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(2011) 08 GUJ CK 0007

In the Gujarat High Court

Case No : Special Civil Application No. 3984 of 2010

Messrs Add International, A Sole Proprietary Concern APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 09-08-2011

Acts Referred:

Customs Act, 1962 — Section 112
Foreign Exchange Management Act, 1999 — Section 10(6), 16(3), 6(1)

Citation : (2011) 08 GUJ CK 0007

Hon'ble Judges : Sonia Gokani, J;Akil Kureshi, J

Bench : Division Bench

Advocate : S. Suriyanarayanan and Dhaval Shah, for the Appellant; P.S. Champaneri, for Respondents 1 - 3, for the Respondent

Final Decision : Allowed

Judgement

Sonia Gokani, J.—Petitioner in the present petition has challenged the Demand Notice, Certificate of Recovery of Demand and Show Cause Notice for civil imprisonment issued by the Directorate of Enforcement-Respondent No. 2 herein on various grounds predominantly on account of violation of principles of natural justice and has urged to exercise writ jurisdiction as a remedy to the contest raised.

2. Petitioner-Firm engaged in import and export business with various countries has a established Unit in Kandla Special Economic Zone. Petitioner entered into two sales contracts for import of 100% polyester dyed woven fabrics with M/s. Tripasa Industries Ltd., Hong Kong. It is averred by the Petitioner that advance remittance to the tune of 20% of the total consideration of import of 100% Polyster Woven Fabric in the quantity of 2,16,000 yards was agreed upon, being U.S. Dollars 28,944/-(equivalent to Rs. 14,18,256/-) and the same was sent through Corporation Bank, Gandhidham to M/s. Tripasa Industries Ltd. on 19th September, 2002. It is further averred that due to delay in shipments and other disputes, Petitioner did not file Bill of Entry for the goods received in six

containers at Kandla Port. Supplier substituted the name of one M/s. Warren Trading Company, Vapi as the new drawer in the import documents and the Petitioner filed a Special Civil Suit No. 18/2003 before the Civil Judge, Senior Division, Gandhidham for mandatory injunction and declaration regarding performance and damage which is pending before the Court.

3. A Show Cause Notice was issued on 18th February, 2005 by the Commissioner of Customs, Kandla to the supplier and six others including the present Petitioner, which on due adjudication imposed on dated 31.3.2006 penalty of Rs. 5,00,000/- u/s 112(a)(iii) of the Customs Act, 1962 on the Petitioner.

4. Petitioner challenged the said decision before the Central Excise & Service Tax Appellate Tribunal ("CESTAT" for short) and obtained stay against recovery of penalty.

5. It is further averred that in the meantime a Show Cause Notice dated 5.7.2006 was issued on the basis of the complaint filed u/s 16(3) of the Foreign Exchange Management Act, 1999 ("FEMA Act, 1999" for short) alleging contravention of Section 10(6) of FEMA read with 6(1) of FEMA, 2000. After Petitioner''s replied, this same was decided by Respondent No. 2 by its order dated 29th December, 2006 imposing penalty of Rs. 3,50,000/- on the proprietor of Petitioner Firm.

6. Against the impugned order holding the Petitioner guilty of contravention of Section 10(6) of the FEMA Act, 1999, of not utilizing purchased foreign exchange for the purpose for which the acquisition was made. Appellant sought to prefer an appeal before Respondent No. 3 with application for condonation of delay of 7 days.

7. It is also averred that the address of New Delhi shown of Respondent No. 3 in the order dated 29th December, 2006 was preferred for sending Appeal Memo through courier Company on dated 24.2.2007 and this had returned back on account of incorrect address. Once again, papers were sent on dated 28.2.2007 after correcting the address which were delivered on 1st March, 2007. Although hearing was requested for by the Petitioner after 2 months on 14th May, 2007, No. reply was received.

8. But as averred in the petition in the year 2009, the impugned demand notice(dtd.11.8.2009) with certificate of recovery of demand (dated 23.11.2009) and anotice proposing arrest and imprisonment of the Petitioner (dated 25.11.2009)are sent which are in challenge before this Court.

9. Respondents on due notice appeared and in its affidavit-in-reply contended that the Order-in-Original concluded by the Adjudicating Authority vide dated 29th December, 2006 speaks effectively that the appeal against the said order would lie before the Special Director (Appeals), Commissioner of Income Tax (CIT-VIII) Room No. 183, 1st Floor, I.P. Estate, New Delhi. It is fervently contended that the documents at Annexure 1 do not contain description of

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address and it was sent to the address which never existed. Again, it is contended that the same are said to have been signed and verified on 24th February, 2007 No. address is shown. Again, documents referred to in Appeal (Form No. 1)are vide C. No. 52789 dated 23rd February, 2007 which bears dtd. 28th February, 2007. Address is quite insufficient as it merely refers to Special Director (Appeals) Commissioner of Income Tax (IT), New Delhi. It is also contended that there is a difference in the number of parcel as well. Moreover, Stay Application, Memo of Appeal and Memorandum and other verification also reflect variation on the dates. The ambiguities apparent with regard to verification, date of sending of documents, date of returning of the documents and the forwarding etc. are seriously questioned. It is the say of Respondents that Notification was also issued on 8th January, 2008 showing that the Appellate Authority had shifted to Mumbai which on inquiry refused to have received any such Appeal Memo or Application for Condonation of Delay or Stay Application from the Petitioner.

10. Affidavit-in-rejoinder has also been filed by the Petitioner, where, it is pointed out that clerical mistake of writing the parcel No. 52739 as Parcel No. 52789 in forwarding letter can hardly doubt the authentication of documents produced by the Petitioner. It is also pointed out by the proprietor of the Petitioner- firm that the Notification produced does not state the address of Special Director nor does FAX communication produced with the affidavit suggest that the address given in the preamble to the order dated 29.12.2006 was of the office of Special Director (Appeals) from December, 2006 to March, 2007. Moreover to show bonafide photocopy of demand draft No. 208911 dated 8th January, 2007 drawn on Corporation Bank, New Delhi in favour of Special Director (Appeals) is enclosed.

11. This Court heard the learned Counsel for the Petitioner, who has urged emphatically that No. person should be condemned unheard. Moreover, only on technical aspects Petitioner''s statutory rights cannot be marred. It is further submitted by the learned Counsel that the address shown in the order of Respondent No. 2 of 29th December, 2006 was taken as correct address, and therefore, based thereon appeal was preferred. All the papers including demand draft required to supplement Appeal Memo were also sent and only on account of confusion of correct address of the Respondent, valid rights of Petitioner cannot be defeated.

12. It is argued by the Learned Assistant Solicitor General Mr. Chapaneri for the Respondents that citizen are supposed to be aware of their statutory rights and moreover, Petitioner could have made out from the record correct address. Again, when address of the Special Director (Appeals) was very clear, sending Appeal Memo through the courier on different address with No. substantive proof, cannot uphold the cause of Petitioner. There is absence of diligence and bona fide on the part of the Petitioner, according to learned Counsel.

13. The short question that requires to be addressed by this Court in this petition is whether the Petitioner in fact had sent Appeal Memo along with requisite

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materials to the Special Director (Appeals) against the Order-in-Original dated 29th December, 2006 and corollary to that, whether confusion over address can be permitted to take away substantive right of Appeal of the Petitioner.

14. Documents throwing light on factual matrix in this case are relevant to appreciate the question being decided by this Court, where it gets revealed that the Petitioner is alleged to have committed breach of provisions of Foreign Exchange Management Act 1999 (FEMA, 1999). It is law that when an Indian citizen acquires US Dollars or any foreign currency of other country utilization has to be for the purpose for which it is acquired on purchased. In the instant case, Petitioner has to bring the goods to India or the same amount of Foreign currency has to be remitted back to the Authority, according to the Respondents. In the instant case, Petitioner himself, aggrieved by the alleged breach of contract, preferred a Special Civil Suit before the Court of Civil Judge, Gandhidham being Special Civil Suit No. 18/2003 seeking prohibitory and mandatory orders against M/s. Tripasa Industries Ltd and Ors.. It is also noteworthy to record that Show Cause Notice issued by the Commissioner of Customs, Kandla is also challenged by the present Petitioner where Order-in-Original was held against the Petitioner and the matter is pending before the CESTAT for final adjudication where there is an operation of order of Stay of recovery of Rs. 5,00,000/- of penalty imposed u/s 112(a)(3) of Customs Act. In the meantime, proceedings under the FEMA have been initiated against the Petitioner. Proceedings were conducted before the Respondent No. 2 and there penalty is imposed to the tune of Rs. 3,50,000/- on dated 29.12.2006.

15. Thus, what can be seen is that Petitioner is relentlessly found to be perusing its legal remedies and the defence of the Petitioner all throughout is the breach of contractual terms and obligations on the part of the M/s. Tripass Industries Ltd. Hong Kong to whom the advance payment of goods was remitted in US dollars being 28,944/-US $. Not only it is question of involvement large sum of money, but, it is further leading to imposition of the penalty under different statutory provision against the present Petitioner.

16. In this premise, it would be difficult to perceive that Petitioner would be in any manner interested in either referring its appeal to the wrong forum or would choose to avoid preferring the appeal before the correct authority within prescribed period as pursuing remedy would not only help Petitioner in concluding the issue one way or other but the same would have direct/indirect bearing on the outcome of pendency of Appeal before the CESTAT as well as on that of Special Suit. It is to be made clear at this stage that this Court is not concerned with the merits of the case of the Petitioner as that requires to be dealt with by the concerned authority in accordance with law and discussion is limited to the question of availment of opportunity to the Petitioner in preferring an appeal before the Special Director (Appeals).

17. As can be seen from the address shown in the Order-in-Original of Respondent No. 2 of Appellate Authority is Special Director (Appeals)

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Commissioner of Income Tax (CIT -VIII), Room No. 183, First Floor, I.P. Estate, General Revenue Building, ITO, New Delhi This order suggest deposition of penalty imposed within 45 days from the order along with the payment of prescribed fees of Rs. 5,000/-by way of Demand Draft or cash. Papers sent on the address given appear to have returned due to incorrect address. Documents exhibit dispatch through Bom Gim Courier 2nd time on dated 28.2.2007 with address thereon special Director(Appeals), Commissioner of Income Tax, (CIT VIII), 6th Floor, Lok Nayak Bhavan, New Delhi and delivery on dated 1.3.2007. Documents shown vide No. 52739 returned on account of wrong address, of course, the letter accompanying this parcel speaks of documents with different number being C-52789. This hardly has any relevance as that appears to be a clear clerical mistake. Again, as rightly pointed out by the learned Counsel for the Petitioner that notification dated 8.1.2008 specifying change in the address does not say anywhere address of Special Director (Appeals). It merely speaks of appointment of Commissioner of Income tax (Appeals) Mumbai and Commissioner of Income Tax (Appeals) Delhi, etc., as Special Director (Appeals) in the respective zones specifying their jurisdiction. Additionally, it can be revealed from the material on record that Corporation Bank also has issued in favour of the Petitioner certificate that Demand Draft No. 208911 dated 8th January, 2007 was drawn on Corporation Bank, New Delhi in favour of Special Director (Appeals).

18. From cumulative readings of these materials placed before this Court, it can be gathered that the Petitioner did make specific and positive attempt to send Appeal Memo along with the accompanying documents to the Special Director (Appeals) against the order dated 29th December, 2006. It was sent on the address specified in the preamble to the order-in-original, through the Bom Gim Courier and the same returned due to wrong address. Second time also the address obtained was through the advocate and delivery appears to have been made. The intention of the Petitioner also is evidently clear by its persistent stand of taking recourse to various legal remedies that he intended seriously to challenge the order of penalty and the same is substantiated by valid material. The Court is of the opinion that shifting of the office of special Director (Appeals) vide Notification dated 8th January, 2008 has caused confusion which did not allow the appeal of Petitioner to be decided on merits. Petitioner has No. reason to either not pursue this remedy or do it at a delayed stage. It is not to gain anything by requesting to wrong or incorrect address and thereby adding to its own difficulties. Thus, Petitioner succeeds in establishing its credentials in approaching the authority for appeal against order dated 29.12.2006.

19. Reliance is placed on the decision reported in case of Ashokbhai Vallabhbhai Gol Vs. Union of India (UOI), where objections on the ground of expiry of period of limitation was not held sustainable in view of the peculiar circumstances of that case and Court had set aside the Order-in-Original and directed Adjudicating Authority to adjudicate on merits Case of the Petitioner afresh. In case of Ashokbhai Vallabhbhai Gol request was of waiver of pre-deposit of duty and

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penalty and the act of dismissal of Appeal on the ground of the same being time barred was not sustained. Another decision of the Supreme Court given in case of Municipal Corporation, Gwalior Vs. Ramcharan (D) by Lrs. and Others, on account of some confusion in the noting in the date of hearing when Municipal Corporation failed to appear before the Appellate Court and when the appeal was heard, Court found that there was sufficient cause for condonation of delay in filing the appeal and appeal was restored by the High Court by holding that Petitioner was not to gain anything by absenting himself at hearing or by giving false excuse. It also said that this was more a question of regarding bonafides of the party and when that was found established, it condoned the delay.

20. It needs to be made clear that this Court is not deciding the aspect of delay and condonation of the same in preferring appeal. Petitioner, since was prevented from approaching the Appellate Authority on account of confusion over address of the authority and in the mean time, Show Cause Notice of demand and demand of recovery etc. have been raised,the said acts of Respondents need to be set aside as opportunity requires to be availed to the Petitioner considering cumulatively facts and circumstances of this matter. The Petitioner when makes out its case under the law, it is left open to the concerned authority to decide the aspects of the limitation as well as the wavier of pre-deposit. Technicality and procedurality being the handmaids must never allow genuine and substantive rights to be defeated at their hands. However, in this petition, it is not for this Court to condone delay or to waive pre-deposit amount or decide any other amount in as much as Petitioner has not been denied those reliefs so far. He could not approach the concerned Authority for such requests on account of confusion over correct address and hence he is before this Court. He cannot be condemned unheard for No. fault of his and even otherwise when his bona fides have been well established of his pursuit to the legal remedy, merely on technical grounds, right to take recourse to the appeal cannot be hampered. Resultantly, this petition is partially allowed with the following directions:

1. The demand notice, certificate of recovery of demand and show cause notice dated 11th August, 2009, 23rd November, 2009 and 25th November, 2009 respectively are hereby quashed.

2. Petitioner shall file an Appeal before the Respondent No. 4 Special Director (Appeals) within two weeks of this order on the address specified in the order of this Court dated 29.7.2010.

3. On receiptof the said appeal, the Respondent No. 4 shall decide the aspects of condonation of delay sympathetically; keeping in mind the sequence of facts and observation of this Court in this regard.

4. Wavier of pre-deposit; if requested for in accordance with statutory provision, the same shall be decided.

21. With these observations and directions the present petition stands disposed of with No. order as to cost.

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22. Rules is made absolute to the above extent.

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