(2014) 01 CAL CK 0001

In the Calcutta High Court

Case No : W.P. No. 20 of 2014

Gippsaero Pty Ltd. APPELLANT

Vs

Commissioner of Customs (Airport & Admin) RESPONDENT

Date of Decision : 21-01-2014

Acts Referred:

Citation : (2015) 315 ELT 392

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Advocate : J.P. Khaitan, Sr. Advocate, P. Khaitan, A. Sengupta and V. Jhunjhunwala, Advocates for the Appellant; S.B. Saraf and S.K. Saha, Advocates for the Respondent

Judgement

Harish Tandon, J.—The solitary point raised in this writ petition relates to the action of the customs authorities in invoking the bank guarantee before the statutory period for an appeal having expired. At the time of provisional release of the subject goods, the petitioner furnished a bank guarantee as well as PD Bond with the customs authorities. The petitioner also paid the duty so assessed by the customs authorities together with interest as applicable under the Customs Act.

2. Subsequently, the customs authorities by the order-in-original dated 18-11-2013 imposed a redemption fine of Rs. 81,61,500/- as well as the penalty.

3. The said order is amenable to be challenged before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT). The petitioner apprehends that the authorities may take recourse for invocation of the bank guarantee before the period to prefer an appeal expires. While the appeal and the application are pending, the petitioner caused a letter dated 11th December, 2013 requesting the customs authorities to forbear from invoking the bank guarantee though there is some confusion whether the appeal, in fact, was filed or not, as according to the petitioner, the same was misquoted.

4. Be that as it may, during the statutory period for preferring an appeal, the customs authorities had invoked the bank guarantee.

5. The petitioner prayed for an order to refund the money together with an interest in this writ petition.

6. The respective counsels are not ad idem to the issue whether the bank guarantee can be invoked during the period as provided for preferring statutory appeal. According to the petitioner, such invocation amounts to a coercive measures taken by the customs authorities and is otherwise not permissible and/ or justiciable under the law. To fortify the aforesaid submission, reliance is placed upon a judgment of the Andhra Pradesh High Court in the case of Lanco Kondapalli Power Private Ltd. Vs. Union of India (UOI) and The Shinhan Bank Ltd., and the judgment of the Bombay High Court in the case of GKN Sinter Metals Private Limited (formerly known as GKN Sinter Metals Limited) Vs. Union of India (UOI) and The Dy. Commissioner of Customs, .

7. Mr. Khaitan took further shelter under a circular dated January 1, 2013 wherein the recovery proceeding was to wait till the expiry of statutory period for preferring an appeal.

8. Upon reading of the aforesaid judgments cited by the petitioner, the ratio which could be culled out therefrom is that the authorities should not have resorted to any coercive measures while the period to prefer appeal has not expired. To come out from the rigour of the ratio, Mr. Saraf tried to submit that the invocation of the bank guarantee does not amount to a coercive measures as the same was submitted for satisfying the claim of the authorities if subsequently crystalised.

9. This Court is conscious of the said proposition of law that the Court should not pass an interim order against the invocation of the bank guarantee unless a strong case of fraud or a like nature and irreparable injury is made out.

10. The judgment of the Andhra Pradesh High Court was delivered when the writ petition was finally heard and decided. In the said judgments, the learned Judges of the Division Bench was conscious of the aforesaid settled proposition of law relating to the grant of the interim order against the invocation of the bank guarantee.

11. The Division Bench of the Bombay High Court laid down that any measure for recovery of the amount during the statutory period provided for an appeal is not justified and amounts to coercive collection of the entire customs duty. This court also does not propose to take any contrary view to the ratio laid down in the aforesaid judgments.

12. Though this Court initially proposed to decide the writ petition upon exchange of affidavits, this Court finds that the justice would be sub-served if the following orders are passed:

1. Since the customs authorities have already invoked the bank guarantee, they are directed to keep the said amount separately in a Fixed Deposit carrying interest with any nationalized bank until the further order that may be passed by the CESTAT, either on an application for stay or in an appeal itself.

2. The Tribunal before whom the appeal has been filed and an application of stay has been taken out, is directed to hear out an application for stay and shall dispose of the same within three weeks from the date of communication of this order.

3. It is hereby recorded that this order shall not be construed to have made on the merit of the said application for stay or an appeal and the Tribunal shall be free to take independent decision without being influenced by any observation made hereinabove in accordance with law.

It is further made clear that while considering an application for stay or an appeal, the Tribunal shall not be swayed by the fact that this Court has not passed any order for refund of the amount collected upon invocation of the bank guarantee and shall be free to pass an appropriate order which includes any direction, if necessary, to be made on the aforesaid amount realized upon invocation of the bank guarantee by the customs authorities.

13. The writ petition is thus disposed of. Urgent computerised certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.