IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 22.07.2019

CORAM

THE HONOURABLE MR.JUSTICE M.SUNDAR

W.P.No.19527 of 2019
&
W.M.P.No.19016 of 2019

M/s.Kawarlal & Co.
No.27, Raghunayakulu Street
Chennai - 600 003
By its Proprietor K.Ramlal Jain ... Petitioner

Vs.

1. Joint Director General of Foreign Trade
   O/o.The Additional Director of Foreign Trade
   Ministry of Commerce & Industry
   26, Haddows Road
   Shastri Bhavan Annexe Building
   Chennai - 600 006

2. The Joint Addl. Commissioner of Customs (Imports)
   No.60, Rajaji Salai, Customs House
   Chennai - 600 001 ... Respondents

Writ Petition is filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorari to call for the entire records comprised in Order in Original dated 17.05.2019 in F.No.I(146) Addl. DGFT/ECA/Che/AM 16 passed by the 1st respondent herein and to quash the same, insofar as the said order has been passed without jurisdiction and contrary to the statutory provisions and in total violation to the principles of natural justice and also violating the fundamental rights guaranteed to the petitioner in terms of Art.19(1) (g) and 301 of the Constitution of India

For Petitioner : Mr.T.Mohan for
Mr.S.Baskaran

For Respondent : Mr.K.Srinivasamurthy
Sr. Panel Counsel for Central Government for R1

Mr.P.Rajkumar Jhabakh
Junior Standing Counsel for R2

O R D E R

Mr.T.Mohan, learned counsel appearing on behalf of counsel on record for the writ petitioner and Mr.K.Srinivasa Murthy, learned Senior Panel Counsel, Central Government on behalf of first respondent, who is also representing Mr.P.Rajkumar Jhabakh, learned junior Standing Counsel (Customs & Excise) on behalf of second respondent are before this Court.

2.With consent of learned counsel on both sides, main writ petition itself is taken up, heard out and is being disposed of.

3.Subject matter of instant writ petition, central theme and the core issue have been encapsulated and captured in earlier proceedings of this Court dated 09.07.2019, which reads as follows:

> 'This matter is listed under the caption 'FOR ADMISSION' today.
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> 2. Mr.T.Mohan, learned counsel appearing on behalf of the counsel on record for writ petitioner is before this Court.
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> 3. It is submitted that subject matter of instant writ petition pertains to a certificate of 'Importer-Exporter Code' (IEC) given to the writ petitioner under 'The Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992), hereinafter 'Foreign Trade Development Act' for brevity.
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> 4. It is submitted that writ petitioner was visited with a 'show cause notice' ('SCN' for brevity) dated 15.05.2019, bearing Reference F.No.I (147)/ Addl.DGFT/ECA/CHE/AM 16. It is the specific assertion of learned counsel for writ petitioner that said SCN was served on the writ petitioner in person (hand delivery) at 4.00 p.m. on the same day i.e., 15.05.2019. It is pointed out that in the said SCN, writ petitioner has been asked to appear before the Officer, who issued the said SCN, on 17.05.2019 at 3.30 p.m. To be noted, said SCN has been issued by Ms.Shakuntala Naik, Joint Director of Foreign Trade.
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> 5. It is further submitted that writ petitioner i.e., Mr.K.Ramlal Jain, appeared before the said Officer i.e., Ms.Shakuntala Naik on 17.05.2019 at 3.30 p.m.
>
> 6. It is pointed out that on the same date i.e., 17.05.2019, an order captioned 'Order in Original' bearing Reference F.No.(146)/Addl.DGFT/ECA/Che/AM 16

(hereinafter 'impugned order' for brevity) came to be passed. Though obvious it is made clear that impugned order has been called in question in the instant writ petition.

7. Two main points are urged and they are as follows:

a) The time granted to respond to said SCN is too short, this was pointed out/difficulties in responding expressed, but the same were overlooked and in any event the same is in breach of the procedure adumbrated in Section 8 of Foreign Trade Development Act, which deals with suspension of IECs.

b) While the writ petitioner appeared before the Officer, who issued said SCN i.e., Ms.Shakuntala Naik, impugned order has been passed by another Officer viz., Mr.Varun Singh.

8. Faced with the above situation, Mr.K.Srinivasamurthy, learned Senior Panel Counsel Central Government, who accepted notice on behalf of respondent No.1, sought time to get instructions and make submissions.

9. Mr.P.Rajkumar Jhabakh, learned Junior Standing Counsel (Customs & Excise) accepted notice on behalf of second respondent, who in any case is only a formal party as far as challenge to the impugned order is concerned.

10. At request of Revenue Counsel, to get instructions, list this matter on 17.07.2019 in the 'Motion List'.

4. Thereafter, the first respondent has filed a counter affidavit dated 15.07.2019. To be noted, counter affidavit has been sworn to by one Mr.Varun Singh, Joint Director General of Foreign Trade, who has passed the impugned order in original dated 17.05.2019. After hearing both sides and after perusing the aforesaid counter affidavit, this Court is of the considered view that time granted in SCN is too short. To be noted, there is no disputation or disagreement before this Court that SCN dated 15.05.2019 was served on the writ petitioner on the same day i.e., 15.05.2019 at 04.00pm and the personal hearing was fixed on 17.05.2019 at 03.30pm. It is also not in dispute that the writ petitioner has sent two responses. One response before the personal hearing and the other after the personal hearing, both dated 17.05.2019.

5. The reply sent before the personal hearing very clearly articulates that two days from the date of SCN is too short and that records pertaining to 17 years have to be produced. This is particularly articulated in Paragraph 3, which reads as follows:

> '3. Further, I also respectfully submit to this authority that the details sought for in your notice refers to the period from the year 2002 till May 2009 i.e., for a period of nearly 17 years, which is voluminous in nature, which requires sufficient time and the same to be produced to this respected authority, as the time period given by this respected authority, as referred to in the SCN is hardly 2 days, that too, the subject SCN was hand delivered to me at my office by the officers working with your goodself office at around 4pm evening on 15.05.2019, which I feel that sufficient breathing time has to be given for me, so as to arrange for the production of the said documents , as requested by this authority in the subject SCN. '

6. In this regard, attention of this Court was drawn to Section 8 of Foreign Trade Development Act, which reads as follows:

> '8.Suspension and cancellation of Importer - exporter Code Number - [I-Where
>
> (a) any person has contravened any of the provisions of this Act or any rules or orders made thereunder or the foreign trade policy or any other law for the time being in force relating to Central excise or customs or foreign exchange or has committed any other economic offence under any other law for the time being in force as may be specified by the Central Government by notification in the Official Gazette; or
>
> (b) the Director General or any other officer authorised by him has reason to believe that any person has made an export or import in a manner prejudicial to the trade relations of India with any foreign country or to the interests of other persons engaged in imports or exports or has brought disrepute to the credit or the goods of, or services or technology provided from, the country; or
>
> (c) any person who imports or exports specified goods or services or technology, in contravention of any provision of this Act or any rules or orders made thereunder or the foreign trade policy,
>
> the Director General or any other officer authorised by him may call for the record or any other information from that person and may, after giving to that person a notice in writing informing him of the grounds on which it is proposed to suspend or cancel the Importer-Exporter Code

Number and after giving him a reasonable opportunity of making a representation in writing within such reasonable time as may be specified in the notice and, if that person so desires of being heard, suspend for a period, as may be specified in the order, or cancel the Importer-Exporter Code Number granted to that person.]

(2) Where any Importer - Exporter Code Number granted to a person has been suspended or cencelled under sub-section (1), that person shall not be entitled to [Import or export any goods or services or technology] except under a special license, granted, in such manner and subject to such conditions as may be prescribed, by the Director-General to that person.'

(Underlining made by this Court to highlight and supply emphasis)

7. This Court is convinced that time granted, which is less than 48 hours, is too short and certainly does not qualify as reasonable time within the meaning of Section 8 of Foreign Trade Development Act, more particularly Section 8(1)(c) of Foreign Trade Development Act.

8. This takes us to the second aspect of the matter. It is submitted by learned counsel for respondents that though the order-in-original as served on the writ petitioner, shows that it has been signed by an Officer other than the one before whom the writ petitioner appeared for personal hearing, the records show that the order has, in fact, been passed by the same officer before whom the writ petitioner has appeared and the other officer has merely communicated the said order. However, this is not articulated in the impugned order. At best it could have been sent under cover of letter saying that an order passed by another Officer is being communicated. In any event, the order has to be signed by the Officer who has passed the order and in instant case, the order has been signed by an Officer who is not the one, who held the personal hearing .

9. The obtaining position is very clear that an impugned order cannot be improved by way of counter affidavit, more so by buttressing the same with some records and files. Therefore, with regard to the second point raised by the writ petitioner also, this Court is convinced that the same Officer, who held the personal hearing ought to have passed the impugned order and therefore, the impugned order is liable to be set aside on this ground also.

10. This Court is of the considered view that it would serve the purpose to set aside the impugned order without expressing any opinion on merits and directing the second respondent to

afford a fresh personal hearing, pass orders afresh after taking into account the response and records of the writ petitioner. In this regard, there is one other issue that is being raised by the learned counsel for writ petitioner. Adverting to the aforesaid counter affidavit dated 15.07.2019, learned counsel for writ petitioner submits that a reading of Paragraphs 14 and 18 brings to light that the Authority has pre-determined the issue as it has been averred that the writ petitioner has decided to hide the entire information and besides saying that the granting of any amount of time could not make any difference.

11. With regard to the aforesaid averments, learned counsel for respondents submits that the same have been made in a particular context. Learned counsel submits that these averments occurring in Paragraphs 14 and 18 of the counter affidavit have to be read as a whole and if read in the context and setting in which these averments have been made, it would bring to light that the Authority has not pre-determined or pre-judged the issue.

12. Considering the nature of the order which this Court proposes to pass in the light of the trajectory which the hearing has taken today, this Court deems it appropriate not to delve into those aspects any further. The impugned order in original being order dated 17.05.2019, bearing reference F.No.I (146)/ Addl.DGFT/ECA/Che/AM16, will be set aside without expressing any opinion on merits and the matter will be heard afresh including holding a personal hearing by Joint Director General of Foreign Trade in Bangalore. This Court is informed that Joint Director General of Foreign Trade at Bangalore who will hold the personal hearing and hear the matter afresh is an Officer other than the Officer who issued the SCN dated 15.05.2019 (Shakuntala Naik) and the Officer who passed the order-in-original dated 17.05.2019 (Varun Singh).

13. In the aforesaid backdrop, the following order is passed:

a) The order-in-original dated 17.05.2019 bearing reference F.No.I (146)/ Addl.DGFT/ECA/Che/AM16 is set aside. It is made clear that this order is set aside only to facilitate a personal hearing to be held afresh and redoing the order. In other words, this order is set aside without expressing any opinion or view on the merits of the matter.

b) By consent of both sides, personal hearing shall now be held by the Joint Director General of Foreign Trade, Bengaluru, on 26.07.2019 (Friday) at half-past 11 in the forenoon (11.30am). Though obvious, it is made clear that the venue will be the office of the Joint Director General of Foreign Trade, Bengaluru, which has been set out hereunder:

Joint Director General of Foreign Trade,
Office of the Additional Director General of Foreign
Trade,
6th Floor, Kendriya Sadan,
C&E Wing, Koramangala,
2nd Block, 17th Main Road
Bengaluru – 560 034

c) There shall be no separate notice regarding personal hearing and the writ petitioner undertakes to avail the personal hearing on the aforesaid date, time and venue. It is open to the writ petitioner to produce the documents and response to the SCN dated 15.05.2019 bearing reference F.No.I (147)/ Addl.DGFT/ECA/CHE/AM16 in the personal hearing on the aforesaid date, time and venue.

d) If the writ petitioner does not avail the personal hearing on the aforesaid date, time and venue, it will be open to the aforesaid Officer to pass orders on available records without further reference to this Court. If the personal hearing is availed, the aforesaid Officer at Bengaluru, shall consider all the objections, records and pass orders in accordance with law, as expeditiously as possible and in any event, within a fortnight from the date of the personal hearing. Order so passed shall be communicated to the writ petitioner under due acknowledgement within 7 working days from the date of the order.

13. As the Joint Director General of Foreign Trade, Bengaluru is not a party to these proceedings, Mr.K.Srinivasa Murthy, learned Senior Panel Counsel, Central Government, will communicate this order to the Officer concerned in Bengaluru.

This writ petition is disposed of with the above directions. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

gpa

To

1. Joint Director General of Foreign Trade
   O/o.The Additional Director of Foreign Trade
   Ministry of Commerce & Industry
   26, Haddows Road
   Shastri Bhavan Annexe Building
   Chennai - 600 006

2. The Joint Addl. Commissioner of Customs (Imports)
   No.60, Rajaji Salai, Customs House
   Chennai - 600 001

+2 ccs to Mr.S.Baskaran, Advocate, S.R.No.62440

+1 cc to Mr.K.Srinivasamoorthy, Advocate, S.R.No.62303

W.P.No.19527 of 2019 &
W.M.P.No.19016 of 2019

RGN(CO)
SSM(24/07/2019)