IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.09.2021

CORAM

THE HON'BLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HON'BLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

Writ Appeal No.2465 of 2021
and
C.M.P.No.15873 of 2021

M/s.Kiruba Export,
Rep. by its Proprietor
Mrs.S.Vimaladevi
No.84, Chennimalai Road,
Perundurai,
Erode District – 638 052. .. Appellant

-vs-

1.The Commissioner of Customs, Chennai-IV,
O/o. The Commissioner of Customs, Chennai-IV,
Custom House, No.60, Rajaji Salai,
Chennai – 01.

2.The Deputy Commissioner of Customs (BRC-DBK)
O/o. The Commissioner of Customs, Chennai-IV,
Custom House, No.60, Rajaji Salai,
Chennai – 01. .. Respondents

Appeal under Clause 15 of Letters Patent against the order dated 30.07.2021 in W.P.No.15897 of 2021 and set aside the same.

Prayer in WP.No.15897 of 2021: Petition filed under Article 226 of the Constitution of India praying for Issuance of Writ of Certiorari to Call for the records pertaining to the impugned Order-In-Original No.81386/ 2021 of the 2nd respondent dated 17.03.2021 and quash the same.

For Appellant : Mr.Derrick Sam
for Mr.A.Mohamed Ismail

For Respondents : Mr.Mohana Murali
Senior Standing Counsel

JUDGMENT
(Delivered by T.S.Sivagnanam, J.)

This Writ Appeal filed by the appellant-assessee questions the correctness of the order dated 30.07.2021, by which the writ petition filed by the appellant in W.P.No.15897 of 2021 was dismissed on the ground that the appellant should avail the alternate remedy available under the provisions of the Customs Act.

2.It is no doubt true that alternate remedy is available under the provisions of the various enactments, especially in taxing statutes Courts will always be slow in entertaining the writ petitions. It is equally true that Courts have also drawn distinction to cases which can be entertained by way of a writ petition and carved out certain exceptions. One such exception is that there has been violation of principles of natural justice. The appellant before us has pitched their case on the ground of violation of principles of natural justice. The respondent issued notice dated 01.03.2021 referring to the show cause notice dated 10.03.2017 stating that as per the available records in the Office, the proof of realization of export proceeds for Shipping Bill with Drawback amounting to Rs.13,63,336/- is pending. Therefore, the respondent directed the appellant to produce all relevant documents and fixed the date of personal hearing as 08.03.2021, 09.03.2021 and 10.03.2021. The appellant appeared before the Deputy/Assistant Commissioner of Customs, Drawback Section-BRC, Chennai and requested for two weeks time for submission of Bank Realization Certificate. The concerned Officer has made an endorsement in the said representation, which is to the following effect.

> "As directed by DC [DBK-BRC] extension of time has been extended upto 06.04.2021 to produce (BRC) negative certificate. If failed to produce the documents within the fix time limit the case may be decided on available documents."

3.In terms of the above endorsement, the appellant has been granted extension of time upto 06.04.2021 though not by the first respondent but by the second respondent, who is the concerned Officer of the said Department. Much prior to the expiry of the said date, the Order-in-Original dated 17.03.2021 has been passed on the ground that the appellant failed to give any objections to the notice dated 01.03.2021, did not availed the opportunity of personal hearing granted on those three days and therefore, the proposal in the show cause notice is confirmed. By letter dated 05.04.2021, the appellant has filed the BRC-Negative Statement in the office of the respondent as could be seen from the date seal dated 07.04.2021. However, by then the first respondent having passed an order had become functus officio and had no power to review this decision. Therefore, the appellant filed the writ petition challenging the said order which has been dismissed on the ground of availability of alternate remedy.

4.The learned counsel for the appellant submitted that the dates fixed for providing opportunity of personal hearing cannot be mechanically fixed and the opportunity of personal hearing is for the purpose of giving a fair opportunity to the noticee and in the instant case, three dates were pre-fixed by the first respondent even while issuing the show cause notice. The Central Board of Excise and Customs [CBEC] in Circular No.1053/2/2017-CX dated 10.03.2017 has issued a master circular on show cause notices, adjudication and recovery proceedings and in paragraph 14.3 of the Circular deals with personal hearing which reads as hereunder:

> “14.3 Personal hearing : After having given a fair opportunity to the noticee for replying to the show cause notice, the adjudicating authority may proceed to fix a date and time for personal hearing in the case and request the assessee to appear before him for a personal hearing by himself or through an authorised representative. At least three opportunities of personal hearing should be given with sufficient interval of time so that the noticee may avail opportunity of being heard. Separate communications should be made to the noticee for each opportunity of personal hearing. In fact separate letter for each hearing/extension

should be issued at sufficient interval. The Adjudicating authority may, if sufficient cause is shown, at any stage of proceeding adjourn the hearing for reasons to be recorded in writing. However, no such adjournment shall be granted more than three times to a noticee."

5.In terms of the above Circular, the Adjudicating Authority has to proceed to fix a date and time for personal hearing and atleast three opportunities should be given with sufficient interval of time so that the noticee may avail opportunity of being heard and separate communication should be made to the noticee for each opportunity of personal hearing. Further, it has been directed that separate letter for each hearing/extension should be issued on sufficient interval and if sufficient cause is shown in any stage of the proceedings, the Adjudicating Authority can adjourn the hearing for the reasons to be recorded in writing and no adjournment should be granted more than three times to the noticee. The procedure adopted by the first respondent in issuing a show cause notice and fixing three dates for personal hearing which are pre-fixed dates would fall foul of the above Circular.

6.The facts clearly show that adequate opportunity was not afforded to the appellant. It may be true that the show cause notice is of the year 2017, yet the Customs Department did not take any action till issuance of notice dated 01.03.2021. On receipt of the notice, the appellant sought for two weeks time to produce the Bank Realization Certificates and time was granted by the concerned Officer till 06.04.2021. Much before the said date, the Order-in-Original has been passed. Therefore, we find that there has been violation of principles of natural justice. That apart, the appellant has submitted the certificates in the form of negative statement on 07.04.2021. If those certificates are verified and the stand taken by the appellant is found to be correct, then the proceedings itself had to be dropped. Therefore, we are convinced that the appellant's case will fall within one of the exceptions that have been carved out by the Hon'ble Supreme Court for entertaining the writ petition. In this regard, we rely on the observations of the Hon'ble Supreme Court in the case of Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and others [(1998) 8 SCC 1].

7.Thus, for the above reasons, the writ appeal is allowed, the order passed in the writ petition is set aside and the Order-in-Original No.81386/2021 dated 17.03.2021 is set aside and the matter is remanded to the first respondent for fresh consideration. The BRC-Negative Statement submitted by the appellant on 07.04.2021 shall be verified by the concerned authority and after affording an opportunity of personal hearing to the appellant, the case shall be adjudicated afresh on merits and in accordance with law. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-VIII)

//True Copy//

Sub Assistant Registrar

cse

To

1.The Commissioner of Customs, Chennai-IV,
O/o. The Commissioner of Customs, Chennai-IV,
Custom House, No.60, Rajaji Salai,
Chennai – 01.

2.The Deputy Commissioner of Customs (BRC-DBK)
O/o. The Commissioner of Customs, Chennai-IV,
Custom House, No.60, Rajaji Salai,
Chennai – 01.

+1cc to Mr.A.Mohamed Ismail, Advocate, S.R.No.50328
+1cc to M/s.K.Mohana Murali, Advocate, S.R.No.50601

W.A.No.2465 of 2021

GSM(CO)
SB(13/10/2021)