IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	30.09.2022
Pronounced On	01.11.2022

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN
and
THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.A.No.209 of 2022
and
C.M.P.No.1558 of 2022

M/s.Conybio Healthcare (India) P Ltd,
Represented by its Authorised Signatory/General Manager,
Mrs.Malini,
No.96, Jawaharlal Nehru Salai,
Ekkattuthangal,
Chennai – 600 097. ... Appellant

Vs.

The Commissioner of Customs,
(Airport and Air Cargo Complex)
Meenambakkam,
Chennai – 600 027. ... Respondent

PRAYER: Writ Appeal filed under Clause 15 of the Letters Patent against the order of his Lordship in M.P.No.2 of 2013 in W.P.No.19153 of 2008 dated 16.09.2021 for the following among other.

For Appellant : Mr.R.Senniappan
for M/s.Ganesh and Ganesh

For Respondent : Mr.Pramod Kumar Chopda
Senior Standing Counsel

JUDGMENT

S.VAIDYANATHAN, J.
And
C.SARAVANAN, J.

The importer is the appellant in this writ appeal. This writ appeal has been filed against the order dated 16.09.2021 passed by the learned single Judge of this Court in M.P.No. 2 of 2013 in W.P.No.19153 of 2008.

2. The appellant had filed W.P.No.19153 of 2008 for the following relief:-

> *"To issue a writ of mandamus directing the respondent to complete the adjudication proceedings pending before it in File No.S.Misc.45/2002-SIIB(ACC),pursuant to the show cause notice issued by the respondent dated 27.01.2005, following the due process of law and the principles of natural justice as enshrined and afford the petitioner company an opportunity of cross examination of the*

persons sought for vide its reply to the show cause notice dated 12.03.2007 in the proceedings before the respondent.”

3. The writ petition was disposed of by directing the respondent to follow due process of law without violating the principles of natural justice and also by considering the order of this Court dated 24.06.2005 in W.P.No.18918 of 2000. Relevant portion of the said order dated 24.06.2005 reads as under:

“4. Considering the facts and circumstances, suffice is to direct the respondent to commence and complete the entire process. Pursuant to the show cause notice issued to the petitioner by this respondent dated 27.01.2005, following due process of law, without violating the Principles of Natural Justice and also by considering the order of this court and by also considering the order of this court dated 24.06.2005, made in W.P.No.18918 of 2000 etc., The respondent is directed to carryout the said exercise and pass orders within six months from the date of receipt of the copy of this order.”

4. None appeared on behalf of the respondent at the time of disposal of the writ petition on 29.09.2008.

5. In these circumstances, the respondent, the Commissioner of Customs filed M.P.Nos.1 and 2 of 2013 in W.P.No.19153 of 2008 and M.P.No.1 of 2013 in Rev.Aplw.SR.No.13749 of 2013 for the following reliefs:

M.P.No.1 of 2013 in W.P.No.19153 of 2008	Petitioner praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to extend the time by a further period of three months to complete the adjudication proceedings.
M.P.No.2 of 2013 in W.P.No.19153 of 2008	Petitioner praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to modify the order dated 29.09.2008 in the above writ petition by deleting the observation to consider, the order of this Hon'ble Court dated 20.06.2005 passed in W.P.No.18918 of 2000 etc.
Rev.Aplw.SR.No.13749 of 2013	Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to review the order dated 29.09.2008 passed in W.P.No.19153 of 2008 and pass such further order as this Hon'ble Court may deem fit and proper in the circumstances of the case.
M.P.No.1 of 2013 in Rev.Aplw.SR.No.13749	Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to condone the delay of 1514 days in filing the review petition and pass such further order as this Hon'ble Court may deem fit and proper in the circumstances of the case.

6. The learned single Judge, after considering the arguments advanced by the appellant and the respondent has modified the order with the following observations:-

> *“9. This Court is of the considered opinion that once a show cause notice is issued, the noticee is expected to submit his objections, explanations, documents to the competent authority and the authority is bound to consider the same independently on merits and take a decision and pass orders by following the procedures as contemplated as contemplated under law.*
>
> *10. As far as relying on a judgment in a batch of case is concerned, unless the facts in those cases are adjudicated elaborately in comparison with the facts and circumstances of the cases, placed before the Court, the same would cause unnecessary implications in the matter of deciding the issues independently and in accordance with law. Thus, this Court is of the opinion that the reference made in Paragraph No.5 of the order dated 29.09.2008 passed in W.P.No.19153 of 2008, is to by modified. Such modifications are essential in view of the fact that it is brought to the notice of this Court that the facts and circumstances of the present case are not akin to that of the facts and circumstances decided by this Court in W.P.No.18918 of 2000 etc. batch of cases. When the facts are distinguishable then the case of the petitioner is to be decided independently. Accordingly the order dated*

29.09.2008 passed in W.P.No.19153 of 2008 stands modified in respect of paragraph No.5 as under:

> *"Considering the facts and circumstances, respondents are directed to commence and complete the entire process pursuant to the show cause notice issued to the petitioner by the respondent on 27.01.2005 and pass final orders on merits and in accordance with law and by affording an opportunity to the writ petitioner, within a period of four months from the date of receipt of a copy of this order."*

7. The case of the appellant is that the respondent, Customs Department has heavily placed reliance on the document authored by some of its directors and employees from Malaysia**.** Therefore, unless the Officers and Directors are cross examined, show cause proceedings ought not to have been continued and therefore, a positive direction was obtained by the petitioner in terms of the order passed by this Court in W.P.No.18918 of 2000 on 24.06.2005.

8. When the case was taken up for hearing, the learned counsel for the petitioner also drawn attention to Section 28(9) of the Customs Act, 1962. Section 28(9) of the Customs Act, 1962, which reads as under:

> "*SECTION 28.* ***Recovery of duties not levied or short-levied or erroneously refunded***
>
> *(9)The proper officer shall determine the amount of duty or interest under sub-section (8),—*
>
> *(a) within six months from the date of notice in respect of cases falling under clause (a) of subsection (1);*
>
> *(b) within one year from the date of notice in respect of cases falling under sub- section (4)."*

9. He specifically placed reliance on the limitation contained therein. He, therefore submitted that there is no basis on which the show cause notice proceeding beyond the period of limitation prescribed under section 28(9) can be preceded long after the limitation expired.

10. The learned counsel for the respondent on the other hand submits that the decision of the court in W.P.No.18918 of 2000 dated 24.06.2005 was not applicable to the facts of the case. Therefore, the Customs Department was constrained to file the Miscellaneous Petitions to

modify the order dated 29.09.2008 and for review as mentioned above. That apart, it is submitted that the appellant sought for cross examination of its own employees and directors. In this connection, reference was made to para 5.2 of the counter affidavit filed by the respondent before this Court, which reads as under :

> *"5.2 It is submitted that on 09.07.2008, the 3 SCNs issued by the customs seaport Commissionerate Chennai were also transferred to this respondent by the Chief Commissioner of Customs, Chennai Custom Zone in order to have comprehensive adjudication proceedings. However, in view of the pendency of the modification petition against the order in W.P.No.19153/2008 dated 29.09.2008 the above 3 SCNs also could not be taken up for adjudication since all the 4 SCNs were based on specific intelligence to the effect that the appellant importer were regularly importing healthcare products of "Conybio Branc" from Malaysia for selling under the multi level marketing mode, from their related parties/ principals abroad, with whom the relationship had been suppressed and resorting to mis-declaration of the transaction value of the imported goods to evade customs duty. Whereas they stated during personal hearing that they would give their detailed reply to the show cause notices on the question of under valuation only after they were given the opportunity of cross examination of their very same related parties who could not be produced by the department."*

11. By way of rejoinder, the learned counsel for the appellant submitted that though an order was passed by the learned single Judge directing the respondent to complete the assessment within a period of six months, no steps were taken to complete the assessment and the respondent kept mute for almost six years and only in 2013, applications were filed for modification and for review of the order. But no steps were taken for bringing these applications for hearing.

12. We have considered the arguments advanced by the learned counsel for the appellant and the learned Senior Standing Counsel for the respondent.

13. There is no merits in the present Writ Appeal filed by the Appellant seeking to set aside the order dated 16.09.2021 of the learned Single Judge of this Court in dismissing the Miscellaneous Petition Nos.1 & 2 of 2013 in W.P.No.19153 of 2008 and Miscellaneous Petition No.1 of 2013 in Rev.Aplw.Sr.No.13749 of 2013.

14. The Appellant cannot take advantage of the decision of this

Court in W.P.No.18918 of 2000 vide order dated 24.06.2005. The order dated 24.06.2005, has not laid down the law, so as to have a binding of force of law as a precedent.

15. That apart, reliance placed on the aforesaid order dated 24.06.2005 in W.P.No.18918 of 2000, shows it was disposed of at the time of admission on 24.06.2005.

16. W.P.No.19153 of 2008 was also disposed on 29.09.2008 (ex parte), at the time of admission, as is evident from a reading of the aforesaid order dated 29.09.2008.

17. Therefore, the Review Application filed by the respondent, the Commissioner of Customs and the miscellaneous applications for interim reliefs were rightly considered by the learned Single Judge by modifying the order.

18. That apart, the petitioner cannot force the Department to summon petitioners own directors/employees for cross-examination. The Department has merely relied upon the documents authored by those directors/employees. If it is the case of the appellant that documents relied upon were fabricated, it is open for the appellant to produce them as a witness and let in evidence.

19. The Appellant cannot force the department to issue summons to its directors/employees to scuttle the adjudication proceedings. The question of cross examination of a witness will arise only where statements of such witnesses are relied upon in the show cause notices issued.

20. That apart, under the Customs Act, 1962, strict rules of evidence under the provisions of Indian Evidence Act, 1872, do not strictly apply to quasi judicial proceedings namely before the Adjudicating Authority under the Act. Finding of facts and conclusion thereon is to be determined on the principle of preponderance of probability. If the department makes out a case based on the aforesaid well settled principal of law of preponderance

of probability, the proposal in the show cause notices can be confirmed.

21. Reliance placed on the Provisions of Section 28(9) of the Customs Act, 1962, is also misplaced. The time line prescribed under the aforesaid provision is elastic and not rigid. It cannot be invoked by the appellant to assail the continuance of the show cause notice proceeding dated 27.01.2005 as it is based on the decision of the learned Single Judge in W.P.No.18918 of 2000 vide order dated 24.06.2005. The hands of the adjudicating authority cannot be tied and shackled. If any error is committed by an adjudicating authority while passing it is always open for an assessee to assail the same in an appellate proceeding under the Act.

22. In our view, the appellant has not made out any case for interfering with the order of the learned Single Judge of this Court dated 16.09.2021 while modifying an order dated 29.09.2008 in W.P.No.19153 of 2008.

23. Under these circumstances, the writ appeal is liable to be dismissed. Therefore, this writ appeal stands dismissed. The respondent is directed to adjudicate the Show Cause Notices within a period of four

months as was ordered by the learned Single Judge while passing the interim order. No costs. Consequently, connected miscellaneous petition is closed.

[S.V.N., J.] **[C.S.N., J.]**

01 .11.2022

Intex : Yes/No
Internet : Yes/No
Speaking : Non-speaking Order
vsi/rgm

To

The Commissioner of Customs,
(Airport and Air Cargo Complex)
Meenambakkam,
Chennai – 600 027.

S.VAIDYANATHAN, J.
and
C.SARAVANAN, J.

vsi/rgm/kkd

Pre-delivery Judgment in
W.A.No.209 of 2022
and
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