the corrigendum.

f) It is in the aforesaid scenario, the writ petitioner has filed the instant writ petition assailing the impugned SCN and corrigendum thereto.

5. Having set out the factual matrix in a nutshell, this Court now proceeds to examine the submissions made at the bar today.

6. Learned counsel for petitioner projected his submissions on the sole ground that impugned SCN and corrigendum are barred by limitation. In other words, limitation is the only ground on which the impugned SCN and corrigendum are being assailed.

7. Learned counsel for writ petitioner very fairly submitted that no time frame has been prescribed in the said Rules as well as the said new Rules. It is not in dispute that both the said Rules and said New Rules have been made by Central Government in exercise of Rule making powers conferred on it under Section 75 (2) of said Act.

8. In this backdrop, learned counsel for writ petitioner drew the attention of this Court to Section 28 of said Act and submitted that this case would, at best, come close to Section 28 of said Act. Learned counsel pointed out that under Section 28, two separate time frames, one being two years and another being 5 years have been stipulated albeit for recovery of duties not levied, not paid, short levied, short paid or erroneously refunded. Learned counsel also submitted that in cases where collusion or any wilful misstatement or suppression of facts are alleged, the time frame is 5 years from the date. The expression 'relevant date' has also been explained in Explanation No.1 to Section 28 of said Act.

9. Learned counsel thereafter pressed into service a judgment of a Hon'ble Division Bench of Gujarat High Court in Pratibha Syntex Ltd., Vs. Union of India reported in 2013 (287) E.L.T.290 (Guj.) and submitted that Gujarat High Court while dealing with Rule 16 of said Rules held that when limitation is not prescribed, power with regard to such provisions has to be exercised within reasonable time.

10. Learned counsel drew the attention of this Court to Paragraph 18 of the said judgment, which reads as follows:

'18. Rule 16 of the Drawback Rules provides that where an amount of drawback and interest, if any, has been paid erroneously or the amount so paid is in excess of what the claimant is entitled to, the claimant shall, on demand by a proper officer of customs, repay the amount so paid erroneously or in excess, as the case may be, and where the claimant fails to reply the amount, it shall be recovered in the manner laid down in sub-section (1) of Section 142 of Customs Act, 1962. Thus, apparently Rule 18 of the Rules does not provide for any time limit for making recovery of excess drawback paid erroneously. The question, therefore, is when Rule 16 does not prescribe any period of limitation, whether action can be taken thereunder after any length of time or whether the concept of reasonable period has to be read into it. In this regard, it is by now well settled by the Supreme Court in a catena of decisions that if the statute does not prescribe any period of limitation, the power thereunder has to be exercised within a reasonable time. What would be a reasonable period would, of course, depend upon the facts of each case.

11. On the aforesaid basis, it was submitted that impugned SCN and corrigendum are clearly barred by limitation as the same have been issued nearly a decade after the exercise. To be noted, the exercise was between June 2009 and December 2009 and the impugned SCN is dated 24.08.2018.

12. Responding to the aforesaid submission, learned counsel for Revenue submitted that Gujarat High Court Division Bench judgment is not at the SCN stage and that it is at a stage where the writ petitioner had challenged the orders passed in revision i.e., order passed by the Revisional Authority. In other words, it was post adjudication and is therefore factually distinguishable is learned Revenue counsel's say.

13. It was also pointed out by the Revenue counsel that limitation is a mixed question of law and facts and in the aforementioned Gujarat High Court judgment itself it has been clearly held that what would be the period would depend on facts of each case. In the instant case, as the consignment itself appears to have been not there at the time of export i.e., not arrived at ICD are CFS, this is a matter where the allegation itself needs to be gone into and it cannot be scuttled at the SCN stage itself.

14. This Court has no difficulty in accepting Revenue Counsel's submission that Gujarat High Court's Pratibha Syntex case does not help the writ petitioner in the instant case,

owing to reasons alluded to supra.

15. This takes us to the exercise of writ jurisdiction and interference at the SCN stage. There are a long line of authorities in this regard. This Court deems it appropriate to refer to Kunisetty Satyanarayana case [Union of India and another Vs. Kunisetty Satyanarayana reported in (2006) 12 SCC 28]. Most relevant paragraphs are Paragraphs 15 and 16 and the same read as follows:

> '15. Writ jurisdiction is discretionary jurisdiction and hence such discretion under Article 226 should not ordinarily be exercised by quashing a show-cause notice or charge sheet.
>
> 16. No doubt, in some very rare and exceptional cases the High Court can quash a charge-sheet or show-cause notice if it is found to be wholly without jurisdiction or for some other reason if it is wholly illegal. However, ordinarily the High Court should not interfere in such a matter.'

16. While dealing with another rule of discretion, i.e, rule pertaining to alternate remedy, Hon'ble Supreme Court in Satyawati Tandon Case [United Bank of India Vs. Satyawati Tondon and others reported in (2010) 8 SCC 110] held that when it comes to revenue matters, such rules of discretion though are not rule of compulsion have to be applied with utmost rigour. Satyawati Tandon Case has been subsequently reiterated in the recent K.C.Mathew case [Authorized Officer, State Bank of Travancore Vs. Mathew K.C. reported in (2018) 3 SCC 85]. Relevant paragraph in K.C.Mathew case is Paragraph 10 and the same reads as follows:

> '10. In Satyawati Tondon the High Court had restrained further proceedings under Section 13(4) of the Act. Upon a detailed consideration of the statutory scheme under the SARFAESI Act, the availability of remedy to the aggrieved under Section 17 before the Tribunal and the appellate remedy under Section 18 before the Appellate Tribunal, the object and purpose of the legislation, it was observed that a writ petition ought not to be entertained in view of the alternate statutory remedy available holding: (SCC pp.123 & 128, Paras 43 & 55)
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> > "43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this Rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of

> banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.
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> 55.It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection.'

17. In the instant case considering the facts and circumstances, this Court is of the considered view that this is not a fit case for interfering at the SCN stage. This is because the exceptions for interfering in writ jurisdiction at SCN stage have been clearly laid down in a long line of authorities. It should be a case of SCN being issued without jurisdiction or a SCN that is attempting to re-open settled position of law or a SCN which has been issued with malafide intentions or a SCN which has been issued in a manner that leads one to believe that Authority issuing the SCN has pre-determined the issue. In other words, the adumbration is like this:

a) Lack of jurisdiction;
b) opening a well settled position of law;
c) Malafides;
d) Should be pre-determining the issue, which is subject matter of SCN in the instant case.

Aforesaid enumeration is not exhaustive, but it is a adumbration of broad heads for the limited purpose of disposing of instant case.

18. Considering the factual matrix, this Court is unable to

persuade itself to believe that this matter falls under any one of the aforesaid exceptions. This Court is inclined to accept the submission made by Revenue counsel that even in the aforesaid Gujarat High Court judgemnt it has been clearly held that what would be reasonable period depends on the facts of each case. While this Court comes to the conclusion that this is not a fit case for interfering in the SCN stage, this Court is also of the view that it would be appropriate to direct the respondent to

a) decide the issue of limitation first and then proceed with the adjudication, subject of course to the decision of limitation; and

b) direct the Authority to complete the adjudication within a time frame.

19. Owing to all that have been set out supra, this Court passes the following order:

a) Impugned SCN dated 24.08.2018 bearing reference F.No.S.Misc/159/2018-DRI and corrigendum dated 28.02.2019 are not set aside and the same will be carried to its logical end;

b) Writ petitioner will file further response to the impugned SCN and corrigendum with all supporting documents within a fortnight from the date of receipt of a copy of this order;

c) Respondent will decide the show-cause notice by adjudicating upon the issues in a manner known to law within a period of one month from the date of filing of the objections:

d) As this Court has said that limitation shall be decided first, it does not mean that a separate order has to be passed with regard to limitation, but the proceedings will be subject to the decision taken on the limitation aspect. It is made clear that all these will be done in one go even if the Authority decides the limitation aspects against the writ petitioner.

e) Post adjudication and passing of orders, a copy of the order shall be served on the writ petitioner under due acknowledgement within 10 working days and in accordance with the applicable Rules.

Instant writ petition is disposed of with the above said directions. There shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

Gpa

To

The Joint Commissioner of Customs
Chennai IV Commissionerate
Customs House, 60 Rajaji Salai
Chennai - 600 001

+1cc to M/s.Hari Radhakrisnan, Advocate, SR. No. 49851
+1cc to M/s.A.P.Srinivasan, Senior Staning Counsil
Customs & Central Excise & Service Tax , SR. No. 48803

W.P.No.16141 of 2019 and
W.M.P.No.15883 of 2019

PPA(CO)
RMP(04/07/2019)