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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.03.2022

CORAM :

THE HONOURABLE MR. JUSTICE R. MAHADEVAN
and
THE HONOURABLE MR. JUSTICE J.SATHYA NARAYANA PRASAD

Civil Miscellaneous Appeal No. 222 of 2022

M/s. Doosan Bobcat India Pvt.Ltd.,
3rd Floor, TNPL Building
67 Mount Road, Guindy
Chennai 600 032.

.. Appellant

Versus

The Commissioner of Customs
Chennai III Commissionerate
Custom House, No.60, Rajai Salai,
Chennai - 600 001

.. Respondent

Civil Miscellaneous Appeal filed under Section 130 of Customs Act, 1962 to set aside the Miscellaneous Order No.40002/2022 dated 24.01.2022 passed by the Customs, Excise & Service Tax Appellate Tribunal at Chennai.

For Appellant :Mr. Hari Radhakrishnan
For Respondent :Mr. M. Santhanaraman
Standing Counsel

JUDGMENT

(Judgment of the court was delivered by R.MAHADEVAN, J.)

This appeal is filed by the appellant to set aside the Order dated 24.01.2022 made in Miscellaneous Order No.40002/2022, in Customs Appeal No. 41133 of 2019-DB, passed by the Customs, Excise & Service Tax Appellate Tribunal, Chennai.

2. According to the appellant, their company had imported excavator machine tools, spare parts and accessories from M/s.Doosan Infracore Co. Ltd., South Korea. The supplier being related company, the correctness of the declared value was examined by the Special Valuation Branch. After considering the



documentary evidence, the Assistant Commissioner passed an order-in-original No.7731/2008 dated 4.6.2008 holding that the price declared was on par with contemporaneous imports made by unrelated buyers and therefore concluded that the declared price was the transaction value in terms of Rule 3(3)(a) of Customs Valuation Rules, 2007. The appellant company also imported similar goods, which were also subjected to scrutiny and ultimately, order-in-original dated 05.03.2010 was passed holding that the profit margin was normal and reasonable and there was no flow back towards royalty, licence fee or technical know-how/fee. According to the appellant, the said order dated 05.03.2010 was valid upto 03.06.2014. However, the Deputy Commissioner (SVB) had subjected the order dated 05.03.2010 for a review and ultimately, an order dated 04.06.2014 in Review Order No.26120/2014 was passed observing that the price declared was comparable to the value derived from NIDB. It was also observed that (i) royalty amount of Rs.28.14 lakhs shown in the balance sheet for the year 2012-2013 was net of taxes and therefore, not included in the declared value (ii) the amount of Rs.98.16 lakhs and Rs.136 lakhs paid to the foreign supplier as seen from the balance sheet for 2011-2012 and 2012-2013, but the payment did not relate to the imported goods and payment was not a condition of sale, therefore, not included in the declared value and (iii) an amount of Rs.26 lakhs paid to the group company for the insurance of expat employees was not included as it did not relate to imported goods. In effect, the Deputy Commissioner of Customs (SVB) ordered for inclusion of Rs.8 lakhs found to have been paid towards freight forwarding and directed to accept the declared value.

3. Aggrieved by the order passed by the Deputy Commissioner of Customs (SVB) on 04.06.2014, the Commissioner of Customs preferred an appeal before the Commissioner of Customs (Appeals), who, vide order dated 30.01.2015 passed an Order in Appeal C.Cus.II No.124 of 2015, setting aside the order dated 04.06.2014 and directed the adjudicating authority to revisit the issue and also ordered to collect extra duty deposit @ 5% equivalent of the value of the goods.

4. As against the order dated 30.01.2015 of the Commissioner of Customs (Appeals), the appellant herein preferred an appeal before the Tribunal. The Tribunal vide order No. 42209 of 2017 dated 20.09.2017, directed the adjudicating authority to collect extra duty deposit at the rate of 1% of the value. In spite of the order dated 20.09.2017 of the Tribunal, the Deputy Commissioner of Customs (SVB) passed an order-in-original (de novo) No.64397 of 2018 dated 11.07.2018 holding that the royalty



amount shown to have been paid during the financial year 2012-13, as per balance sheet, should be added to the invoice value. Feeling aggrieved, the appellant herein went on appeal before the Commissioner of Customs (Appeals-II), who vide his order dated 25.04.2019 passed in Order in Appeal SEA.C.Cus II No.338/2019, rejected the same upholding the order passed by the Deputy Commissioner of Customs. Therefore, the appellant filed further appeal before the Tribunal along with an application seeking stay of recovery of the demand, besides filing an application for fixing an early date for final hearing of the appeal. The application for early hearing was allowed on 30.01.2020 and thereby the appeal itself was directed to be taken up for final disposal on 11.03.2020. In view of the fixing of date for final hearing of the appeal, the appellant's counsel did not press the stay application and accordingly, the application for stay was dismissed as withdrawn. But, owing to the pandemic situation, the appeal could not be taken up for final hearing on the date fixed, which compelled the appellant to file an application for restoration of the stay application before the Tribunal. By order dated 24.01.2022 made in Misc.Order No.40002 of 2022, the Tribunal dismissed the application filed by the appellant for restoration of the stay application. It is this order dated 24.01.2022 which is subjected to challenge in this appeal.

5. This Civil Miscellaneous Appeal is filed by raising the following substantial questions of law for consideration;

(i) Whether the Tribunal has failed to exercise jurisdiction by refusing to stay the operation of the impugned order-in-appeal C.Cus.II No.338/2019 dated 25.04.2019, which has confirmed the order-in-original (denovo) No.64397/2018 dated 11.07.2018 passed by the original adjudicating authority?

(ii) Whether the Tribunal is empowered in terms of Rule 41 of the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982 to stay the operation of the impugned order-in-appeal C.Cus.II No.338/2019 dated 25.04.2019, which has confirmed the order-in-original (denovo) no.64397 / 2018 dated 11.07.2018 passed by the original adjudicating authority?'

6. The learned counsel for the appellant submitted that when the stay application came up for hearing before the Tribunal, the Tribunal fixed 11.03.2020 as the date for final



hearing of the appeal. However, the appeal could not be listed on 11.03.2020 due to absence of required coram and prevalence of covid-19 pandemic situation. Even after lapse of two years and despite repeated reminders made to the Registry of the tribunal, the appeal was not taken up for final hearing. While so, the Proper Officer of Customs attempted to implement the order-in-original (denovo) No.64397/2018 dated 11.07.2018, which was confirmed by the first appellate authority vide order in appeal C.Cus.II No.338/2019 dated 25.04.2019, despite the fact that the Tribunal was ceased of the appeal filed against the said order. Since the Tribunal had specifically fixed a date of final hearing but the appeal could not be taken up for final hearing for quite some time, the appellant filed the petition for restoration of stay. According to the counsel for the appellant, Rule 41 of the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982 empowers the Tribunal to pass any such order as may be necessary or expedient to give effect to or in relation to its orders or to prevent abuse of process or to secure the ends of justice. Thus, the Tribunal is very well empowered to stay the operation of the impugned order pending disposal of the appeal to secure the ends of justice, instead, the Tribunal dismissed the application for restoration of the stay application. Therefore, the learned counsel for the appellant prayed for allowing the Civil Miscellaneous Appeal.

7. The learned counsel appearing for the respondent submitted that the stay application was dismissed on the ground that application for fixing an early date was allowed and in view of the same, the counsel for the appellant did not press the stay petition. In the meantime, the appellant was importing further goods and continue to give bank guarantee. He would further submit that the appellant has already given up its right for obtaining stay by not pressing the stay application, therefore, they cannot seek for restoration of the stay petition and thus he prayed for dismissal of this appeal.

8. Heard the learned counsel appearing on either side and perused the materials placed before this Court.

9. On perusal of the materials made available, it is evident that the appellant has filed an appeal before the Tribunal, as against the order dated 25.04.2019 passed by the Commissioner of Customs (Appeals-II) in Order in Appeal SEA.C.Cus II No.338/2019. Pending appeal, the appellant filed two applications, one for grant of interim stay and another for fixing a date for final hearing of the appeal. The Tribunal fixed 11.03.2020 as the date for final hearing of the appeal and



therefore, the appellant withdrew the application for grant of interim stay. However, it is stated that due to want of coram and prevalence of Covid-19 Pandemic situation, the appeal could not be taken up for hearing on the date fixed by the Tribunal. In such circumstances, the appellant has filed the instant application for restoration of the application for interim stay by stating that the department is attempting to implement the order-in-original (denovo) No.64397/2018 dated 11.07.2018 passed by the Deputy Commissioner of Customs, which was confirmed by the first appellate authority on 25.04.2019, notwithstanding the fact that the order dated 25.04.2019 is the subject matter of appeal pending before the Tribunal. The application for restoration of the stay application filed by the appellant was rejected by the Tribunal on 24.01.2022, which has prompted the appellant to approach this Court with this appeal.

10. It is evident that the appeal filed by the appellant is pending for quite some time and during the pendency of the appeal, it is contended that the Department is seeking to implement the order passed by the original authority. It is also seen that the appellant withdrew the application for interim stay when the Tribunal fixed a date for final hearing of the appeal. Having regard to the above facts, as agreed by the counsel for both sides, in order to give a quietus, this Court issues the following directions:-

(i) The respondent shall not make any recovery from the appellant till the disposal of the appeal pending before the Tribunal.

(ii) The questions of law raised in this appeal are left open to be adjudicated between the parties in a separate proceedings.

(iii) Since the issue pertains to collection of extra duty deposit relating to the year 2010-2013, the Customs, Excise & Service Tax Appellate Tribunal at Chennai is directed to dispose of the appeal filed by the appellant, within a period of four months from the date of receipt of a copy of this Judgment.

11. With the above directions, this Civil Miscellaneous Appeal is disposed of. No costs. Connected C.M.P. Nos. 1527 & 1526 of 2022 are closed.

Sd/-

Assistant Registrar(CS-VIII)

// True Copy //

Sub Assistant Registrar



msr/rsh

To

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The Commissioner of Customs,
Chennai III Commissionerate,
Custom House, No.60, Rajai Salai,
Chennai - 600 001.

+1cc to Mr.M.Santhanaraman, Advocate SR.No.13670

CMA No. 222 of 2022

GMR(CO)
CB(01/04/2022)