IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 30-07-2019

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

W.P.Nos.31058 and 31059 of 2018
And
W.M.P.No.36237 of 2018

M/s.New Way Trading,
Represented by its Proprietor
Shri Rahul.M,
No.52/165A, Benazir Building,
Venus Corner,
Thalaserry,
Kerala-670 101.

Presently having office at
Nirvana House,
Kavumbagam P.O.,
Thalasserry,
Kerala-670 110. .. Petitioner in both WPs

vs.

1.The Commissioner of Customs,
Custom House,
Willington Island,
Cochin,
Kerala-682 009.

2.Customs, Central Excise and Service
Tax Settlement Commission,
Additional Bench, II Floor,
Narmada Block,
Custom House,
No.60, Rajaji Salai,
Chennai-600 001. .. Respondents in both WPs



WP No.31058 of 2018 is filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus and call for the records pertaining to impugned order No.3/ 2018-Cus. Dated 30.10.2018 in F.No.S.A.CUS./38/2018-SC passed by the second respondent and quash the same and direct the second respondent to admit the petitioner's application for settlement filed in

F.No.S.A.CUS./38/2018-SC.

WP No.31059 of 2018 is filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Mandamus, directing the first respondent to encash the bank guarantees executed by the petitioner to the extent of the admitted balance duty liability and interest and appropriate the same.

For Petitioner in both WPs: M/S.Hari Radhakrishnan

For Respondents in both WPs: Mr.A.P.Srinivas,
Senior Standing Counsel
for Central Government.

COMMON ORDER

Mr.Hari Radhakrishnan, learned counsel on record for writ petitioner in both writ petitions and Mr.A.P.Srinivas, learned Senior Standing Counsel for Central Government on behalf of both respondents in both writ petitions are before this Court.

2. A common counter-affidavit has been filed by respondents in both writ petitions.

3. With consent of learned counsel on both sides, main writ petitions are taken up, heard out and are being disposed of.

4. Short facts shorn of not so necessary details/particulars or in other words, factual matrix in a nutshell, which is imperative for appreciating this common order runs as follows:

(a) Writ petitioner imported a consignment, which is without any dispute, gift items i.e., 'Christmas trees, water bottles etc.', from China.

(b) Writ petitioner through its agent filed nine (9) Bills of Entry for clearing aforesaid consignment, the details of which are as follows:

| S.No. | Bill of Entry No. | Date |
|---|---|---|
| 1. | 3771063 | 27.10.2017 |
| 2. | 3880766 | 06.11.2017 |
| 3. | 3880856 | 06.11.2017 |
| 4. | 3952626 | 10.11.2017 |
| 5. | 4090054 | 21.11.2017 |

| S.No. | Bill of Entry No. | Date |
|---|---|---|
| 6. | 4148730 | 25.11.2017 |
| 7. | 4181149 | 28.11.2017 |
| 8. | 3771330 | 27.10.2017 |
| 9. | 4009696 | 15.11.2017 |

(c) Aforesaid consignment has been described by the Department also as 'Christmas Decoration Items'. This 'consignment covered under aforesaid 9 Bills of Entry' shall hereinafter be referred to as 'said consignment' for the sake of convenience and clarity.

(d) There is no disputation or disagreement between writ petitioner/importer and the respondents regarding the nature of goods which constitute the said consignment. In other words, there is no disputation between the parties in lis before this Court regarding importability of said consignment and that the said consignment is Christmas Gift Items.

(e) Writ petitioner valued the said consignment at Rs.30,62,254/- (Rupees Thirty Lakhs Sixtytwo Thousand Two Hundred and Fifty Four only). However, respondents i.e., Customs Department took the stand that said consignment has been undervalued and that the same ought to have been valued at Rs.41,08,830/- (Rupees Fortyone Lakhs Eight Thousand Eight Hundred and Thirty only).

(f) To be noted, there is no disputation or disagreement about the nature of consignment or about the classification of consignment. There is no disputation even about the rate of duty payable and it is only a case of disputation qua valuation. While writ petitioner has valued said consignment at little over Rs.30.62 lakhs, according to Customs Department, said consignment has to be valued at little over Rs.41.08 lakhs. To be noted, the difference is Rs.10,46,586/- (Rupees Ten Lakhs Fortysix Thousand Five Hundred and Eighty Six only). In other words, the difference in valuation is little over Rs.10.46 lakhs.

(g) Customs Department therefore issued a 'Show Cause Notice' (hereinafter

'SCN' for brevity) dated 30.5.2018 bearing Reference F.No.SIIB/53/2017-CUS. in this regard.

(h) While responding to SCN, writ petitioner/importer submitted that it will pay the differential duty payable pertaining to the aforesaid difference in valuation of said consignment, which is little over to Rs.10.08 lakhs. Saying so, writ petitioner/importer, approached the second respondent, namely, 'Customs, Central Excise and Service Tax Settlement Commission' (hereinafter 'said Settlement Commission' for brevity) seeking waiver of fine (fine under Section 125 of 'Customs Act, 1962', which shall hereinafter be referred to as 'said Act'), waiver of penalty under Section 112-A of the said Act and immunity from prosecution.

(i) For the aforesaid purpose, the importer/writ petitioner filed an application before said Settlement Commission being application dated 16.10.2018 and this application is under Section 127-B of the said Act. With regard to an application under Section 127-B of the said Act, it is necessary or in other words, a condition precedent that an applicant should pay differential customs duty for said Settlement Commission to entertain the application. This is adumbrated in the first Proviso to sub-section (1) of Section 127-B of the said Act.

(j) In the interregnum, with regard to provisional clearance of said consignment, writ petitioner was permitted to clear the said consignment by furnishing Bank Guarantees for a sum of Rs.25,50,000/-. There is no disputation or disagreement that writ petitioner/importer has furnished Bank Guarantees in favour of the first respondent for a total sum of Rs.25,50,000/-. There is also no disputation or disagreement that Bank Guarantees have been renewed from time to time and that they are now subsisting.

(k) When things stood as above, for entertaining writ petitioner's application before said Settlement Commission being aforementioned application dated 16.10.2018, writ petitioner made a request that aforesaid Bank Guarantees for a total sum of

Rs.25,50,000/- can be encashed and the same can be appropriated towards condition precedent adumbrated in clause (c) of First Proviso to Section 127-B(1). To be noted, writ petitioner has also made a sub-application before said Settlement Commission in this regard.

(l) Even when the sub-application in this regard was pending, second respondent i.e., said Settlement Commission, passed an 'order dated 30.10.2018 bearing Reference F. No.S.A.CUS/38/2018-SC' (hereinafter 'impugned order') wherein and whereby, the said application dated 16.10.2018 made by the writ petitioner was dismissed for non-compliance with the aforesaid condition precedent of payment of differential duty. To be noted, vide impugned order, application made by writ petitioner was rejected solely on the ground of non-compliance with the condition precedent without going into merits of the matter.

(m) Assailing the impugned order, instant writ petitions have been filed. In one writ petition i.e., WP No.31059 of 2018, a Mandamus prayer has been made seeking to Mandamus the first respondent to encash the Bank Guarantees, so that the same can be appropriated towards condition precedent for said Settlement Commission to entertain writ petitioner's aforementioned application. In the second writ petition i.e., WP No.31058 of 2018, impugned order made by second respondent i.e., said Settlement Commission has been sought to be quashed, besides seeking a direction to the second respondent Settlement Commission to entertain writ petitioner's application and pass orders on the same.

5. Having set out the factual matrix in a nutshell, this court now turns to the rival submissions on both sides made before this Court in the hearing today.

6. Learned counsel for writ petitioner submitted that in cases of this nature, it is a normal thumb rule that fine and penalty put together will not exceed 15% of the value of consignment, though the provisions of law provide for more. Saying so, learned counsel for writ petitioner submitted that the writ petitioner has already shown his bona fides by

furnishing Bank Guarantees for Rs.25,50,000/-, renewing it from time to time and keeping the same alive.

7. In response to the aforesaid arguments advanced by learned counsel for writ petitioner, learned Revenue Counsel submitted that the Bank Guarantees themselves were furnished as part of adjudication pursuant to aforementioned said SCN. Aforementioned SCN, proposes levy of fine, imposition of penalty, besides collection of differential duty and therefore, the submission was to the effect that these Bank Guarantees have been furnished for these purposes or other words to cover these contingencies. Learned Revenue Counsel submitted on instructions that Bank Guarantees for a total sum of Rs.25,50,000/- have been renewed from time to time and are now subsisting.

8. This Court has carefully considered the rival submissions. This Court has also examined the entire matter and sum totality of the circumstances under which instant writ petitions have been filed with aforementioned prayers.

9. This Court notices that there is no disputation that Bank Guarantees have been renewed from time to time and that they are subsisting. This Court also notices that consignment is Christmas Decoration Items even according to Customs Department and therefore, it is not a case of contraband or prohibited item. In other words, this Court is also of the considered view that said consignment is extremely innocuous and there is no issue regarding importability of said consignment. To be noted, this Court has passed this order in the light of the peculiar facts and circumstances of this case. In other words, what has weighed in the mind of this Court is said consignment is absolutely innocuous and there is no issue other than valuation issue. This dovetailed with the undisputed position that there is no disputation regarding classification or rate of duty makes it clear that the nature of matter itself is not complex. Writ petitioner has also shown his bona fide by not only furnishing Bank Guarantees for a total sum of Rs.25,50,000/-, but also by renewing the same from time to time.



10. Therefore, this Court is left with the considered view that this is an appropriate case for directing the second respondent Settlement Commission to entertain the application of writ petitioner being application dated 16.10.2018, after first respondent appropriates the Bank Guarantees for a total sum of Rs.25,50,000/-. In other words, appropriation of Bank Guarantees by first respondent (To be noted, in the Bank Guarantees, the first respondent is the beneficiary) which shall be treated as compliance with condition precedent for entertaining the application by second respondent Settlement Commission as adumbrated in clause (c) of the First Proviso to Section 127-B

(1) of said Act.

11. In the light of the narrative thus far and owing to reasons that have been set out by this Court supra, this Court's dis-positive reasoning qua rival submissions, this Court passes the following order:

(a) Impugned order of second respondent/Settlement Commission being order dated 30.10.2018 bearing Reference F.No.S.A.CUS/38/2018-SC is set aside. To be noted, impugned order is set aside without expressing any opinion or views on merits of the matter. Also to be noted, impugned order has rejected application of the writ petitioner, solely on the ground of non-compliance with condition precedent, which pertains to payment of additional customs duty accepted by the writ petitioner with interest due thereunder. To be noted, this condition precedent is adumbrated in clause (c) of First Proviso to Section 127-B(1) of the said Act.

(b) First respondent is Mandamused/ directed to appropriate the Bank Guarantees for a sum of Rs.25,50,000/- (Rupees Twentyfive Lakhs and Fifty Thousand only) within a fortnight from the date of receipt of a copy of this order which are undisputedly subsisting.

(c) After encashment of Bank Guarantees in the aforementioned manner by first respondent, the second respondent/ Settlement Commission shall take up application of the writ petitioner being application dated 16.10.2018 under Section 127-B of the said Act, seeking waiver of fine, penalty and immunity from prosecution qua said consignment, hear the application of the writ petitioner on its own merits and dispose of the same in accordance with law as expeditiously as possible and in any event within twelve (12) weeks from the date of encashment of Bank Guarantees in the aforesaid manner.

(d) The order passed by the second respondent/said Settlement Commission shall be communicated to the writ petitioner under due acknowledgement within seven working days from the date of such order.

12. Both writ petitions are disposed of with the above directions. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-VI)

//True Copy//

Sub Assistant Registrar

Svn

To

1.The Commissioner of Customs,
Custom House,
Willington Island,
Cochin,
Kerala-682 009.

2.Customs, Central Excise and Service
Tax Settlement Commission,
Additional Bench, II Floor,
Narmada Block,
Custom House,
No.60, Rajaji Salai,
Chennai-600 001.

+1cc to Mr.M/S.Hari Radhakrishnan Advocate, S.R.No.65344
+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.65260

JP(CO)
CB(17/09/2019)

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