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16.11.2023
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IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

W.P.A. No. 25210 of 2023

Saiful Islam Sekh
Vs.
The Union of India & Ors.

Mr. Krishan Ray,
Mr. Anindya Ghosh,
Mr. Sekhar Mukherjee,
Mr. Anindya Chowdhury,
Mr. Santanu Sett,
Mr. Subhajit Mukherjee,
.... for the petitioner

Mr. Arijit Chakrabarti,
Mr. Deepak Sharma,
....for the Enforcement Derectorate

Ms. Sayani Roy Chowdhury
....for the respondent no. 3

1. Learned counsel for the petitioner contends that the petitioner has gold transactions with foreign entities and for such purpose set-offs are necessary.

2. By pointing out to clause C26.1, in particular sub-clause (ii)(c) of the Master Direction – Export of Goods and Services issued by the Reserve Bank of India, initially on January 01, 2016 and updated till May 12, 2016, it is argued that if the invoices under the transaction-in question are not being investigated by the Directorate of Enforcement /CBI or any other investigative agency, the process of set-off can go through.

3. When the petitioner insisted upon such set-off being carried out from the end of the AD Bank, the respondent-bank refused to do so and sought a clarification to be obtained from the Enforcement Directorate (E. D.) in that regard.

4. Learned counsel for the petitioner submits that from a communication dated October 22, 2021 to the petitioner by the E.D., it transpires that an investigation is ongoing against the petitioner.

5. Learned counsel appearing for the Bank contends that since a communication was made to the Bank by the E.D. whereby details were directed to be furnished by the Bank regarding certain bank accounts of the petitioner with the respondent-bank, the Bank asked the petitioner to obtain such clarification from the E.D.

6. It transpires from the relevant clause, that is, Clause C26.1 of the Master Direction – Export of Goods and Services issued by the Reserve Bank of India that there is a deterrent to set-off being carried out if "the invoices under the transaction" are under investigation by E.D. or any other investigative agency.

7. However, learned counsel for the E.D. categorically points out that the ongoing investigation, as reflected in the communication dated October 22, 2021, pertains primarily to certain unexplained advance receipts by the petitioner, which have not been accounted for by corresponding transactions of export.

8. It is argued that thus, the investigation-in-question does not relate to any invoice under transaction as envisaged in Clause C26.1(c) of the concerned Master Direction and as such the E.D. has no authority to issue any no-objection certificate.

9. Upon hearing learned counsel for the parties, it is evident that the E.D. is justified in arguing that the scope of its pending investigation does not directly pertain to the restriction stipulated in Clause C26.1(c) of the concerned Master Direction insofar as the investigation does not relate to any invoice under transaction with regard to set-off as envisaged in the said provision.

10. It is important to note that Clause (ii) of C26.1 speaks about set-off of outstanding export receivables against outstanding import payables with overseas group/associate companies either on net basis or gross basis. Sub-cause (i) of Clause C26.1 contemplates set-off of outstanding export receivables against outstanding import payables from/to the same overseas buyer/supplier. None of the said provisions have any nexus with the ongoing investigation against the petitioner by the E.D., which relates not to outstanding export receivables but advance amounts received without corresponding actual exports.

11. As such, there is no occasion for the E.D. to give any no-objection and/or the Bank refusing to carry out the process of set-off insofar as the outstanding export receivables against outstanding import payables of the petitioner is concerned.

12. However, it is made clear that nothing in this order shall tantamount to the Bank changing the status of the advance amounts received by the petitioner.

13. Accordingly, W.P.A. No. 25210 of 2023 is disposed of by directing the Bank to go ahead with the process of set-off of the outstanding export receivables of the petitioner against the outstanding import payables from and to overseas buyers and suppliers by segregating the amounts received by the petitioner in advance.

14. It is further clarified that nothing in this order shall preclude the E.D. to continue with its investigation and no observations have been made herein pertaining to the merits of such investigation.

15. There will be no order as to costs.

16. Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance of all necessary formalities.

(Sabyasachi Bhattacharyya, J.)