IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.06.2021

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

W.P.No.12498 of 2021
and
W.M.P.No.13270 of 2021

M/s.Fuso Glass India Pvt.Ltd.,
Represented by its Legal Head
Mr.Madanlal Chowatia
No.91, Poonamallee High Road,
Egmore, Chennai - 600 084. ..Petitioner

Vs.

1.The Assistant Director General of Foreign Trade,
5th Floor, Shastri Bhavan Annexe,
No.26, Haddows Road,
Chennai - 600 006.

2.The Joint Commissioner (EODC-Advance)
Office of the Commissioner of Customs,
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 Certiorari, calling for the records relating to the impugned order-in-original no.OINO/81721/2021 dated 22.03.2021 passed by the 2nd respondent in F.No.S45/565/2015-DEEC-EODC(Sea) and quash the same.

For Petitioner : Mr.Hari Radhakrishnan
For Respondents: Mr.Rajnish Pathiyil
Senior Panel Counsel

ORDER

The relief sought for in the present writ petition is to quash the order in original issued by the 2nd respondent in proceedings dated 22.03.2021.

2.The order impugned is issued by the Joint Commissioner under the provisions of the Customs Act, confirming the demand of the customs duty and further, imposed penalty.

3.The petitioner company is engaged in the business of Glass, Import/Export and processing. The petitioner company had obtained advance authorisation dated 24.03.2015 for import of clear float glass and polyvinyl butyl. The petitioner company had an export obligation to export double layered laminated glass of a value of USD 498368.68. After fulfilling the export obligation, the petitioner company had submitted an application dated 21.01.2016 to the Zonal Director General of Foreign Trade, Chennai. The said application submitted for obtaining an export obligation discharge certificate and in support of the said application, the petitioner had submitted the original advance authorization. Form-ANF-4F, original export promotion copies of the 11 shipping bills mentioned above, copies of the bills of entry and Appendix-23 certified by the Chartered Accountant. In response, the Assistant Director General of Foreign Trade issued a deficiency letter dated 25.01.2016, calling upon the petitioner to submit the bank realization certificates in respect of the exports made by them. The petitioner states that the said certificate was also submitted vide their letter dated 15.12.2017. Thereafter, there was no response from the Zonal DGFT, Chennai.

4.The Joint Commissioner of Customs / second respondent issued a show cause notice dated 06.11.2020, calling upon the petitioner to show cause as to why customs duty amounting to Rs.20,70,798/-(Rupees Twenty Lakhs Seventy Thousand Seven Hundred Ninety-Eight only) should not be demanded from the petitioner for allegedly non-fulfilling the export obligation caused upon them in terms of advance authorization dated 24.03.2015. The show cause notice was further proposed to confiscate the raw material imported by the petitioner and also impose penalty under Section 112(a) of the Customs Act, 1960. The petitioner submitted a reply dated 04.12.2020 to the Superintendent of Customs, informing him that they had fulfilled the export obligation and that an application was already filed with the 1st respondent on 21.01.2016. The petitioner states that all the copies of shipping bill and related documents were also submitted. The petitioner meanwhile sent reminders to the 1st respondent seeking issuance of the export obligation discharge certificate. The second respondent was requested to keep the adjudication proceedings in abeyance till a decision was taken by the first respondent. However, without considering any of these requests made by the petitioner, the impugned-Order-in-Original dated 22.03.2021, confirming the demands of customs duty of Rs.20,70,798/-(Rupees Twenty Lakhs Seventy Thousand Seven Hundred Ninety-Eight only) was issued. The order also imposed redemption file of Rs.9,80,000/-(Rupees Nine Lakhs Eighty Thousand only) and penalty of Rs.2,00,000/-(Rupees Two Lakhs only).

5.The learned counsel for the petitioner contended that the petitioner themselves are aware of the appellate remedy available under the statute against the impugned order dated 22.03.2021. However, the impugned order has been passed without awaiting the decision of the licensing authority. Therefore, they have chosen to move the present writ petition. Further, the impugned order does not disclose the evidence submitted by the petitioner regarding the fulfillment of export obligation and therefore, the order impugned is non-speaking in this regard.

6.Thus, it is made clear by the petitioner that they are very much aware of the appellate remedy contemplated under the provisions of the Customs Act and in spite of that, the present writ petition is filed on the ground that the impugned order has been passed without awaiting the decision of the licensing authority based on the letters sent by the writ petitioner, stating that they have fulfilled the export obligations.

7.The learned Senior Panel counsel appearing on behalf of the respondents disputed the said contentions by stating that the contentions of the petitioner were considered by the authorities competent. The findings of the impugned order, more specifically, in paragraph 12, it is elaborately contended that the petitioner has not fulfilled the EODC. This apart, the opportunities were given, personal hearing was also granted. Therefore, the contentions raised in this regard by the petitioner are incorrect and they are bound to prefer an appeal, if at all they are advised to do so. In order to avoid the appellate remedy and payment of deposit as contemplated under the Statute, the present writ petition is filed and thus, the writ petition is to be dismissed.

8.In this regard, it is relevant to extract paragraph 12 of the impugned order, which reads as under:

> "12. A demand notice dated 22.11.2017 was issued to importer. As per www.eodc.online an order no.04/21/40/372/AM16 dated 04.11.2020 is in force, according to which a DEL Order no.68/AM20 is issued to importer for not-fulfilling the EODC. After issuance of SCN, the importer was given fifteen days time to reply to the Show Cause Notice and personal hearings were fixed on 13.11.2020, 20.11.2020 and 27.11.2020. The importer sent a letter dated 01.12.2020, requesting for time till first week of February, 2021. Subsequently, one more Personal Hearing dated 15.02.2021 was granted to importer. Importer appeared on the said date and stated that they had fulfilled the EODC and requested for more time for submission of Redemption Letter. Importer was given time till 15.03.2021. Again,

importer failed to submit redemption letter. Since the importer did not submit Redemption Letter, the case is decided on the basis of documents available on record."

9.This Court is of the considered opinion that the arguments made on behalf of the petitioner as well as the counter arguments advanced by the learned Senior Panel Counsel for the respondents reveal that certain representations or letters or documents, if at all not considered by the original authority, the said documents or letters or grounds are to be placed before the appellate authority by preferring an appeal under Section 128(1) of the Customs Act. Such disputed facts and circumstances between the parties cannot be adjudicated in a writ proceedings under Article 226 of the Constitution of India. Such an adjudication is to be done by verifying the original documents and records, which all are to be produced by the respective parties before the authorities competent or before the appellate authorities. Thus, the petitioner has to exhaust the appellate remedy contemplated under the statute.

10.Right of appeal is a valuable right of a person. The legislatures intended to prescribe an appellate remedy in order to ensure that the orders passed by the original authority or scrutinize and the justifiability and the legality of those are tested by the higher authorities of the department. This being the legislative intention for enacting the law, more specifically, prescription of an appellate remedy, then such a right cannot be denied nor be dispensed with by the High Court by exercising powers under Article 226 of the Constitution of India. It is needless to state that the appellate authority is empowered to adjudicate both the facts as well as the legal grounds raised by the respective parties. They are exercising quasi-judicial powers and therefore, the appellate authority is well within his powers to summon the documents as well as hearing the parties and decide the appeal on merits and in accordance with law.

11.In the present case, the appeal lies before the Commissioner of Customs (Appeals) before whom the legal practitioners are permitted to test the cases. When the litigants are having the benefit of legal assistance through the legal practitioners, then such a remedy must be exhausted by the aggrieved persons before approaching the High Court under Article 226 of the Constitution of India as stated above. Disputed facts cannot be adjudicated by the High Court nor a finding can be given in a writ proceedings without exhausting the appellate remedy and therefore, the petitioner is bound to approach the appellate authority under the Act. The introductory portion of the impugned order reveals that an appeal against the impugned order lies with the Commissioner of Customs (Appeals), 5th Floor, Customs House, Chennai, under Section 128(1) of the Customs Act, 1962, within 60 days of the communication of the impugned order. The petitioner also is aware of the appellate remedy provided. However, by raising certain legal grounds, litigants are attempting to sustain the writ petition, which is not otherwise entertainable without exhausting the appellate remedy contemplated under the provisions of the Customs Act. Such a practice by the litigants cannot be encouraged by the High Court as roving enquiry cannot be conducted in a writ proceedings under Article 226 of the Constitution of India. This apart, the litigants cannot be deprived of availing the statutory remedy which is efficacious and further, the parties would get an opportunity to scrutinize the original documents and put forth their additional grounds, documents and evidences etc., This being the wider scope of the appellate remedy, the parties must be allowed to exhaust such remedy before approaching the High Court.

12.The powers of the High Court under Article 226 cannot be extended to conduct an enquiry with reference to the disputed facts. High Court can go into the procedures contemplated by the competent authorities with reference to the provisions of law and certainly not the decision itself. In this context, it is to be understood that the appellate authority who is empowered to reappreciate the facts with reference to the documents and evidences and such a valuable opportunity cannot be denied to the litigants. In the event of non-filing of an appeal, the litigants are not only deprived of an opportunity, but the High Court cannot appreciate those facts culled out with reference to the documents and evidences. The appellate authority in the event of passing an order, with reference to the facts and the grounds raised, it would be convenient for the High Court to consider the further proceedings, if any in the light of the findings by the original authority as well as by the appellate authority. These aspects are vital in order to form a clear opinion, which would be of paramount importance to render justice. Thus, the importance of an appeal under a statute cannot be undermined by the High Court by dispensing with the appellate remedy.

13.This Court has elaborately considered the issues with reference to preferring a statutory appeal before approaching the High Court under Article 226 of the Constitution of India in the case of M/s.Sri Sathya Jewellery vs. The Principal Commissioner of Customs, Chennai - VII reported in Manu/TN/3216/2021 and the relevant paragraphs are extracted hereunder:

> "7.In order to avoid the Pre-Deposit, which is contemplated under the Statute, the practice of filing writ petitions is prevailing in the High Court and the

High Court cannot encourage such practice and the appellate remedy contemplated under the Act is to be exhausted in all circumstances and only under extraordinary circumstances, in order to mitigate injustice, the High Court can intervene and not otherwise. Such power of dispensing with the appeal remedy is to be exercised sparingly and not in a routine manner. The learned Senior Standing Counsels reiterated that, in respect of the writ petitions on hand, the original assessment order has been passed either by the Joint Commissioner or by the Commissioner of Customs. Against such original orders passed by the original authorities under the provisions of the Customs Act, an appeal is contemplated under Sections 128 and 129 of the Customs Act, respectively. Without exhausting the appellate remedy, the writ petitioners have filed these writ petitions, and therefore, the writ petitions are liable to be dismissed.

8.With reference to the appellate remedy, the Hon'ble Division Bench of this Court in W.A.No.640 of 2021 [M/s.Fourceess Diamond Pvt. Ltd. and another v. The Joint Commissioner of Customs (Air Cargo), Meenambakkam, Chennai] delivered a judgment on 25.02.2021 and the relevant paragraphs are extracted hereunder :

"8.After elaborately hearing the learned counsel for the appellants and the learned Senior Standing Counsel appearing for the respondent, we are of the view that the issues raised in the writ petition are not purely questions of law, but mixed questions of fact, which would require a process of adjudication. Such matters cannot be decided by a Writ Court based on affidavits. Therefore, we do agree with the ultimate conclusion of the learned Writ Court that the appellant should avail the alternate remedy available under the Act.

9.For the reasons, which we have assigned in the preceding paragraph, the Writ Appeal stands dismissed and the appellants are granted 60 days time from the date of receipt of a copy of this judgment to file an appeal before the Commissioner of Customs (Appeals) and if the same is filed, the Commissioner of Customs (Appeals) shall entertain the appeal, without reference to the limitation as the writ petition was filed before this Court in the year 2016, which is well within the period of limitation, had the appellants filed appeals before the Commissioner of Customs (Appeals) at the relevant point of time.

10.Since the learned counsel for the appellants submitted that the certified copy of the impugned order was filed in the writ petition, the Registry is directed to return the impugned original order filed in the writ petition, after retaining a photostat copy. No costs. Consequently, connected miscellaneous petition is closed.”

11.This Court is of the considered opinion that all such grounds raised on merits are to be adjudicated with reference to the documents and evidences to be produced and the scope of the writ petition under Article 226 of the Constitution of India cannot be expanded so as to exercise the powers of the appellate authority in the matter of examination or scrutiny of original documents and evidences produced by the respective parties. The very purpose of the statutory appeal is to scrutinize the orders passed by the original authorities, and therefore, the legislative intention in this regard is to be scrupulously followed in the mater of adjudication of merits with reference to the documents and evidences.

12.In common parlance, Statutes contain appeal provisions. In some of the Statutes, there are two-tier appeal provisions in order to ensure that the facts, grounds, evidences are appreciated and the grievances are redressed in the manner known to law. Such appeal provisions are provided with the legislative intention to provide remedy to the aggrieved persons. The High Court, in normal circumstances, would not interfere nor dispense with the appellate remedy.

13.The High Court cannot adjudicate the facts and merits with reference to documents and evidences. Trial is not entertainable under Article 226 of the Constitution of India. All such procedural aspects are to be followed by complete adjudication/trial by the original authorities as well as by the appellate authorities under the provisions of the Statute and the powers under Article 226 of the Constitution of India is limited to find out whether the processes contemplated under the Statutes and the procedural aspects are followed by the competent authorities as well as the appellate authorities or not. The High Court, under Article 226 of the Constitution of India, is not expected to usurp the powers of the appellate authorities by adjudicating the merits of the matter on certain documents and evidences. In the event of adjudication of merits under Article 226 of the Constitution of India in the absence of complete trial with reference to the documents and evidences, there is a possibility of miscarriage of justice, and therefore, the High Court is expected to be cautious, while entering into the venture of adjudication of certain merits with reference to the original documents and evidences produced by the respective parties to the lis. This being the legislative intention, High Court is expected to trust the institutional authorities as well as the hierarchy of institutions contemplated under the Statutes. Institutional respects are of paramount importance for providing complete justice to the parties and the various stages of adjudication are important for the purpose of correcting omissions, commissions, errors in appreciation of evidence, etc. Powers of the High Court under Article 226 of the Constitution of India cannot be extended nor widened so as to allow lay hands on the facts and circumstances by conducting the trial, nor certain facts and circumstances with reference to documents and evidences can be assumed or presumed or inference can be drawn, which is not preferable.

15.As far as the judgment of the Hon'ble Supreme Court of India in the case of M/s.Canon India Private Limited (supra) is concerned, as rightly pointed out by the learned Senior Standing Counsels appearing on behalf of the respondents that the matter went to the Hon'ble Apex Court by way of regular appeal and the Hon'ble Supreme Court of India, while adjudicating the final orders passed by the Appellate Tribunal, formed an opinion that the issuance of show cause notice itself was by an improper authority. Thus, by citing the said finding, the appellate remedy otherwise provided under the Statute cannot be dispensed with, and in the event of accepting the said contention, in all such cases, every litigant will approach the High Court by way of writ petition bypassing the appellate remedy, which is not desirable and cannot be accepted. As observed earlier, Institutional respect is of paramount importance. Even the point of jurisdiction, limitation, error apparent on the face of the record, are on merits and all are to be adjudicated before the appellate authority and the appellate authority, more specifically, the Appellate Tribunal or the Commissioner (Appeals), as the case may be, is empowered to adjudicate all such legal grounds raised by the respective parties and make a finding on merits. Thus, usurping the powers of the appellate authorities by the High Court by invoking its powers under Article

226 of the Constitution of India is certainly unwarranted. The parties must be provided an opportunity to approach the appropriate authorities for redressal of their grievances in the manner known to law. In the event of entertaining all such writ petitions, the High Court will not only be over-burdened, but usurping the powers of the appellate authority is certainly not desirable.

18.Large number of writ petitions are filed without exhausting the statutory appeal remedies and High Court is also entertaining such writ petitions in a routine manner. Keeping such writ petitions pending for long time would cause prejudice to the interest of the assessee also. Thus, such statutory provisions regarding the appeal are to be decided at the first instance, enabling the litigants to avail the remedy by following the procedures as contemplated under law. Such writ petitions are filed may be on the ground of jurisdiction or otherwise. However, the Courts are expected to ensure that all such legal grounds available to the parties are adjudicated before the proper Forum and only after exhausting the statutory remedies, writ petitions are to be entertained. In the absence of exhausting such remedies, High Court is loosing the benefit of deciding the matter on merits as the High Court cannot conduct a trial or examine the original records in the writ proceedings under Article 226 of the Constitution of India. Thus, the Courts shall not provide an unnecessary opportunity to the assessee to escape from the liability merely on the ground on jurisdictional error, which is rectifiable.

19.This being the facts and circumstances established, this Court has no hesitation in arriving at a conclusion that the petitioners are bound to exhaust the appellate remedy, either under Section 128 or Section 129 of the Customs Act, respectively. Thus, the petitioners are at liberty to approach the appellate authority and file an appeal by following the procedures contemplated and by complying with the conditions to prefer the appeal, within a period of 60 days from the date of receipt of a copy of this order, and in the event of filing of appeal(s) by the writ petitioners within a period of 60 days, all such appeals are directed to be entertained without reference to the period of limitation, and the matters are to be adjudicated on merits and in accordance with law and by affording opportunity to all the parties, and the appeals are to be disposed of as expeditiously as possible."

14. With these observations, the writ petition stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

Kak
To

1.The Assistant Director General of Foreign Trade,
5th Floor, Shastri Bhavan Annexe,
No.26, Haddows Road,
Chennai - 600 006.

2.The Joint Commissioner (EODC-Advance)
Office of the Commissioner of Customs,
Chennai -IV Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai - 600 001.

+1 CC to Mr.Rajnish Pathiyil, Advocate sr 27678.

W.P.No.12498 of 2021

CP(CO)
SP(12/07/2021)