Diksha Rane

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5154 OF 2021

Kitchen Essentials & ors. ..Petitioners
vs.
The Union of India & ors. ..Respondents

Mr. Devashish Trivedi i/b. Agrud Partners for petitioners.
Mr. P.S. Jetly, Senior Advocate a/w. Ms. Sangeeta Yadav for respondents.

CORAM : DIPANKAR DATTA, CJ &
M. S. KARNIK, J.

DATE : OCTOBER 26, 2021

P.C. :

1. The petitioners' challenge in this Petition is to an order-in-appeal dated June 25, 2021 passed by the Commissioner of Customs (Appeals) whereby, the order-in-original dated December 20, 2019 passed by the Joint Commissioner of Customs confirming the show cause notice-cum-demand notice under Section 124 read with Section 28 of the Customs Act, 1962 (hereinafter referred to as 'the said Act' for short), is upheld.

2. The petitioners are engaged in manufacture of stainless steel utensils. They had imported Cold Rolled

Stainless Steel (C.R. S.S.) flat products during the period from September 7, 2017 to October 12, 2017 under advance license by claiming the exemption benefits under Notification No. 18/2015 - Cus. dated April 1, 2015 as amended. The petitioners had imported two consignments of Stainless Steel Coils which were supplied by a company in China. The petitioners had declared before the Indian Customs that “Country of Origin” in regard to both the consignments to be ‘China’. Basic Customs Duty (BCD), Customs Education Cess and Secondary and Higher Education Cess were shown as “Nil” as per the availment of Notification dated April 1, 2015 while generating Bill of Entry. The import was permitted by the jurisdictional customs officers. No dispute was raised by the proper officer of the customs department. Bill of Entry dated September 13, 2017 and September 21, 2107 were generated by the proper officers of the customs department and the petitioners were allowed to import the goods whilst availing exemption benefit as aforesaid.

3. The Directorate of Revenue Intelligence (DRI) vide its letter dated November 2, 2017 (according to the petitioners the DRI is not the proper officer of customs) asked the petitioners to provide details of imports made by them whilst availing benefit of aforesaid exemption notification. Vide letters dated November 22, 2017 and November 27, 2017, the petitioners provided the required details to the DRI. During the course of the investigation, as a gesture of cooperation and abundant caution, the petitioners deposited Rs. 23, 61,625/- towards CVD Exemption availed by them. Further, amount of Rs.21,96,680/- and Rs.1,64,765/- came to be deposited. The details of the payments made by the petitioners were informed to the DRI.

4. The DRI believes that CVD imposed on import of Flat Rolled products of Stainless Steel (H.R. and C.R.) originating in or exported from the People's Republic of China with effect from September 7, 2017 vide Notification dated September 7, 2017 was not covered under the Head "Details of Duties exempted from imports under Advance Authorisation" in terms of para 4.14 of the FTP 2015-2020

and also not included in the list of the duties exempted for material imported into India against a valid advance authorisation between September 7, 2017 to October 12, 2017. As a consequence, the respondent No.2 - Joint Director, DRI, issued a show cause-cum-demand notice under Section 124 read with Section 28 of the said Act calling upon the petitioner No.1 to show cause as to why CVD in terms of Notification No.1/2017-Cus (CVD) should not be levied for the goods imported by the petitioners; why CVD totally amounting to Rs.23,61,625/- should not be demanded and recovered under the provisions of Section 28 of the said Act along with interest under the provisions of Section 28AB and 28AA (from April 8, 2011 onwards) of the said Act; amount of Rs.23,61,625/- deposited during investigation should not be appropriated against the said demand; why goods imported under aforesaid bills of entries should not be held liable for confiscation under Section 111(d) of the said Act; why penalty under Sections 112(a) and/or 112(b), or Section 114A and Section 114AA of the said Act should not be imposed on them. Likewise, the petitioner Nos. 2 and 3 were called upon to show cause as to why penalty under Section 112(a), 112(b) and 114AA of the said Act should not be imposed on them.

5. The petitioners contested the show cause notice before the adjudicating authority, i.e., the respondent No.3. After hearing the petitioners, the respondent No.3 passed the order-in-original dated December 20, 2019 confirming the show cause notice.

6. Being aggrieved by the order-in-original, the petitioners filed three separate appeals before the respondent No.4 under Section 128A of the said Act. The respondent No.4 for the reasons recorded in the order dated June 25, 2021 upheld the order-in-original and rejected the appeals.

7. Relying on the decision of the Hon'ble Supreme Court in the case of **M/s. Canon India Private Limited vs. Commissioner of Customs**[1] dated March 9, 2021, learned counsel for the petitioners contended that the Directorate of Revenue Intelligence has no authority in law to issue a show

1 2021 (376) ELT 3 (SC)

cause notice under Section 28 of the said Act. According to learned counsel, the show cause notice is totally *non est* in the eyes of law for absolute want of jurisdiction of the authority to even investigate into facts.

8. Learned Senior Advocate appearing on behalf of the revenue contended that against the impugned order passed in appeal, the remedy of the petitioners is to file an appeal under Section 129A of the said Act before the Appellate Tribunal. Learned Senior Advocate urged that the petitioners have an alternate efficacious remedy under the said Act which they can avail of and hence this Court need not invoke the writ jurisdiction under Article 226 of the Constitution of India in the present matter.

9. Learned Senior Advocate further contended that against the order passed in **M/s. Canon India Private Limited** (supra), the department has filed a Review Petition before the Hon'ble Supreme Court and the same is pending. Learned Senior Advocate submits that in this view of the matter, instead of entertaining the present writ petition, it would be appropriate to relegate the petitioners to the

remedy provided before the Appellate Tribunal under Section 129A of the said Act.

10. Having gone through the decision of the Hon'ble Supreme Court in the case of **M/s. Canon India Private Limited** (supra), we find that the issue raised in the present writ petition is squarely covered by such decision. The show cause notice in the present case is also issued by the respondent No.2 - Joint Director, DRI, Mumbai, who is not a proper officer within the meaning of Section 28(4) read with Section 2 (34) of the said Act.

11. Additionally, a profitable reference also needs to be made to the decision of the Hon'ble Supreme Court in the case of **Commissioner of Customs, Kandla vs. M/s. Agarwal Metals and Alloys**[2]. Their Lordships in view of the decision in **M/s. Canon India Private Limited** (supra) dismissed the appeals filed by the Commissioner of Customs. The order reads thus :

> "Delay condoned.
>
> In view of decision dated 09.03.2021 of three judge Bench of this Court in Civil Appeal No. 1827 of 2018 titled as "*M/s. Canon India Private Ltd. vs. Commissioner of*

2 Civil Appeal No. 3411/2020, order dated August 31, 2021.

> *Customs*" reported in *2021 (3) SCALE 748*, these appeals must fail as the show cause notice (s) in the present cases was also issued by Additional Director General (ADG), Directorate of Revenue Intelligence (DRI), who is not a proper officer within the meaning of Section 28(4) read with Section 2 (34) of the Customs Act, 1962.
>
> Hence, these appeals stand dismissed.
>
> However, dismissal of these appeals will not come in the way of the competent authority to proceed in the matter in accordance with law.
>
> Pending application (s), if any, stand disposed of"

12. In the light of the decisions of the Hon'ble Supreme Court referred to herein above, we have no hesitation in holding that the entire proceedings in the present case initiated by the respondent No. 2 - Joint Director, DRI, Mumbai, by issuing the show cause notice are invalid, without any authority of law and liable to be set aside and ensuing demands are also liable to be set aside.

13. We, however, must address the objection raised by learned Senior Advocate on behalf of the respondents as regards the availability of alternate remedy to challenge the impugned order under the said Act. In this regard we may straightway refer to the decision of the Hon'ble Supreme Court in the case of **Whirlpool Corporation vs. Registrar**

of Trade Marks, Mumbai and others[3] wherein Their Lordships held: "the alternative remedy would not operate as a bar in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is violation of principles of natural justice; or (iii) where the order or the proceedings are wholly without jurisdiction or the vires of an Act is challenged."

14. We also draw support from the order of this Court in the case of **Om Drishian International Ltd. vs. Additional Director, Directorate of Revenue Intelligence and anr.**[4]. Vide order dated September 24, 2021, in paragraph 3 Their Lordships held thus:-

> "3. It seems to us that this writ petition is inspired because of the decision rendered by the Supreme Court in **Canon India** (supra). Law is well settled that the Court exercising jurisdiction under Article 226 of the Constitution of India would step-in to assist a party who finds either his constitutional rights, fundamental or non-fundamental, and/or other legal rights to have been infringed by any authority answering the definition of 'State' in Article 12 of the Constitution of India, or even if there be a threat of such infringement, ~ the threat being real, and not illusory ~ and injury to be suffered is

3 (1998) 8 SCC 1
4 Writ Petition No.1088/2021, order dated September 24, 2021.

imminent. No doubt, law is further well settled that the party may invoke the writ jurisdiction of the High Court challenging a notice to show-cause, if the authority issuing such notice lacks inherent jurisdiction to so issue or if the jurisdictional fact for issuing the notice to investigate facts is non-existent. If the High Court is satisfied that the show-cause notice is totally *non est* in the eyes of law for absolute want of jurisdiction of the authority to even investigate into facts, in the judicious exercise of its discretion, the court may entertain the petition and pass appropriate orders. However, law is also well settled that writ petitions challenging show-cause notices ought not to be entertained for the mere asking and as a matter of routine. In an appropriate case, the writ petitioner can invariably be directed to respond to the show-cause notice and raise all points that are highlighted in the writ petition. Whether the show-cause notice is founded on any legal premise is a jurisdictional issue, which can even be urged by the recipient of the notice and such issues can also be adjudicated by the authority issuing the very notice initially, before the aggrieved party could approach the Court. If any authority is required, we may profitably refer to the decision of the Supreme Court reported in (2004) 3 SCC 440 **[Special Director and Anr. vs. Mohd. Ghulam Ghouse and Anr.].**"

15. As the Hon'ble Supreme Court has now settled the legal position in **M/s. Canon India Private Limited** (supra), we have no hesitation in holding that the challenge to the impugned show cause notice in this petition must succeed as the respondent No.2 lacked the jurisdiction to issue it. Furthermore, in the light of the decisions rendered

in **M/s. Canon India Private Limited** (supra) and **Commissioner of Customs, Kandla** (supra), in our opinion, the alternative remedy would not operate as a bar, as we find that the proceedings initiated by the respondent No.2 are wholly without jurisdiction. The show-cause notice is totally *non est* in the eyes of law for absolute want of jurisdiction of the authority which issued it and therefore we have no hesitation in entertaining the present writ petition and passing appropriate orders thereon. Consequently, the order-in-appeal, the original order and the show-cause notice stand set aside.

16. The writ petition stands allowed with no order as to costs.

17. We make it clear that this order shall not preclude the competent authority to proceed against the petitioners in accordance with law.

(M.S.KARNIK, J.) **(CHIEF JUSTICE)**