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Ct. 19

W.P.A. 6522 of 2020
IA No. CAN 1/2020(Old No. CAN 5253/2020)

M/S. Saraf Infraprojects Limited & Anr.
Vs.
The Principal Commissioner of Customs (Port) & Ors.

Mr. S. K. Bagaria
Mr. Vikram Wadehra
Mr. Soumava Ghosh
... For the Petitioners.

Mr. Vipul Kundalia
Mr. Siddhartha Lahiri
... For the Union of India.

Mr. K. K. Maiti
Mr. Bhaskar Prasad Banerjee
... For the Respondent Nos. 1,2 and 3.

Mr. Bagaria, learned Counsel appearing for the petitioners submits that the petitioner company completed construction of a multistoried building for operating a hotel way back in 2011, with an investment of Rs. 200 Crores. Such cost included the cost of imported goods against which customs duty was not paid, as the goods imported were against 50 EPCG licenses. In accordance with the conditions of EPCG license, the company furnished Bank guarantee to the customs authority in respect of such licenses. Though the hotel was ready for operation way back in 2012, but because of an objection raised by Army authorities, Kolkata Municipal Corporation restrained themselves from issuing the occupation certificate and which was only issued after the order of the Supreme Court on 28th November, 2018.

However till the time, such direction was given, the said project had already failed and the bank initiated proceedings under the SARFAESI Act, 2002 and sold the property to a prospective buyer. In May, 2019, the customs authorities initiated a proceeding for recovery of custom dues against nor fulfilment of export obligation and ultimately directed the proforma respondent/bank on March, 18, 2020 to encash the bank guarantee for recovery of the customs duty. The petitioner filed an application on 9th August, 2020 before the EPCG Committee, Ministry of Commerce & Industry for relaxation of the conditions of import, to amend the trade policy and the petitioner be excused of non performance. But the application is pending till date.

Mr. Bagaria, learned Counsel relies on 2010(254) E.L.T. 647 (Bom.) (UNION OF INDIA Versus CUS. & C. Ex. SETTL. COMMISION, KOLKATA) AND 2018 (19) C.G.S.T. 257(Ker.) (K.P.JOY VERSUS GOVERNMENT OF KERALA, THIRUVANANTHAPURAM) on this issue and prays for stay of encashment of bank guarantee till an order is passed by the EPCG Committee. Mr. Bagaria has also pointed out Item No. 5.11.3 of a Public Notice No. 1 of 2009-14 which says that if there is restriction imposed on export, then there is no question of fulfillment of export oblication.

Mr. Kundalia, learned Counsel appearing for the

Union of India submits that the petitioner was conscious of its failure to fulfill the export obligation at the time of alienating with the assets of the company in the year 2017, but has made the application before the EPCG committee only on 9th August, 2020, as the petitioner was aware that the committee has no power or jurisdiction to amend the trade policy.

Mr. Maiti, learned Counsel appearing for the Customs authorities submits that the property in question in respect of which this import was made and the export obligation was due has already been alienated and as such the petitioner does not have any intention to fulfil export obligation. On 13th June, 2019 a notice was issued by the customs for submission of proof for discharge and export obligation but the petitioner prayed for extension of time, sat tight over the matter till the customs initiated the process of encashing the bank guarantee and ultimately filed the application before the committee on 9th August, 2020.

Heard all the parties.

Since an application is pending, I am not going into the merits of the case. The EPCG committee is requested to consider the application filed by the petitioner on 9th August, 2020 within four weeks from today. The committee is also requested to pass a reasoned order after giving opportunity of hearing, not only to the petitioner but also to the customs authority, if required. As the petitioner has already alienated with the goods, imported without payment of customs duty, the customs authority may proceed to encash the bank guarantee for realising the customs duty but such realised amount shall be kept in a separate account and not to be appropriated as government dues till a reasoned order is passed by the EPCG committee. If the reasoned order is in favour of the petitioner, the customs department shall refund the amount to the petitioner at an earliest.

The writ petition being WPA 6522 of 2020 and UA No. 1 of 2020 (CAN 5253 of 2020 are disposed of.

There will be no order as to costs.

Since no affidavits have been invited, the allegations made in the writ petition are deemed to have been denied by the respondents.

Urgent certified website copy of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Rajarshi Bharadwaj, J.)