

Item no. **06**

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice T.S. Sivagnanam

And

The Hon'ble Justice Hiranmay Bhattacharyya

MAT 132 of 2022

with

IA No. CAN 1 of 2022

Emami Agrotech Limited

vs.

Union of India & ors.

For the Appellant : Mr. Sujit Ghosh
Mr. Pranit Bag
Mr. R. Dhamika
Mr. Joybrata Misra
Mr. M. Chowdhury

For the Respondent No.1 : Mr. Sujit Mitra

For the Respondent Nos.3,4 &5 : Mr. Bhaskar Prosad Banerjee
Mr. Sukalpa Seal

Heard on : 01.03.2022

Judgment on : 01.03.2022

T.S. Sivagnanam J.:

1) Heard the learned Counsel for the parties.

2) This intra-court appeal is directed against an order dated 3rd February, 2022 passed in WPA No.1348 of 2022. The appellant filed the writ petition challenging the order of adjudication dated 21.1.2022 passed by the Assistant Commissioner of Customs, Appraising Group-I, Kolkata Customs, Port Commissionerate, Customs House Kolkata, the fifth respondent before us rejecting the request made by the appellant for cancellation/withdrawal of 10 nos. of ex-bond Bills of Entry filed by the appellant on 21.9.2021 and 28.9.2021, for clearance of goods for home consumption. The appellant had submitted a written request on 08.10.2021 praying for withdrawal and/or cancellation of 10 nos. of ex-bond Bills of Entry and according to them they are compelled to do so having regard to the market conditions. On 13.10.2021 the Government of India issued notification reducing the basic customs duty and the agricultural infrastructure and development cess on crude palm oil and the notification is to take effect from 14.10.2021. Much prior to the said notification the appellant had requested the fifth respondent to consider its application for withdrawal /cancellation of the ex-Bond Bills of Entry on 08.10.2021. On 27th October, 2021 such request was rejected on the grounds that the reasons given by the appellant are inadequate. The appellant reiterated their request by submitting representations to the respondent nos.3,4 and 5 on 1.11.2021 and 3.11.2021. In response to said representations the fifth respondent issued communication dated 04.12.2021 reiterating its stand taken in the communication dated

October 27, 2021. Aggrieved by the said communication the appellant filed WPA 20577 of 2021 praying for setting aside the communications dated 27.10.2021 and 04.12.2021 and to permit the appellant to withdraw/cancel the ex-bond Bill of Entries. The writ petition was disposed of by order dated 11.1.2022.

3) To examine as to what relief the appellant would be entitled to in the appeal, we need to take note of the order passed by the learned Single Judge dated 11th January, 2022. The operative portion of the order reads as follows:-

“Considering the respective submission of the parties, I am of the view that the only scope for consideration in this writ petition is with regard to consideration of the petitioner’s application for cancellation or withdrawal of the Ex-bond relating to Bill of Entries in question which, sitting in writ court, I am not inclined to act as an adjudicating authority.

Hence I remand the matter to the respondent concerned to consider the petitioner’s application for cancellation/withdrawal of the Ex-bond relating to Bill of Entry in question afresh in accordance with law by passing a speaking order, after giving an opportunity of hearing to the

petitioner or its authorized representative, within four weeks from the date of communication of this order.

In the meantime, if the petitioner deposits 50 per cent of the duty in question by cash and the rest 50 per cent by way of bank guarantee, subject to the satisfaction of the authority concerned within seven days from date, the respondent concerned will release the goods in question within 72 hours from making such payment. This payment of cash and bank guarantee will be without prejudice to the rights and interest of both the parties and will be subject to the final outcome of the order to be passed by the respondent concerned on petitioner's aforesaid application.

With the aforesaid observations, WPA No.20577 of 2021 stands disposed of.

Since this writ petition has been disposed of without calling for affidavits, allegations contained therein shall be deemed to have been denied by the respondents.”

- 4) It is not in dispute that in terms of the directions issued in the writ petition the appellant had requested the department to furnish the details with regard to the format of the bank guarantee etc. However, on 13.1.2022 the fifth respondent issued a notice fixing the date for personal hearing on 14th January, 2022 or 15th January, 2022. The

appellant sought for postponement of the personal hearing for a period of seven days as the legal consultant of the appellant had tested positive for Covid-19 virus. On 18th January, 2022 the appellant furnished bank guarantee of Rs.23,91,39,462/- and made payment of duty of Rs.23,91,39,462/- along with interest in terms of the directions issued by the learned Single Judge in the earlier writ petition. The fifth respondent adjourned the personal hearing to 19th January, 2022 or 20th January, 2022 and again request was made on behalf of the appellant for adjournment on the ground that its legal consultant still continues to be unwell supported by a doctor certificate dated 16.01.2022, test report, prescription etc. The fifth respondent passed the order dated 21.01.2022, which was impugned in the writ petition. To be noted that no separate order was passed rejecting the request for deferment of the personal hearing. The learned Single Judge has dismissed the writ petition on the ground of availability of an alternative remedy.

5) The question would be whether the appellant should be directed to avail the alternative remedy or whether the writ Court can exercise jurisdiction despite availability of alternative remedy under the statute.

The Hon'ble Supreme Court in several decisions have culled out certain exceptions to the restriction in refusing to entertain a writ petition when alternate remedy has been provided for. Some of the exceptions being that when an order was passed in violation of principles of natural

justice; when the order has been passed without application of mind; or where the order suffers from the vice of total lack of jurisdiction etc. If the appellant's case falls within any one of the exceptional circumstances they need not be relegated to the statutory remedy.

6) Admittedly, the order impugned in the writ petition passed by the fifth respondent was an ex parte order. We are at a loss to understand as to why the fifth respondent had taken such a hurried step to complete the proceeding and pass an order. This presumably was done with the intention to make one portion of the direction issued by the learned Single Judge in its order dated 11.1.2022 as unworkable. The fifth respondent has misread the direction issued by the learned Single Judge in the above quoted order containing twin directions. The first one being the matter is remanded to the fifth respondent to consider the appellant's application for cancellation/withdrawal of 10 nos. of ex-bond Bills of Entry and such consideration should be done afresh in accordance with law by passing a speaking order after giving an opportunity of hearing to the appellant or its authorized representative within four weeks from the date of communication of the order. The second limb of the direction is, on depositing 50% of the duty in question in cash and the rest 50% by way of bank guarantee by the appellant, the goods shall be released within 72 hours from making such payment.

7)The fifth respondent has mixed up both the directions and his interpretation of the words “in the meantime” in the order dated 21.1.2022 is utterly perverse. Above all the fifth respondent has no jurisdiction to interpret an order passed by the High Court and if he requires any clarification he should have approached the Court seeking for clarification. Thus, the attempt of the fifth respondent is vividly clear that he had taken hurried steps in the matter in order to make the direction issued by the learned writ Court as unworkable. In fact, the Court would have been well justified in initiating action for contempt.

8) Be that as it may, the order directing release of the goods subject to the conditions remains intact. The revenue has not filed any appeal against such direction. The appellant has also complied with the conditions by making payment of 50% of the duty in cash and balance 50% by way of furnishing bank guarantee. Therefore within 72 hours from the said date the goods ought to have been released. Therefore, we are of the view that the interpretation given by the respondent in paragraph 19.12 of the order dated 21.01.2022 is wholly illegal and perverse and should be set aside.

9) As pointed out earlier the fifth respondent has unnecessarily hurried up the matter by taking an ex parte decision.

10) We take judicial note of the fact that seldom the appeals filed by the revenue before this Court are not being filed within the period of limitation. Invariably the appeals are delayed for merely a year and the revenue will endeavour to seek umbrage under the order passed by the Hon'ble Supreme Court extending the period of limitation though the order may not apply to the appeals. The time limit for issuance of show cause notice under the Customs Act has been extended by placing reliance on the decision of the Hon'ble Supreme Court and the ordinance issued by the Central Government. Thus, the appellant has pleaded a genuine difficulty that its consultant being tested positive for Covid-19 and unable to appear. Such request has to be accommodated unless it is shown to be absolutely false.

11) Mr. Banerjee, learned senior standing counsel for the revenue has drawn our attention to paragraph 19.1 of the order passed by the fifth respondent dated 21.1.2022. This is with a view to show that there was a doubt raised in the mind of the authority that as to whether at all the appellant's legal consultant had been tested Covid-19 positive. In any event the direction issued by the learned writ Court in the earlier writ petition was by directing the fifth respondent to give an opportunity of hearing and pass a speaking order. Opportunity of hearing should be an effective opportunity of hearing and not illusory. There may be several cases where under the pretext of being infected by Covid-19 virus several

employees had not reported for duty. There is every likelihood that the Customs Department would also have such cases. That apart, all establishments were functioning with less than 30% staff, public transport system was withdrawn. There was also restriction on plying of private vehicles on road. Therefore, the opportunity granted to the appellant is held to be thoroughly inadequate. Further, we reiterate that the direction for release of the goods upon compliance of certain conditions can have no impact on the direction issued on the fifth respondent to pass a final order after granting opportunity of hearing to the appellant.

12) For all the above reasons, we are of the view that the appellant need not be relegated to avail the alternative remedy. We are satisfied that the order dated 21.1.2022 impugned in the writ petition is unsustainable in law and in violation of principles of natural justice apart from having passed by misinterpreting the order passed in the earlier writ petition. Therefore, the order dated 21.1.2022 is liable to be set aside.

13) In the result the appeal and the connected applications are allowed, consequently the writ petition is allowed and the order dated 21.01.2021 passed by the fifth respondent is quashed and the

respondent department is directed to release the goods in question within 48 hours from the date of receipt of the server copy of this order.

14) The fifth respondent shall issue a notice of personal hearing to the appellant granting 7 days time for the appellant to appear and the appellant shall not seek for any adjournment and participate in the hearing on the date fixed by the concerned officer and thereafter proceed to pass a speaking order on merits and in accordance with law.

15) We make it clear that if the very same officer, who passed the order dated 21.1.2022, is to deal with the matter, it goes without saying that he shall do so uninfluenced by any of the observations made by him in the order dated 21.01.2021 which has been quashed by us in this judgment.

15) The bank guarantee furnished by the appellant shall be kept alive till the order is passed by the concerned authority in terms of the above directions. No costs.

(T. S. Sivagnanam, J.)

(Hiranmay Bhattacharyya, J.)