

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	06.08.2020
Pronounced on	17.08.2020

CORAM:

THE HONOURABLE MR. JUSTICE M.S. RAMESH

W.P.No.29944 of 2018

M/s.ELPE Labs,
"Sree Harikunj", No.185/2, 14th "A"
Wing, 8th "A" Cross, CHWS Layout,
Vijayanagar, 2nd Stage, Bangalore-560 040.
Rep by its Proprietor Shri H.C.Verma ...Petitioner

Vs

1. The Commissioner of Customs
(Sea Port-Import), Chennai IV,
Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai-600 001.
2. Assistant Commissioner of Customs
(Refund), Group 2, Chennai IV,
Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai-600 001.Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus calling for the records of the second respondent in F.No.SR.3750/2018-Refunds dated 24.08.2018, quash the same and direct the respondents to disburse a sum of Rs.3,70,472/- with interest at appropriate rates deposited under TR6 Challan No.3923 dated 25.09.2015 pursuant to orders of this Court in W.P.No.15472 of 2015 dated 18.08.2015.

For Petitioner : Mr.B.Satish Sundar

For Respondent : Mr.V.Sundareswaran, SSC

O R D E R

The Writ Petition was called through video conferencing on 06.08.2020. By consent of both the parties, this writ petition is taken up for final disposal.

2. When the petitioner had filed a Bill of Entry No.7349429 dated 12.11.2014, the department had denied release of the consignment on the ground that some of the goods, namely L-ASCORBATE 2 - PHOSPATE - 35 PCT, attracted Anti Dumping Duty (hereinafter referred as ADD).

3. The petitioner had approached this Court in W.P.No.15472 of 2015, seeking for release of the goods covered under the Bill of Entry dated 12.11.2014 and by an order dated 18.08.2015, it was held as follows:

9. The issue relating to classification of items viz., whether the goods would attract Anti Dumping Duty or not can be looked into by the authority concerned by adopting proper adjudication process followed by a speaking order, which is yet to be made. Hence, such exercise shall be completed by the respondents within a period of four weeks from the date of receipt of a copy of this order. In this meanwhile, for the purpose of release of goods i.e., L-ASCORBATE 2-PHOSPATE-35 PCT, 50% of the Anti Dumping Duty as determined shall be paid by the petitioner and for the balance amount, a bond as directed authority concerned is directed to be executed by the petitioner. On such compliance, the goods shall be released forthwith. As far as the other item viz., MONO POTASSIUM PHOSPATE it is mutually agreed by both the counsel on record that there is no dispute. Hence, the respondents are directed to release the said goods forthwith.

4. In compliance with the order of this Court, the petitioner deposited a sum of Rs.3,70,472/-, being 50% of the Anti Dumping Duty determined, along with a bond. The duty was paid "under protest". Subsequently, the Deputy Commissioner of Customs had, pursuant to the above order of this Court, passed an Order-In-Original dated 19.10.2015, holding that the ADD is not leviable on the aforesaid items imported through Bill of Entry dated 12.11.2014 and that the petitioner is entitled to a consequential relief.

5. Thereafter, the petitioner's refund application came to be rejected on 24.08.2018 by the second respondent stating that the refund claim, which was made on 16.08.2017, is after a period of one year from the payment of the ADD, i.e. from 25.09.2015, which is opposed to Section 27 of Customs Act, 1962. It was further stated that the petitioner had not produced any proof to show that the duty was paid "under protest". Aggrieved against the same, the present Writ Petition has been filed.

6. The learned counsel for the petitioner submitted that the petitioner had deposited 50% of the ADD, through a Challan No.3923 "under protest", pursuant to the order of this Court dated 18.08.2015. Hence, when the payment of ADD was made "under protest" on the directions of this Court and the petitioner has all along been contending that no ADD is payable by them, the rejection of the refund claim on the ground of limitation, cannot be sustained. It is his further contention that when the assessment group passed a speaking Order-in-Original dated 19.10.2015, holding that ADD is not leviable on the subject goods and that the petitioner is entitled for a consequential relief, the duty already paid and collected from the petitioner for securing the release of the goods, would have to be refunded. Apart from these grounds, the learned counsel for the petitioner would submit that the impugned order is a non-speaking order, bereft of any reasoning for rejection of the refund claim.

7. The learned Senior Standing Counsel appearing for the respondents, by placing reliance on the counter affidavit, submitted that when the petitioner intends to pay the duty "under protest", he is required to request the concerned Appraising Group to pay the duty "under protest", as per the Customs House Public Notice No.07/2002 dated 21.01.2002, which the petitioner had failed to comply. Apart from that, the petitioner had not submitted audited Balance Sheet and certificate from the Statutory Auditor or any other evidence to show that the excess ADD paid by them, has not been passed on to the buyer or any other person, to rule out unjust enrichment.

8. I have given careful consideration to the submissions made by the respective counsels.

9. The petitioner's claim for refund of ADD was rejected on two grounds, namely, that the petitioner had not filed the refund claim of ADD within one year from the levy of ADD and that the ADD was not paid "under protest", which are against the requirements under Section 27 of the Customs Act.

10. It is seen that the petitioner had all along been taking a stand that the subject goods would not attract ADD. In view of the query raised by the respondents that the subject goods are leviable to ADD and the consequent refusal for clearance of the goods covered under the Bill of Entry, the petitioner had approached this Court and by an order passed in W.P.No.15472 of 2015, the respondent was directed to complete the adjudication processed and issue a speaking order in connection with the issue as to whether ADD would be attracted for the classification of the subject goods. There was a further condition that the petitioner should pay 50% of the ADD for the

purpose of release of goods and the balance amount should be secured by a bond.

11. Pursuant to the orders of this Court, the Deputy Commissioner of Customs (Group-2) had passed a speaking Order-in-Original dated 19.10.2015, concluding that ADD was not leviable on the subject goods in terms of Notification No.67/2009 dated 16.06.2009 and that the petitioner is entitled to consequent relief. The order of the Deputy Commissioner of Customs (Group-2) was not put under challenge and has thus become final. In other words, it could be said that the levy of the ADD for the subject goods, requires to be forthwith refunded to the petitioner, pursuant to this Order-in-Original.

12. The petitioner's claim for refund has been rejected stating that the claim is made after a period of one year from the date of payment and that the petitioner had not produced evidence to the effect that the duty was paid "under protest". When this Court in its earlier order dated 18.08.2015 had observed that the authority concerned should pass a speaking order after adjudication, the Deputy Commissioner of Customs had held that ADD was not leviable on the subject goods and that the importer is entitled for consequential relief, I am unable to comprehend as to how the Assistant Commissioner of Customs could resort to any reasoning for rejecting the petitioner's claim for refund, when the Deputy Commissioner of Customs had held that the duty itself was not leviable and that the petitioner would be entitled for consequential relief, which order has become final. While holding so, in the impugned order, the second respondent ought to have borne-in-mind that the order of the Deputy Commissioner of Customs was pursuant to the directions of this Court passed in the Writ Petition. However, without any reasoning or reference to the directions of this Court in the Writ Petition or the findings of his higher authority, namely the Deputy Commissioner of Customs, in the Order-in-Original dated 19.10.2015, the impugned order has been passed in a cryptic manner. As a matter of fact, the second respondent had no other opinion, but to comply with the request of the petitioner for refund, in view of the Order-in-Original dated 19.10.2015 passed by the Deputy Commissioner of Customs. As such, both the reasonings that the application for refund is time barred and that the payment was not made "under protest", cannot be sustained.

13. The learned Senior Standing Counsel for the respondents would rely on certain reasonings given in the counter affidavit filed by them with regard to the procedure for paying duty "under protest" and the statement of the audited Balance Sheet and certificates from the Statutory Auditor. Curiously, these submissions made based on the counter averments, are not the

reasonings given by the second respondent in the impugned order for rejecting the petitioner's claim.

14. It is a well settled proposition that the reasoning adduced in the impugned order cannot be improved or substituted by way of a counter affidavit filed in a Writ Petition. As such, in view of the observations made by this Court with regard to the illegality of the reasons cited in the impugned order, the petitioner would be entitled to succeed.

15. In the light of the above observations, the impugned order dated 24.08.2018 passed by the second respondent herein is set aside. Consequently, there shall be a direction to the second respondent to disburse the petitioner a sum of Rs.3,70,472/- lying in deposit under TR6 Challan No.3923 dated 25.09.2015, together with interest at the rate of 6% p.a. From 19.10.2015, till the date of actual payment. The second respondent shall ensure that the disbursement is made, atleast within a period of 4 weeks from the date of receipt of a copy of this order.

16. The Writ Petition stands thus allowed. No costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

To

1. The Commissioner of Customs
(Sea Port-Import), Chennai IV,
Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai-600 001.
2. The Assistant Commissioner of Customs
(Refund), Group 2, Chennai IV,
Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai-600 001.

+2cc to Mr.Sathish Sundar, Advocate in Sr.26773 & 26774

Pre-delivery order made in
W.P.No.29944 of 2018

MG (CO)
RV (14/09/2020)