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APOT/57/2022
IA No.GA/1/2022

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

INDIA CARBON LTD.

-Versus-

DEPUTY DIRECTOR, DIRECTORATE OF REVENUE INTELLIGENCE AND ORS.

Appearance:
Mr. Sudhir Mehta, Adv.
Mr. Anurag Bagaria, Adv.
...for the appellant.

Mr. Kaushik Dey, Adv.
Mr. Tapan Bhanja, Adv.
...for the respondent.

BEFORE:
The Hon'ble JUSTICE T.S. SIVAGNANAM
-And-
The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA

Date : 29th March, 2022.

The Court : By consent of the parties, the appeal and the application for stay are taken up 'for hearing.'

This intra-court appeal at the instance of the writ petitioner is directed against the order dated 14th March, 2022 in WPO/1123/2022. The appellant had filed the writ petition praying for issuance of a writ of Certiorari to quash the show cause notice dated 31st January, 2022 as well as the seizure memo drawn earlier dated 19th November, 2021. The appellant also sought for issuance of a writ of Mandamus to direct the respondent to release the goods which have been seized.

The learned Single Bench, by the impugned order opined that a challenge to the show cause notice cannot be entertained. However, noticing that the appellant had filed an application/representation dated 30th November, 2021 seeking for provisional release of the goods which have been seized, directed the respondent to consider and dispose of the writ petition in accordance with law and by passing a reasoned and speaking order after giving opportunity of hearing to the appellant or its authorised representative within two weeks. With regard to the other issues, the learned writ Court directed the respondents to file an affidavit-in-opposition within a time framed and reply, if any, by the appellant. The writ petition is pending as on date.

The appellant is before us contending that the learned writ Court ought to have directed release of the goods and the challenge to the show cause notice and other related proceedings are primarily on the ground of lack of jurisdiction and,, therefore the appellant has made out a prima facie case and a positive direction for release of the goods ought to have been granted.

Mr. Sudhir Mehta, learned counsel appearing for the appellant while reiterating the grounds raised in the writ petition, would submit that the show cause notice impugned in the writ petition is palpably without jurisdiction and pointed out various details with regard to sulphur content in the product which was imported by the appellant to be used for manufacturing of Anode. In this regard, the learned counsel has drawn our attention to the Indian Standard for Petroleum Coke and Anode making in aluminium industries and the specifications contained therein. It is submitted that there is no mis-declaration on the part of the appellant and the appellant's end product which is Calcined Petroleum Coke (CPC) meets the standard prescribed by IS as the sulphur content is 3.5. Further, it is pointed out that after the goods have been utilised and 70% of the imported goods have been utilised and the present proceedings have been initiated by the Directorate of Revenue Intelligence (DRI) and a show cause notice under Section 124 of the Customs Act, 1962 has been issued which is without jurisdiction. The learned counsel placed reliance on the decision of the Hon'ble Supreme Court in the case of ITC Ltd. vs. Commissioner of Central Excise, Kolkata-IV, reported in 2019(368) ELT 216 (SC) for the proposition that provisions under Section 27 of the Act cannot be invoked in the absence of amendment or modification having been made in the Bill of Entry on the basis of which self-assessment has been made. It is further submitted that the order of assessment is required to be followed unless modified before the claim for refund is entertained. Further, re-assessment is permitted only under Section 17(3)((4)(5) of the amended provision. Further, learned counsel has referred to the decision of the Hon'ble Supreme

Court in MC Mehta vs. Union of India & Ors. in WP(C) No.13029 of 1985 dated 9th October, 2018 wherein the Hon'ble Supreme Court, after taking notice of the views expressed by the Central Pollution Control Board (CPCB) had stated that as per BIS guidelines, Calcineds are permitted to use high sulphur containing raw petroleum coke for making CPC having sulphur content less than 3.5%. Therefore, it is submitted that as long as the petitioner meets such condition, the question of issuing show cause notice would not arise.

The learned counsel appearing for the respondent submitted that the learned writ Court after noting that the appellant has submitted a representation dated 25th February,, 2022 for provisional release of the goods which is roughly about 30% of the total quantity imported, has directed such representation to be disposed of within the time framed and, therefore, the appellant cannot be aggrieved and the authority will consider the representations and pass orders in accordance with law.

After having elaborately heard the learned counsel for the parties, we are of the view that the moot question to be decided in the writ petition is whether it is maintainable against the show cause notice. Being conscious of the said fact, the learned Single Bench had directed the respondents to file affidavit-in-opposition. Therefore, we do not wish to express our views on the said application and would leave it open to the learned writ Court to take a decision in the matter after affidavits are filed. The learned Advocate appearing for the appellant sought for a positive direction from this Court to direct the respondents to release the cargo. In our view, the statutory authority has to exercise its power in accordance with law and it will be too early for us to express any opinion as to how the application for provisional release has to be considered. Therefore, the best course and the proper course to be adopted is to direct the respondent authority to consider the application for provisional release within a time frame after affording an opportunity to the appellant, as has been directed by the learned Single Bench. Therefore, at this stage, we are not inclined to interfere with the order passed by the learned writ Court. We direct the concerned respondent to consider the representation/application dated 30th November, 2021 for provisional release of the cargo and pass orders on merits in accordance with law from the date of receipt of the server copy of this order after affording an opportunity of personal hearing to the authorised representative of the appellant.

Further we would wish to point out that entertaining a writ petition against a show cause notice can be done in rarest of rare cases. The decision in the case of *ITC Ltd.*, we find, was rendered in a batch of cases and the matter travelled to the Hon’ble Supreme Court pursuant to the orders passed by the CESTAT. The substantial question of law which was framed for consideration in those appeals was whether in the absence of challenge to the order of assessment in appeal, any revision application against the assessed duty can be entertained? In the background of the facts of the case and the question of law framed, the Hon'ble Supreme Court has made certain observations. In any event, the contentions canvassed in the writ petition as well as before us are not pure questions of law. They are mixed question of fact and law, and, therefore, it is advisable and appropriate on the part of the appellant to file the reply to the show cause notice in which they will be entitled to canvas all contentions including the issue relating to jurisdiction of the authority to issue the show cause.

Therefore, we are of the view that the writ petition can be disposed of at this stage by issuing appropriate directions. WPO/1123/2022 stands disposed of, by treating the same as on day's list, by directing the appellant to file their reply to the show cause notice within four weeks from date and the adjudicating authority will commence and complete the adjudication within four weeks from the date of receipt of the reply. We further direct the authority to consider and dispose of the representation/application for provisional release of goods within four weeks from date.

We make it clear that the direction issued by us to consider the representation/application for provisional release shall be considered by the authority within the time stipulated by this Court and the direction to adjudicate the show cause is a separate direction independent of the direction to consider the prayer for provisional release.

In the result, the appeal (APOT/57/2022) is dismissed. Consequently, the connected application for stay (IA No.GA/1/2022) also stands closed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

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