IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 09.08.2021

CORAM:

THE HON'BLE MR. JUSTICE S.M.SUBRAMANIAM

WP No.32280 of 2016
and
WMP No.28001 of 2016

1. M/s.Subbu Diamonds LLP,
Represented by its Partner,
Mr.Ganeshan Suppiah,
No.144-A, Subbu Villa,
North Usman Road,
T.Nagar, Chennai - 600 017.

2. Mr.Ganeshan Suppiah

3. Mr.S.M.Subbiah

4. Mrs.P.Thamizharasi

5. Mrs.Meenu Subbiah

6. Mr.Mukandra .. Petitioners

Vs

The Assistant/Deputy Commissioner
of Customs (Gr.1 to 4),
Office of the Principal Commissioner of Customs,
Chennai - VII Commissionerate,
New Custom House, Meenambakkam,
Chennai - 600 016. .. Respondent

PRAYER: This Writ Petition is filed under Article 226 of the Constitution of India, praying for issuance of Writ of Certiorari, calling for the records of the respondent culminating in the impugned order-in-original No.566/2016 (ACC) dated 09.06.2016 issued from File No.S.Misc 58/39/2016 Gr.1-4-ACC and quash the same.

For Petitioners : Mr.Gowtham Ramvittal
for Mr.S.Murugappan

For Respondent : Mrs.R.Hemalatha
Sr. Panel Counsel

O R D E R

The order in original dated 09.06.2016, passed by the respondent is under challenge in the present writ petition.

2. The preamble of the order impugned reveals that any person deeming himself aggrieved by this order may appeal against this order before the Commissioner of Customs (Appeals), Custom House, Chennai. The procedures for filing an appeal is also contemplated under the Order-in-Original itself.

3. Instead of preferring an appeal for the redressal of the grievances, the petitioners have chosen to file a writ petition raising several grounds, which are all to be adjudicated based on certain facts and on verification of documents and evidences in original. Even in cases where mixed question of fact and law is raised, the appellate authority, is competent to adjudicate both factual and legal grounds and made a finding and pass orders. The appellate authority is the final fact finding authority. Thus, importance attached to the appellate remedy at no circumstances be undermined. Dispensing with an appeal in a routine manner is not preferable and the valuable right of appeal offered to an aggrieved person under the statute need not be taken away unnecessarily.

4. In the present case, the petitioners have stated that there are certain violations and factual aspects either not considered or mistakenly considered. However, all these aspects could be adjudicated before the appellate authority. The importance of appellate remedy and its relevance are elaborately adjudicated by this Court in a batch of writ petitions in W.P.No.3144 of 2016 etc. dated 15.04.2021 [M/s.Sri Sathya Jewellery, Vs. The Principal Commissioner of Customs] 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.
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> 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.”

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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.

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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.

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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.

5. Therefore, following the decision referred to above, in this writ petition also, the petitioners are granted liberty to approach the appellate authority and file an appeal by following the procedures as 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 by the writ petitioners within a period of 60 days, such appeal is directed to be entertained without reference to the period of limitation, and the matter has to be adjudicated on merits and in accordance with law and by affording opportunity to the parties concerned, and the appeal has to be disposed of, as expeditiously as possible.

6. With these observations, the writ petition stands disposed of. No Costs. Consequently, the connected miscellaneous petition is closed.

7. Registry is directed to return the original impugned order to the learned counsel on record, who filed the writ petition.

Sd/-
Assistant Registrar(CS-VI)

// True Copy//

Sub Assistant Registrar

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To

The Assistant/Deputy Commissioner
of Customs (Gr.1 to 4),
Office of the Principal Commissioner of Customs,
Chennai - VII Commissionerate,
New Custom House, Meenambakkam,
Chennai - 600 016.

Copy to:

The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.S.Murugappan, Advocate, S.R.No.39539

WP No.32280 of 2016

PCH(CO)
SU(27/08/2021)