IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.10.2019

CORAM

THE HON'BLE MR. JUSTICE K.RAVICHANDRABAABU

W.P.No.26778 of 2018

M/s.IP Softcom India Private Limited
Nos.18 & 19, Mahalakshmi Nagar Extn.,
Mumbai Village, Thiruverkadu Post
Chennai-600 077. ...Petitioner

vs.

1. Union of India
Department of Revenue
Ministry of Finance
North Block, New Delhi - 110 001.

2. The Commissioner of Customs, Chennai VII
New Custom House, Meenambakkam
Chennai-600 016.

3. The Assistant Commissioner of Customs (Group-5A)
Office of the Commissioner of Customs, Chennai VII
New Custom House,
Meenambakkam, Chennai-600 016. ...Respondents

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for the records relating to the impugned letter dated 07.05.2018 issued by the 3rd respondent and quash the same and further direct the 2nd and 3rd respondent to discharge the remaining Bank Guarantee to the petitioner.

For Petitioner : Mr.R.Parthasarathy

For Respondents : Mr.K.S.Ramasamy
standing counsel

O R D E R

This writ petition is filed challenging the communication of the third respondent dated 07.05.2018, wherein and whereby, the petitioner was directed to keep the remaining bank guarantees mentioned in the letter dated 04.05.2018 alive till further order. Consequently, the petitioner seeks for a direction to the respondents 2 & 3 to discharge the remaining bank guarantees to the petitioner.

2. The facts and circumstances, which have driven the petitioner to file the present writ petition are as follows:

The petitioner is engaged in the import and sale of CDs/DVDs. A show cause notice dated 06.03.2017 was issued on the petitioner by the second respondent proposing to include the royalty paid by the authorized distributors/authorized OEMs to Microsoft on the System Builder packs to the price paid by the petitioner for the CDs/DVDs imported by them. The petitioner contested the proposal. The second respondent passed an order in original dated 28.04.2018 rejecting the transaction value and redetermining the total value of the consignments by including the royalty payable by the authorized distributors/authorized OEMs to Microsoft to the price of the imported goods. Accordingly, the differential duty of Rs.17,71,29,717/- was demanded under Section 18 read with Section 28(8) of the Customs Act, 1962, along with applicable interest. In addition, the imported goods were held liable for confiscation and a redemption fine of Rs.18 crores was imposed. Further, penalty of a sum of Rs.17,71,29,717/- equal to the duty demand was also imposed on the petitioner under Section 114A of the Customs Act, 1962. Further, finalization of provisional assessment was ordered in terms of Section 18 of the Customs Act, 1962 on the basis of the value determined in the order and 29 bank guarantees totally valued at Rs.3,44,16,000/- furnished were directed to be enforced towards the demand. The petitioner submitted a letter dated 04.05.2018 to the second respondent stating that they would file a statutory appeal against the order in original dated 28.04.2018 and in which case, they are required to make a pre-deposit of 7.5% of the duty demand only and therefore, the amount of Rs.1,06,84,728/- alone is payable out of those bank guarantees after adjusting the amount of Rs.26 Lakhs already paid by the petitioner during the investigation. Therefore, the petitioner requested that the bank guarantees to the extent of Rs.1,06,84,728/- may be encashed and the balance bank guarantees may be returned to them. The petitioner also informed the authorities that they cannot insist for balance duty till the disposal of the appeal before the Tribunal and that the Department cannot legally retain the bank guarantees in excess of Rs.1,06,84,728/-. However, the third respondent issued the impugned communication. On 04.07.2018, the petitioner has filed an appeal before the Customs, Excise and Service Tax Appellate Tribunal, Chennai, vide Appeal No.C/41675/2018, and the same is pending. Thus, the petitioner is aggrieved by the act of the third respondent in not returning the remaining bank guarantees and directing the renewal of the same.

3. A counter affidavit is filed by the respondents 1 to 3, wherein, it is stated as follows:

The petitioner imports CDs/DVDs that were assessed as per their declared value. However, during 2006, it is learnt that the authorized distributors and authorized OEMs, who were authorized to sell the systems builder software to its final consumers are paying royalty to Microsoft on usage/sale based on their agreement with Microsoft, USA. In view of the above, investigation initiated to know whether the declared value was inclusive of royalty paid. Pending investigation, their imports in respect of 32 bills of entry filed during the period from February 2007 to November 2008 were provisionally assessed on execution of bond and bank guarantee to the tune of Rs.3,44,16,000/-. In this connection, the show cause notice dated 06.03.2017 was issued and the case was adjudicated. As requested by the petitioner, 3 bank guarantees to the tune of Rs.1,08,40,000/- were encashed from Deutsch Bank and a direction was given to the importer to revalidate the remaining bank guarantees, since appeal was preferred by them. No coercive action so far was initiated against the petitioner. However, the direction was given only to re-validate the bank guarantees lying with the Department to the tune of Rs.2,35,76,000/- in respect of remaining 26 bank guarantees. As per the adjudication order, the importer is liable to pay a sum of Rs.53,42,59,434/- to the Department, which represents the differential duty + redemption fine + penalty. Therefore, the petitioner's claim for returning the bank guarantees, is legally incorrect.

4. Mr.K.Parthasarathy, learned counsel for the petitioner submitted that even though the petitioner suffered the order in original dated 28.04.2018, they preferred the appeal before the CESTAT and thus, they are bound to pay only 7.5% as pre-deposit towards the duty demand. Therefore, he contended that the respondents are not entitled to either enforce or direct the petitioner to keep the remaining bank guarantees alive over and above the sum of Rs.1,06,84,728/-. He further submitted that already the Revenue has encashed the sum of Rs.1,08,40,000/-, out of 3 bank guarantees referred to in the impugned proceedings and therefore, they are bound to return the remaining bank guarantees, apart from the fact that they are not entitled to insist upon the petitioner to keep the remaining bank guarantees alive pending disposal of the appeal.

5. On the other hand, the learned standing counsel appearing for the Revenue submitted that the petitioner has suffered the order in original, which includes the enforcement of all 29 bank guarantees to the tune of Rs.3,44,16,000/- and therefore, only to safeguard the interest of the Revenue, the petitioner was called upon to keep the remaining bank guarantees alive and thus, such direction is not going to prejudice the petitioner in any manner.

6. Heard both sides and perused the materials placed before this Court.

7. The points for consideration in this writ petition is as to whether the petitioner is entitled to seek for return of the remaining bank guarantees over and above the sum representing 7.5% of the duty demand towards pre-deposit as contemplated under Section 129E of the Customs Act, 1962, while preferring the appeal before the CESTAT.

8. Since the issue involved in this case lies in very narrow compass, I am not traversing on the merits and contentions raised by both parties in respect of the order in original passed by the Adjudicating Authority, which is now pending as the subject matter of appeal before the CESTAT. There is no dispute to the fact that before passing the order of adjudication, the subject matter 32 bills of entry were provisionally assessed on execution of provisional duty bond and bank guarantees. It is also not in dispute that the petitioner had thus, furnished the bank guarantees valued at Rs.3,44,16,000/- before the third respondent. Thereafter, the adjudication was completed and the order of adjudication was passed on 28.04.2018 vide order in original No.153/2018, wherein the Adjudicating Authority passed the following order:

> "(i) I reject the declared values in the 32 provisionally assessed Bills of Entry (as listed in Annexure-A to the SCN) under Rule 12 of the Customs Valuation (Determination of Value of imported Goods) Rules, 2007 and Rule 10A of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 and re-determine the values under Rule 3 read with Rule 10(1)(c)(d) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and Rule 3 read with Rule 9(1)(c) of Customs Valuation (Determination of Price of Imported goods) Rules 1988.
>
> (ii) I re-determine the total value of the consignment covered by Bills of Entry listed in Annexure A to the SCN at Rs.188,29,32,298/- (Rupees One Hundred and Eighty Eight Crore Twenty Nine Lakhs Thirty Two Thousand Two Hundred and Ninety Eight Only) (in terms of Rule 3 read with Rule 10(1)(c) & (d) of Customs Valuation Determination of Price of Imported Goods) Rule 2007 and Rule 8 read with Rule 9(1)(c) of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 as applicable.
>
> (iii) I confiscate the goods imported by M/s.IP Softcorn vide the 32 provisionally assessed Bills of Entry (as listed in Annexure A to show cause notice) liable for confiscation under Section 111(d) and Section 111(m) of

Customs Act, 1962 and I allow the confiscated goods to be redeemed under Section 125 of the Customs Act, 1962 on payment of redemption fine of Rs.18,00,00,000/- (Rupees Eighteen Crore Only).

(iv) I confirm the demand of differential duty of Rs.17,71,29,717/- (Rupees Seventeen Crore Seventy One Lakhs Twenty Nine Thousand Seven Hundred and Seventeen Only) under Section 18 read with Section 28(8) of Customs Act, 1962.

(v) I confirm the demand of interest at appropriate rate under Section 18 read with Section 28 AA of the Customs Act, 1962.

(vi) I appropriate the amount of Rs.26,00,000/- (Rupees Twenty Six Lakhs Only) and vide TR-6 Challan No.0821 dated 16.02.2009 towards the duty demand confirmed at (ii) above.

(vii) I impose penalty of Rs.17,71,29,717/- (Rupees Seventeen Crore Seventy One Lakhs Twenty Nine Thousand Seven Hundred and Seventeen Only) and interest thereon on M/s.IP Softcorn India Pvt. Ltd., under Section 114A of the Customs Act, 1962.

(viii) I order finalisation of provisional assessment in terms of Section 18 of Customs Act, 1962 on the basis of the value determined at (ii) above and the 29 bank guarantees totally valued at Rs.3,44,16,000/- (Rupees Three Crore Forty Four Lakhs and Sixteen Thousand Only) furnished shall be enforced in terms of provisional duty bonds towards the duty confirmed at (iv) above."

9. Perusal of the above order of the Adjudicating Authority would show that 29 bank guarantees furnished by the petitioner totally valued at Rs.3,44,16,000/- were also ordered to be enforced in terms of provisional duty bond towards the duty confirmed in the said order. It is true that the petitioner has filed the appeal before the CESTAT, where pre-deposit of 7.5% of the duty demand alone needs to be complied with. It is also not in dispute that the said pre-deposit of 7.5% of the duty demand works out to Rs.1,32,84,728/-. It is also not in dispute that the sum of Rs.26 Lakhs was already paid by the petitioner on 16.02.2009 vide Challan No.0821, as found in the order of adjudication itself. Therefore, the petitioner requested the Revenue to adjust the balance amount of Rs.1,08,40,000/- out of 3 bank guarantees in order to satisfy the requirement of pre-deposit of 7.5% of the duty demand. Accordingly, the Revenue

has also encashed 3 bank guarantees to the tune of Rs.1,08,40,000/-. Upto this, there is no quarrel between the parties. The dispute is only with regard to the balance amount lying to the tune of Rs.2,35,76,000/- in respect of the remaining 26 bank guarantees which are sought to be returned to the petitioner by contending that the Revenue is not justified in retaining those bank guarantees or insisting upon the petitioner to renew the same and keep it alive pending disposal of the appeal.

10. It is seen that as against the order of adjudication, the petitioner has already approached CESTAT and filed the appeal. There is no dispute to the fact that pending disposal of the appeal, the mandatory requirement for the petitioner is to make pre-deposit of 7.5% of the duty demand. It is also not in dispute that the said mandatory requirement of pre-deposit of 7.5% of the duty demand has also been met with by the petitioner by enforcement of three bank guarantees to the tune of Rs.1,08,40,000/- and also by appropriation of Rs.26 Lakhs, already paid by the petitioner on 16.02.2009. Therefore, it is evident that the statutory requirement of making pre-deposit pending disposal of the appeal has been met with by the petitioner. When such being the factual position, it is to be seen as to whether the respondent/Revenue is entitled to direct the petitioner to keep the remaining bank guarantees alive pending disposal of the appeal. I find that the claim made by the petitioner before this Court that the respondents are not entitled to seek for keeping remaining bank guarantees alive, cannot be sustained for the simple reason that the order of adjudication put to challenge before the Tribunal includes a direction for enforcement of all 29 bank guarantees totally valued at Rs.3,44,16,000/-, which has to be considered and decided only by the Tribunal. Therefore, the outcome of the order to be passed by the Tribunal, will certainly have a bearing on the bank guarantees already executed by the petitioner. In such a case, the petitioner is not justified in contending that they will not keep the remaining bank guarantees alive and on the other hand, the Revenue is bound to return the same. Needless to state that the impugned direction issued by the Revenue to keep the remaining bank guarantees alive is only to safeguard the interest of the Revenue pending disposal of the appeal where the duty demand, redemption fine, penalty and interest determined by the Adjudicating authority, which run to several crores of rupees, have to be considered and decided.

11. At this juncture, it is relevant to note that making a pre-deposit of 7.5% of the duty demand is the statutory obligation of the appellant/petitioner to maintain the appeal before the appellate forum. Compliance of such statutory requirement itself, cannot be stated as the reason for returning any balance money lying in the hands of the Revenue, which was

collected during pendency of the adjudication proceedings, especially, when the Revenue has succeeded, before the Adjudicating Authority in confirming the demand. Therefore, the Revenue cannot be faulted in either retaining the money pending disposal of the appeal or asking the appellant/petitioner to keep the bank guarantees alive. In fact, I am of the considered view that the very agreement of the Revenue to make adjustment of the sum equivalent to 7.5% of pre-deposit out of such bank guarantees itself, is a concession shown and therefore, the petitioner should be satisfied with the same.

12. Therefore, I find that such direction of the Revenue is neither arbitrary nor unreasonable, more particularly, when the Revenue is justified in making such direction based on the order dated 28.04.2018 passed by the second respondent, more particularly, at Column No.viii of the order. In other words, I find no ground or reason to exercise the discretionary jurisdiction of this Court under Article 226 of the Constitution of India to interfere with such order.

13. Accordingly, the present Writ Petition fails and thus, the same is dismissed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To
1.Union of India
Department of Revenue
Ministry of Finance
North Block, New Delhi - 110 001.

2.The Commissioner of Customs, Chennai VII
New Custom House, Meenambakkam
Chennai-600 016.

3.The Assistant Commissioner of Customs (Group-5A)
Office of the Commissioner of Customs, Chennai VII
New Custom House,
Meenambakkam, Chennai-600 016.

+1cc to Mr.Lakshmi Kumaran, Advocate SR.84192
+1cc to Mr.K.S.Ramasamy, Advocate SR.84047

W.P.No.26778 of 2018

MP(CO)
CB(07/11/2019)