IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.07.2021

CORAM

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.Nos.15453 & 15455 of 2021

S.Kalith .. Petitioner in W.P.No.15453/2021

M/s.Green Line,
S.Kalith (Beneficial Owner),
No.46/58, O.V.M.Street,
Chepauk, Chennai-600 005. .. Petitioner in W.P.No.15455/2021

-vs-

1. The Commissioner of Customs (Appeals-II),
   Customs House,
   Chennai-600 001.

2. The Additional Commissioner of
   Customs-Group 5A,
   Chennai-II Commissionerate,
   Customs House, Chennai-600 001. .. Respondents in both W.Ps.

Petitions filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorarified Mandamus to call for the records of the proceedings of the 1st respondent made in Order-in-Appeal Seaport.C.Cus.II Nos.432 & 431/2021 dated 20.05.2021 in F.Nos.C3/II/620 & 621/O/2020-Sea, quash the same and consequently direct the 1st respondent to hear the appeals on merits by adjusting the amount already deposited by the petitioner towards the pre-deposit.

For Petitioner (In both W.Ps.)	:	Mr.S.Thirumavalavan
For Respondents (In both W.Ps.)	:	Mr.S.Gurumoorthy, Senior Panel Counsel

COMMON ORDER

The Orders-in-Appeal dated 20.05.2021 are sought to be quashed in the present writ petitions.

2.The introductory portion of the order dated 20.05.2021 reveals that "under Section 129A(1) of the Customs Act, 1962 (hereinafter referred to as "the Act") any person aggrieved by this order can prefer an appeal to the Customs, Excise and Service Tax Appellate Tribunal having its Registry at Shastri Bhawan, Annexe Building, 1st Floor, 26, Haddows Road, Chennai-600 006 on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute".

3.The other procedures are also enumerated in the Orders-in-Appeal itself. Thus, the petitioners have to prefer an appeal before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) for adjudication of certain disputed issues.

4.The learned counsel for the petitioners reiterated that the petitioners have already deposited a sum of Rs.11.36 Lakhs as customs duty and the said amount is to be adjusted towards the pre-deposit as contemplated under Section 129E of the Act. Instead of adjusting the customs duty already paid by the petitioners towards pre-deposit to be made for entertaining an appeal, the appeals itself were rejected on the ground that the petitioners have not complied with the condition regarding the pre-deposit of 10% duty demanded.

5.The order impugned reveals the following facts regarding non-compliance of the mandatory provisions of pre-deposit for entertaining an appeal, which are as hereunder:-

> "5.I have carefully gone through the facts of the case, impugned in Order-in-Original, grounds of appeals, common miscellaneous petition for condonation of delay and to treat the duty deposit made before the SIIB as pre-deposit, and the arguments put forth by the appellant and the appellant company. As both the appeals arise out of a common Order-in-Original and the appellant is the beneficial owner of the appellant company, the same are taken up together for disposal. As regards the petition for the condonation of delay in filing the appeals, I find that the OIO was passed on 31.07.2020 and the appellant claimed to have received on 13.08.2020 but filed the appeals on 21.10.2020. For the reasons as stated in the petitions, I condone the delay.
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> As for the miscellaneous petition to treat the duty deposit said to have been made before the SIIB relying upon the observations as recorded in the Order-in-Original at para 21 that the goods were released provisionally on acceptance of the Demand Draft, which should be treated as pre-deposit, I find

that Para 21 of Order-in-Original reads as follows:-

> 21. "The subject goods in Bill of Entry 4497899 dated 08.03.2016 were released provisionally to Mr.Kalith, the beneficial owner, after he had executed PD bond No.2001148739 for amount of Rs.11,36,000/- hence, there is a lient on those goods and in the event of goods provisionally released were being confiscated, redemption fine has to be levied as per Section 125 of Customs Act, 1962."

From the above, it appears that the appellant executed PD bond for Rs.11,36,000/- and not duty deposit, hence their claim that they made duty deposit of Rs.11.36 lakhs relying upon the above para 21 of OIO lacks clarity. Moreover, LAA vide para 20 of the impugned OIO observed as follows:-

> 20. "As per available records, importer had paid self assessed duty Rs.4,53,644/- with interest Rs.50,709/- vide system generated challan no.2014220200 i.e. 1st condition of the High Court order was fulfilled whereas, importer had not paid any amount ie., 50% of the department assessed duty of 22,72,020/- and also No Bank guarantee executed by them. Hence out of the Department re-assessed Duty Rs.22,72,020/- importer already paid Rs.4,53,644/- the balance Rs.18,18,376/- was demanded as differential duty".

It appears from the above that only the duty of Rs.4,53,644/- with interest of Rs.50,709/- was paid by the appellant and the appellant company. Therefore, copies of confirmation of TR6 challan letter dated 17.10.2020 from SBI and other correspondence/documents lack clarity with regard to payment of duty deposit. Further, had the duty deposit been made, the LAA would have ordered the same to be appropriated against the differential duty confirmed against the four bills of entry involved in the impugned Order-in-Original.

Section 129E of the Customs Act, 1962 reads as follows:-

Section 129E: Deposit of certain percentage of duty demanded or penalty imposed before filing appeal. - The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal, --

(i) under sub-section (1) of section 128, unless the appellant has deposited seven and a half percent 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..................;

(iii) against the decision or order referred to in clause (b) of sub-section (1) of section 129A..............;

Provided that the amount required to be deposited under this section shall not exceed rupees ten crores;

Provided further that the provisions of this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

6.Thus, it is clear that pre-deposit of duty or penalty as prescribed thereunder is mandatory and therefore the petition filed by the appellant and the appellant company to treat the deposit made before the SIIB as pre-deposit cannot be considered for the above discussions. Therefore, both the miscellaneous petition and the appeals are dismissed for non-compliance of Section 129E of the Customs Act, 1962."

6.The above findings would clearly show that the petitioners have paid self-assessed duty of Rs.4,53,644/- with interest of Rs.50,709/- vide system generated challan, that is, first condition of the High Court order was fulfilled, whereas the petitioner/importer has not paid any amount, i.e., 50% of the department assessed duty of Rs.22,72,020/- and also no Bank guarantee was executed by them. Under those circumstances, the appellate authority formed an opinion that there is no clarity in respect of the statement made by the petitioners that they deposited the duty amount of Rs.11.36 Lakhs. When the appellate authority made a finding that the records were carefully gone through and the facts were considered and the petitioners have not established that they are entitled for any adjustment of paid customs duty towards pre-deposit for entertaining an appeal, there is no reason to entertain a writ petition and if at all there is any records available with the petitioners, they are at liberty to approach the CESTAT under Section 129A(1) of the Act. The CESTAT is empowered to call for the entire files, verify the records and form an opinion whether the petitioners are entitled for any such adjustment or not, or there is any error in respect of the findings made by the authority or not. However, such an elaborate adjudication cannot be done by the High Court in writ proceedings at this stage. The petitioners on one hand claim that they have paid Rs.11.36 Lakhs towards duty. The Orders-in-Appeal, which are impugned, state that there is no clarity in respect of the said payment made by the petitioners. Under these circumstances, adjudication of facts is required with reference to the documents in original, which are to be scrutinised. Thus, the petitioners are at liberty to prefer an appeal under Section 129A(1) before the CESTAT for the purpose of redressal of their grievances. Contrarily, this Court need not entertain the writ petitions at this stage and keep the matter pending unnecessarily, as admittedly the petitioners have not exhausted the remedy available under the Act before the appellate tribunal, which is competent to deal with all the grounds raised by the petitioners in the present writ petitions. Thus, the petitioners are at liberty to prefer an appeal in the manner prescribed and by complying with the provisions of the Act and Rules.

With the above observations, these writ petitions stand disposed of. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1. The Commissioner of Customs (Appeals-II),
   Customs House, Chennai-600 001.

2. The Additional Commissioner of
   Customs-Group 5A,
   Chennai-II Commissionerate,
   Customs House, Chennai-600 001.

W.P.Nos.15453 & 15455 of 2021

VG-II(CO)
HS(24/08/2021)