IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.04.2021

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P. No.10066 of 2021

Shri Vikram Jain @ Veerchand Jain
M/s.Navratna, Shop. No.23, No.90, 1st Floor,
Singapore AC Shopping Complex,
Patni Plaza, Chennai-79. .... Petitioner

Vs.

1.The Commissioner of Customs,
Chennai -III Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai - 600 001.

2.The Commissioner of Customs,
Chennai -II Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai - 600 001.

3.The Commissioner of Customs,
Chennai -IV Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai - 600 001.

4.The Additional Commissioner of Customs,
SIIB, Chennai -III Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai - 600 001.

5.The Deputy Commissioner of Customs,
SIIB, Chennai -III Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai - 600 001. .... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to Writ of Mandamus forbearing the respondents herin in auctioning 178 Nos. of Watches seized from the Petitioner, pending disposal of the Petitioner's appeal, pending before the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai in Diary No.402202020 against the Order in Appeal No.Seaport C.Cus.II.No.700/2019 dated 05.12.2019.

For Petitioner : Dr.S.Krishnanandh

For Respondents : Mr.Rajendran Raghavan
Senior Standing Counsel

ORDER

The petitioner company had been subjected to search by the Directorate of Revenue Intelligence (DRI) on 31.07.20217 and 163 numbers. of imported branded watches had been seized. Parallelly, the residential premises of the Directors had also been searched and 15 numbers of imported watches and a sum of Rs.19 lakhs, was seized.

2. Thereafter proceedings for adjudication had been taken up, culminating in an order-in-original dated 24.09.2018 (stated erroneously in the affidavit as 01.10.2018) granting an option to redeem the watches on payment of redemption fine and differential customs duty under Section 125(2) of the Customs Act, 1962 (in short 'Act') and imposing penalty.

3. As against the order-in-original, the petitioner filed a first appeal and by order dated 05.12.2019 (stated erroneously in the affidavit as 05.12.2018), the appeal came to be disposed by the first appellate authority, who, in conclusion, ordered absolute confiscation of the watches and also confirmed the penalty imposed originally.

4. As against the aforesaid order, the petitioner is stated to have filed an appeal dated 19.03.2020 before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), South Zonal Bench, Chennai. The appeal was filed belatedly and the CESTAT has condoned the delay by its order dated 05.04.2021. There is no dispute that the appeal is maintainable insofar as once the delay is condoned and the requisite statutory pre-deposit made, there is no further embargo on hearing of the appeal on merits. In fact, the appeal is stated to be listed for hearing on 03.05.2021, by notice of hearing dated 13.04.2021.

5. In the meantime, the petitioner is in receipt of communication dated 13.04.2021, wherein, the Assessing Authority threatens disposal of the goods pending appeal. It is as against this that the petitioner has filed the present writ petition seeking a mandamus forbearing the respondent from auctioning the watches seized pending disposal of his appeal before the CESTAT.

6. In the forenoon when the matter was heard, Mr.Rajendran Raghavan, learned Senior Standing Counsel had accepted notice for the respondents. His attention was drawn to the fact that, after substitution of Section 129E by Finance No.2 of 2014, there is no question of any stay being required to be obtained

by an appellant, insofar as the pre-deposit would itself suffice to protect the interests of the parties, pending appeal.

7. The provisions of Section 129E dealing with pre-deposit are extracted below:

> '129E. Deposit of certain percentage of duty demanded or penalty imposed before filing appeal
>
> (i) under sub-section (1) of Section 128, unless the appellant has deposited seven and a half per cent of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of customs lower in rank than the (Principal Commissioner of Customs or Commissioner of Customs);
>
> (ii) against the decision or order referred to in clause (a) of sub-section (1) of section 129A, unless the appellant has deposited seven and a half per cent of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;
>
> (iii) against the decision or order referred to in clause (b) of sub-section (1) of section 129A, unless the appellant has deposited ten per cent of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;
>
> PROVIDED that the amount required to be deposited under this sections hall not exceed rupees ten crores;
>
> PROVIDED FURTHER that provisions of this section shall not apply to the stay applications and appeal pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.)'

8. This position is also confirmed by Circular No.1053/2/2017-CX dated 10.03.2017, wherein, at paragraph 20.2, the Central Board of Excise and Customs has specifically addressed the question of recovery during pendency of litigation and has stated as follows:

> '20.2 Recovery during pendency of litigation: Board has issued two circulars on the subject vide Circular No.984/08/2014-CX, dated 16.09.2014 (2014 (307) E.L.T. (T47)) and Circular No.1035/23/2016-CX, dated 04.07.2016 (2016 (337) E.L.T.(T25)).
>
> (i) Sub Section (iii) of section 35F of the Central Excise Act, 1944 and Section 129E of the Customs Act, 1962 stipulate payment of 10% of the duty

or penalty payable in pursuance of the decision or order being appealed against i.e. the order of Commissioner (Appeals). In the event of appeal against the order of Commissioner (Appeals) before the Tribunal, 10% is to be paid on the amount of duty demanded or penalty imposed by the Commissioner (Appeals). This need not be the same as the amount of duty demanded or penalty imposed in the Order-in-Original in the said case.

(ii) In a case, where penalty alone is in dispute and penalties have been imposed under different provisions of the Act, the pre-deposit would be calculated based on the aggregate of all penalties imposed in the order against which appeal is proposed to be filed.

(iii) In case of any short-payment or non-payment of the amount stipulated under Section 35F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962, the appeal filed is liable for rejection.

(iv) Section 35F of the Central Excise Act, 1944 has been amended with effect from 6-8-2014 to provide for mandatory payment of 7.5% or 10% of the duty demanded where duty demanded is in dispute or where duty demanded and penalty levied are in dispute for admission of appeal before Commissioner (Appeals) or CESTAT. Once the amount is paid, no coercive action shall be taken for recovery of the balance amount during the pendency of the appeal proceedings before these authorities.'

9. In the light of the categoric statement of the Board to the effect that no coercive action shall be taken for recovery of any balance of disputed dues, once the pre-deposit is made, the present communication has no legs to stand. Mr.Raghavan, has also obtained instructions to the same effect. He would fairly state that in the light of the above position as noted by me, communication dated 13.03.2021 will not be pursued any more by the authorities. This is recorded.

10. In the light of discussion as above, the mandamus as sought for by the petitioner stands achieved and this writ petition disposed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

rkp

To

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+1cc to M/s.B.Sathish sundar, Advocate Sr.25127

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rr[co]
srg 09/06/2021