IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.09.2024

CORAM

THE HON'BLE MR.JUSTICE R.SURESH KUMAR
AND
THE HON'BLE MR.JUSTICE C.SARAVANAN

Writ Appeal Nos.2660 & 2679 of 2024
and W.P.No.21212 of 2022 and
WMP Nos.20197 & 20287 of 2022

W.A.Nos.2660 & 2679 of 2024

1 M/s.Diamond Mink Blankets Ltd
Space E 3rd Floor Surya Kiran Complex
92, The Mall, Ludhiana, Punjab-141 001
rep. by Its Authorized Signatory
Shri Hira Lal Goyal.

2. Shri Hira Lal Goyal
Authorised Signatory Of M/s. Diamond Mink
Blankets Space E 3rd Floor Surya Kiran Complex
92, The Mall, Ludhiana, Punjab-141 001 ... Appellant in both the appeals

-Vs-

1 The Commissioner Of Customs
Chennai II Commissionerate
Custom House, 60 Rajaji Salai
Chennai -600 001

2 The Assistant Commissioner of Customs
Refunds-II, Office of Commissioner of Customs
Chennai-IV, Custom House, 60 Rajaji Salai
Chennai -600 001.

3 Commissioner Of Customs (Appeals-III)
Customs House 60 rajaji Salai
Custom House Chennai -600 001. .... Respondents in both the appeals

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Prayer in W.A.Nos.2660 & 2679 of 2024 : Writ Appeals under Clause 15 of the Letters Patent against the order dated 26.06.2024 made in W.P.Nos.15896 and 15898 of 2024.

W.P.No.21212 of 2022:

1 M/s.Diamond Mink Blankets Ltd
Space E 3rd Floor Surya Kiran Complex
92, The Mall, Ludhiana, Punjab-141 001
rep. by Its Authorized Signatory
Shri Hira Lal Goyal.

2 Shri Hira Lal Goyal
Authorised Signatory Of M/s. Diamond Mink
Blankets Space E 3rd Floor Surya Kiran Complex
92, The Mall, Ludhiana, Punjab-141 001 ... Petitioners

-Vs-

1 The Commissioner Of Customs
Chennai II Commissionerate
Custom House, 60 Rajaji Salai
Chennai -600 001

2 The Assistant Commissioner of Customs
Refunds-II, Office of Commissioner of Customs
Chennai-IV, Custom House, 60 Rajaji Salai
Chennai -600 001. ... Respondents

Prayer : Writ Petition under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus calling for the records of 2nd respondent in and connected with Order-In- Original No. 91526 / 2022 dated 21.07.2022 emanating from F.No.SR. No. 2253 / 2017 Pt- II - Refunds quash the same and direct the 2nd respondent to conduct proceedings afresh after giving adequate and reasonable opportunity to the petitioner to place their defences qua Show cause Notice No. 67 / 2021 dated 23.7.2021.

For Appellants and Petitioners in W.As & W.P : Mr.Shravan Kochar for M/s.B.Satish Sundar

For Respondents in W.As and W.P. : Mr.J.Vasu Junior Standing Counsel

J U D G M E N T

(Delivered by R.SURESH KUMAR, J.)

These intra Court appeals have been filed against the common order passed by the Writ Court in W.P.No.15896 and 15898 of 2024.

2. The appellant was served with a show cause notice by the respondent Revenue ie., Customs Department on 23.07.2021. Following the same, after adjudication, Order-In-Original was passed by the Assistant Commissioner of Customs on 21.07.2022.

3. Though the said order was passed on 21.07.2022 by the Assistant Commissioner, it was felt by the Revenue that by virtue of the Notification No.29/22 CUSNT dated 31.03.2022, the proper officer / adjudicating authority in the case in hand ought to have been the Commissioner of Customs Department or the Principal Commissioner of Customs.

4. Therefore, noticing that the Order-In-Original passed by the adjudicating authority viz., Assistant Commissioner on 21.07.2022 may be without jurisdiction, the Revenue had approached the appellate authority by filing an appeal and the said appeal was decided by the Commissioner (Appeals) by his order dated 15-16/05.2024, where the appellate Commissioner found that, as per the aforesaid notification, the officer who passed the Order-In-Original dated 21.07.2022 is not the proper officer. Therefore, in order to re-adjudicate the matter by the proper officer, without going into the merits of the case, the appellate Commissioner had set aside the order dated 21.07.2022 and remitted the matter back to the proper officer, who is the adjudicating authority within the meaning of Section 128A to re-adjudicate the matter afresh and to decide the same.

5. As against the order passed by the appellate authority dated 16.05.2024, the appellant filed writ petition in W.P.No.15896 of 2024. Simultaneously, the appellant also filed W.P.No.15898 of 2024 challenging the show cause notice dated 23.0.2021, pursuant to which even though the Order-In-Original was passed on 21.07.2022, that order since has been set aside by the appellate authority by order dated 16.05.2024, the Order-In-Original dated 21.07.2022 goes. Therefore, the limitation period as provided under Section 28(9) has already lapsed. Hence, the show cause notice dated 23.07.2021 cannot be proceeded further by way of re-adjudication.

6. These two writ petitions have been taken together and decided by the learned Judge through the impugned common order dated 26.06.2024.

7. It is also to be noted that the very same appellant has already filed yet another writ petition in W.P.No.21212 of 2022, where the writ petitioner / appellant has challenged the Order-In-Original dated 21.07.2022.

8. Insofar as the said writ petition ie., W.P.No.21212 of 2022 is concerned, since it challenges the Order-In-Original dated 21.07.2022 and the said order was set aside by the Appellate Commissioner by his order dated

16.05.2024, the learned counsel for the appellants / writ petitioners has fairly stated that the prayer sought for in the said writ petition in W.P.No.21212 of 2022 has become infructuous. Recording the said statement and having noted the aforesaid facts, we are inclined to dismiss the said writ petition ie., W.P.No.21212 of 2022 as having become infructuous.

9. Now let us see the orders passed by the Appellate Commissioner dated 16.05.2024, where a remand order has been passed directing proper officer / adjudicating authority to re-adjudicate the matter.

10. In this context, Mr.Shravan Kochar learned counsel for the appellant has raised the following grounds:

(a) That the show cause notice dated 23.07.2021 since has been lapsed by virtue of the Order-In-Original dated 21.07.2022 having been set aside by the appellate authority by order dated 16.05.2024, the adjudicating authority cannot proceed further on the said show cause notice dated 23.07.2021.

(b) Under Section 128A of the Customs Act, the circumstances under which the appellate authority can remit the matter back to the original adjudicating authority have been enumerated. Elaborating the same further, Mr.Shravan Kochar learned counsel for the appellants would contend that sub-section (3) is relevant for the present issue, where the Commissioner (Appeals) has been vested with the power to make an enquiry as may be necessary and to pass orders as he thinks just and proper either confirming the order, modifying the order or annulling the order appealed against or refer the matter back to the adjudicating authority with a direction for fresh adjudication or decision, as the case may be only in the following circumstances viz.,

i. where an order or decision has been passed without following the principles of natural justice; or
ii. where no order or decision has been passed under Section 17; or
iii. where an order of refund under Section 27 has been issued by crediting the amount to Fund without recording any finding on the evidence produced by the applicant;

11. Under these circumstances alone, if at all order to remit the matter has to be passed by the appellate authority, he can pass the same. Beyond these circumstances, no appellate authority can remit the matter back to the adjudicating authority for re-adjudication.

12. Therefore, the learned counsel for the appellants would contend that, insofar as the present issue is concerned, where the jurisdiction of the original authority who passes the Order-In-Original was in question and it was found that by virtue of the notification the adjudicating authority originally passed orders had no jurisdiction, that was accepted by the Revenue as well as the Commissioner (Appeals) and that is the only reason for which the Order-In-Original dated 21.07.2022 was set aside. Inasmuch as, the appellate Commissioner comes to the conclusion that the original authority does not have the jurisdiction, naturally the order dated 21.07.2022 has to go. Therefore, setting aside the order is the proper procedure to be adopted. However, the Commissioner (Appeals) should have stopped with that and he should not have gone beyond that by remitting the matter back to the adjudicating authority for a fresh adjudication.

13. In this context, it is the contention of the learned counsel for the appellants that the circumstances that have been mentioned in Section 128A are not available in the present facts of the case for making the order of remitting the matter back to the original authority.

14. The next ground urged by the learned counsel for the appellants is

that, if at all any order remitting the matter back is to be passed by the Commissioner (Appeals), he can remit the matter back to any adjudicating authority who is subordinate to his level, but not to an equal level officer or higher officer. In the notification, the adjudicating authority is the Principal Commissioner of Customs, to whom he cannot remit the matter back. Therefore, the Commissioner (Appeals) has erred in making such an order remitting the matter back to the adjudicating authority who is none else than the Principal Commissioner of Customs.

15. These are all the grounds and arguments urged by the learned counsel for the appellants, where he questions the order passed by the appellate Commissioner dated 16.05.2024 and as a sequel, the order passed by the Writ Court, which is impugned herein.

16. We have heard the learned counsel for the appellants and the learned Standing Counsel for the respondent Revenue.

17. Insofar as the grounds urged by the learned counsel for the appellant, the circumstances enumerated in sub-section (3) of Section 128A of the Customs Act does not include any circumstance of jurisdiction on which such a remand order ought not have been passed is concerned, it is to be noted that clause (b)

of sub-section (3) makes it clear that, where an order or decision has been passed without following the principles of natural justice, it could be referred back to the adjudicating authority with a direction for fresh adjudication or decision.

18. Here in the case in hand, the original authority who passed the Order-In-Original dated 21.07.2022, does not have the jurisdiction only because of the notification No.29/22 CUSNT dated 31.03.2022. Otherwise, the authority could have enjoyed the jurisdiction to pass orders ie., Order-In-Original. Because of the notification, an error committed by the original adjudicating authority since has been found out by the appellate Commissioner, he has to remit the matter back to the adjudicating authority ie., the proper officer.

19. The words 'adjudicating authority' has been employed by the Legislature in clause (b) of sub-section (3) of Section 128A. This adjudicating authority has also been defined in Section 2(1) of the Act, where it reads that the 'adjudicating authority' means any authority competent to pass any order or decision under this Act, but does not include the Commissioner (Appeals) or Appellate Tribunal.

20. Merely because in this case by virtue of the notification the

Commissioner or Principal Commissioner have been made as equal officer or higher officer than the regular Commissioner of Appeals, the jurisdiction vested in the adjudicating authority who happens to be the Commissioner / Principal Commissioner cannot be said to be ousted.

21. Therefore, the words 'adjudicating authority' since has been employed, as stated supra in Section 128(3)(b), such remand can be made only to the adjudicating authority, who in other words called as proper officer.

22. The Commissioner (Appeals) even if he is an equal officer, if he does not have such a jurisdiction to remit the matter back to the adjudicating authority or a proper officer, then the very power to exercise to set aside the order on whatever reasons and to remit the matter back to the proper officer or adjudicating authority can become redundant. Such kind of interpretation cannot be employed as has been expected by the learned counsel for the appellants. Therefore to that extent, the grounds urged by the learned counsel for the appellants since is liable to be rejected, are rejected.

23. Learned counsel also urged the point that as per the provisions of the Customs Act, from the date of show cause notice, the two years limitation period provided since has lapsed in view of the setting aside of the Order-In-Original

dated 21.07.2022, the show cause notice dated 23.07.2021 cannot be acted upon is concerned, such an argument out rightly is to be rejected for the simple reason that the show cause notice dated 23.07.2021 has been acted upon, adjudicated and Order-In-Original was passed well within the time on 21.07.2022.

24. Merely because the order was appealed for one reason or the other, ultimately the Commissioner (Appeals) in his appellate jurisdiction has set aside the order dated 21.07.2022 and remitted the matter back to the adjudicating authority for re-adjudication, it cannot be stated that the time limit has lapsed and therefore the show cause notice dated 23.07.2021 cannot be acted upon.

25. Moreover, the learned single Judge, in Para 5 of the order impugned has also left the issue to be re-agitated before the adjudicating authority afresh and to be decided by the adjudicating authority on the plea of limitation. Therefore, without expressing any view further on this point, we reject the said ground raised by the learned counsel for the appellants only for the limited purpose of passing this order in the present appeals.

26. Therefore, the grounds urged by the learned counsel for the

appellants in these appeals since have to be rejected as discussed herein above, those grounds are hereby rejected. Resultantly, the order passed by the learned single Judge which is impugned herein cannot be said to be infirm one. Therefore, the order impugned herein passed by the writ Court is to be sustained, as a result of which the remand order passed by the appellate Commissioner by order dated 16.05.2024 is to be acted upon by the proper officer / adjudicating authorty within the meaning of the aforesaid provisions of the Customs Act, where, all the grounds to be urged, apart from the grounds which are answered herein, can be urged on behalf of the appellant/assessee, including the ground of limitation as stated supra and those grounds, if are urged before the adjudicating authority, the same shall also be decided on merits and in accordance with law.

27. With these observations, these writ appeals are dismissed confirming the order passed by the writ Court. Also, W.P.No.21212 of 2022 is dismissed. No costs. Consequently, connected miscellaneous petitions are dismissed.

(R.S.K.,J.) (C.S.N.,J.)
18.09.2024

NCS : Yes
Index : Yes
KST

R.SURESH KUMAR, J.
AND
C.SARAVANAN, J.

KST

W.A.Nos.2660 and 2679 of 2024
and W.P.No.21212 of 2022

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