

(2013) 06 KAR CK 0184

In the Karnataka High Court

Case No : Writ Petition No. 21752 of 2013 (T-TAR)

Oracle India Pvt. Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 18-06-2013

Acts Referred:

Citation : (2014) 303 ELT 366

Hon'ble Judges : Aravind Kumar, J

Bench : Single Bench

Judgement

Aravind Kumar, J.—Petitioner is seeking for quashing of notices dated 21-5-2013 issued by respondent No. 4 to its bankers as per Annexures-A1 and A2 and for a mandamus to respondent No. 4 to refrain them from initiating any recovery proceedings based on impugned notice till the expiry of statutory period of appeal and thereafter, till the disposal of stay application to be filed before the appellate authority. A further direction is also sought to respondent No. 4 to refund the amounts recovered by enforcing the impugned notices and encasing the bank guarantees along with interest thereon and for costs of the petition. Heard Sri K.G. Raghavan, learned Senior Counsel appearing on behalf of Sri Ajay J.N., learned counsel for petitioner, Sri N.R. Bhaskar, learned counsel appearing on behalf of Sri Jeevan J. Neeralagi, for respondents 1 to 5. Perused the averments made in the petition and annexures appended thereto, as also the statement of objections filed by respondent Nos. 1 to 5.

2. Petitioner is engaged in the business of developing and selling information technology related to hardware support and software products and is having its registered office at New Delhi and also at Bangalore. M/s. Sun Microsystems India Pvt. Ltd. became a part of petitioner-company, which is engaged in the activity of importing various information technology related hardware products and spares at Bangalore and Chennai. On an intelligence information received by Department of Revenue Intelligence (DRI) investigations were initiated during October, 2006 to ascertain correct value of the spares imported by M/s. Sun

Microsystems India Pvt. Ltd. in Bangalore and Chennai, pursuant to which show cause notice dated 27-2-2009 came to be issued demanding the differential customs duties based on the assessable value redetermined at United States List price. After hearing the noticee, an Order-in-Original came to be passed on 29-3-2012, demanding tax, interest and penalty vide Annexure-B. Said order also directed the finalization of provisional assessment since Bills of Entry had been provisionally assessed for clearance.

3. Being aggrieved by this Order-in-Original dated 29-3-2012 an appeal has been filed by petitioner before the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as "CESTAT) in appeal No. C/1873/2012, dated 6-7-2012 and an application for stay of Order-in-Original dated 29-3-2012 also came to be filed by the petitioner, which came to adjudicated by the Tribunal and an order came to be passed on 4-3-2013, whereunder an amount of Rs. 75,00,00,000/- was ordered to be paid/deposited as pre-deposit as contemplated u/s 129E of the Customs Act, 1956 and stayed the recovery of balance amount of differential duty determined in Order-in-Original dated 29-3-2012.

4. The goods imported during the period 11-5-2007 to 31-3-2008 had been provisionally assessed pending finalization and as already noted hereinabove in Order-in-Original dated 29-3-2012, provisional assessment orders were directed to be finalized. Pursuant to same, provisional assessment came to be finalized and an Order-in-Original came to be passed on 20-5-2013, Annexure-F, whereunder the value of goods came to be redetermined on the basis of United States of America's list price as Rs. 1,54,74,52,291/- under Rule 9 of the Customs (Valuation) Rules, 2007 and the differential duty payable was determined at Rs. 19,85,21,756/- and affirmed the demand of duty short paid as Rs. 19,85,21,756/- and demanded payment of interest on the short collected duty above referred to by an order of even date. The bank guarantees furnished for an amount of Rs. 24,50,00,000/- at the time of provisional assessment came to be invoked by respondent No. 3 on 21-5-2013 and realized the proceeds thereof. On such Order-in-Original being passed affirming the provisional assessment, communication dated 21-5-2013 came to be issued by respondent No. 4 to the bankers of petitioner for forwarding the cheques in favour of respondent No. 2 towards the bank guarantees invoked which has been undisputedly received.

5. It is the contention of Sri K.C. Raghavan, learned Senior Counsel that impugned notices dated 21-5-2013 (Annexures A-1 and A-2) are in violation of principles of natural justice since Order-in-Original dated 20-5-2013 came to be passed without intimation to the petitioner and thereafter communications dated 21-5-2013 has been forwarded to petitioner's bankers and it is in blatant violation of principles of natural justice. He would also submit that 3rd respondent without even affording the petitioner an opportunity of hearing, has passed Order-in-Original dated 20-5-2013 (Annexure-F) and said order was not even communicated to the petitioner and as such, there is clear violation of

principles of natural justice. He also contends that finalization of provisional assessment without notice to the assessee and without giving an opportunity of personal hearing is in gross violation of Articles 14 and 21 of the Constitution of India and it is diametrically opposite to the principles laid down in the case of Collector of Central Excise, Patna and Others Vs. I.T.C. Limited and Another, , whereunder it is held that before finalization of provisional assessment an opportunity has to be extended to the assessee, particularly when a demand is made from the assessee to pay higher duty or when duty is enhanced, the assessee must be necessarily intimated or put on notice before the assessee is made liable to pay such additional duty. In such circumstances the assessee would have an opportunity to meet the said grounds and in the instant case there has been infraction namely notice is not issued while finalizing the provisional assessment and as such there is violation of principles of natural justice. Hence, Order-in-Original dated 20-5-2013, Annexure-F is liable to be set aside.

6. Sri Raghavan, learned Senior Counsel, would fairly submit that Order-in-Original dated 20-5-2013, Annexure-F is not challenged in this writ petition, inasmuch as petitioner has right of remedy by way of an appeal before the appellate authority and without exhausting the alternate and efficacious remedy available under law, he would not press the said ground for being adjudicated by this court in exercise of extraordinary jurisdiction, but on the other hand the consequential acts of the respondents in invoking the bank guarantees pursuant to said finalization of provisional assessment have forced the petitioner to prefer the present writ petition. He would elaborate his submission in this regard by contending that after finalization of provisional assessment by passing Order-in-Original dated 20-5-2013, respondent No. 4 has proceeded to encash the bank guarantee on very next day i.e., on 21-5-2013 without even issuing the copy of the Order-in-Original at the first instance and has ensured that copy of said order dated 20-5-2013 is forwarded to the petitioner after encashment of Bank Guarantees, ignoring the fact that statutory period of filing an appeal was available to the petitioner u/s 128 read with Section 129E of the Customs Act and seeks stay on recovery of such demand and to pre-empt such order of stay being obtained, Bank Guarantees have been invoked and thus, the provision of Section 129E of the Act is being made nugatory and otiose. Hence, he contends that said act of respondents is also hit by Article 265 of the Constitution of India.

7. He would further contend that recovery proceedings adjudicating duty and interest when the statutory period of appeal is current the respondent authorities cannot take steps to recover the demand and it is impermissible. He would contend that assessee has a vested statutory right to file an appeal together with application for stay and also seek for dispensing with pre-deposit of adjudicated duty or interest or penalty levied. Learned counsel for petitioner/assessee would bring to the notice of the court circular dated 1-1-2013 which came to be issued by the Central Board of Excise and Customs to contend that it has been held therein that when an application for stay has been filed along with an appeal and

if same remains pending for reasons not attributable to assessee, recovery proceedings cannot be initiated for 30 days as provided under said circular since it would deprive the assessee of a remedy available under law to challenge such order and also it enables such aggrieved person to obtain order of stay. He would rely upon the judgment of High Court of Bombay in the case of Larsen and Toubro Limited Vs. The Union of India and Others, to buttress his arguments that before the period of appeal as provided under the statute comes to an end, respondent-authorities would not be entitled to recover the amount during said period unless the delay is attributable to assessee, and contends that impugned notices dated 21-5-2013, Annexures-A and A1 issued by respondent to the bankers of petitioner would run contrary to the settled position of law. He would submit that as on the very next date after Order-in-Original dated 20-5-2013 came to be passed Bank Guarantees have been invoked and proceeds thereof has been received by the respondents that too without notice to petitioner and in utter violation of principles of natural justice and thereby nullifying the provisions of the Act.

8. He would draw the attention of the court to Section 151A of the Customs Act, which enables the Board to issue circulars from time to time which would be binding on its officers. He would contend that respondents have clandestinely encashed the Bank Guarantees i.e., without even dispatching the Order-in-Original dated 20-5-2013 Annexure-F and submits that philosophy of law would indicate that reference to circulars issued by the Board is required to be followed by the officers as they are bound by it and the circular dated 1-1-2013 mandates that till appeal period is over or the stay application is disposed of within a reasonable time, as the case may be, no recovery can be initiated by the department as it would nullify the very provisions of the Act and hence, under the impugned notices the respondents were not justified in invoking the Bank Guarantees and appropriating the proceeds thereof towards the adjudicated amounts and thereby pre-empt the assessee from seeking any order of stay before the appellate authority and as such, he prays for necessary directions to be issued as prayed for.

9. He would further submit that at the time of goods being provisionally released, petitioner had executed bonds as required under the Customs (Provisional Duty Assessment) Regulations, 2011 made u/s 18 of the Customs Act and had got released the goods by executing the bond and had also furnished the Bank Guarantee, which were undisputedly alive and valid as on date of passing of the Order-in-Original on 20-5-2013, Annexure-F and the first Bank Guarantee was due to expire only on 26-7-2013 and as such the respondent at the most could have called upon the petitioner to renew the Bank Guarantee and kept alive after the finalization of provisional assessment since petitioner could have taken steps to file appeal which remedy is available to petitioner even as on date, on such demand being raised by the respondents pursuant to finalization of provisional assessment. He submits that by their present acts, respondent-authorities are scuttling the right of the petitioner to file an appeal and challenge the Order-in-

Original and seeking appropriate orders of stay at the hands of appellate authority and contends that by virtue of invocation of Bank Guarantees respondents have ensured that right of appeal available to the petitioner is taken away. As such, he prays for allowing the writ petition along with suitable directions being issued to refund the proceeds of Bank Guarantee and awarding of costs.

10. He would also contend that even on earlier occasion i.e., when the Order-in-Original dated 29-3-2012 came to be passed, respondent authorities had indulged in encashing bank guarantees unlawfully contrary to the circulars issued to the departments, which was also brought to the notice of CESTAT and as such, it is contended that respondents be directed to refund the amount encashed by them and pass necessary order or directions by putting the petitioner on terms, if necessary.

11. In support of his submission, he has relied upon the following judgments:

- (1) Collector of Central Excise, Patna and Others Vs. I.T.C. Limited and Another,
- (2) Shree Hari Chemicals Exports Ltd. Vs. Union of India,
- (3) Balaji Impex Vs. The Union of India (UOI) and Others, .
- (4) Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd., .
- (5) Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing, Kota Vs. Shukla and Brothers,
- (6) Uma Nath Pandey and Others Vs. State of U.P. and Another, .
- (7) Larsen and Toubro Limited Vs. The Union of India and Others,
- (8) M/s. Ranadey Micronutrients etc. Vs. Collector of Central Excise,
- (9) The Paper Products Ltd. Vs. Commissioner of Central Excise,
- (10) Collector of Central Excise, Vadodra Vs. Dhiren Chemical Industries,
- (11) Commissioner of Central Excise, Bolpur Vs. Ratan Melting and Wire Industries,
- (12) Mahindra and Mahindra Ltd. Vs. Union of India,
- (13) Castrol India Limited Vs. Union of India (UOI),
- (14) Noble Asset Company Ltd. Vs. Union of India (UOI),
- (15) Ocean Driving Center Ltd. Vs. Union of India (UOI), The Commissioner of Customs, The Asstt. Commissioner of Customs and Dena Bank, Indl. Finance Branch,
- (16) Legrand (India) Private Ltd. Vs. Union of India (UOI) and Others,

(17) AIR 1952 139 (Nagpur)

12. Per contra Sri N.R. Bhaskar, learned Counsel appearing for the respondent would support the action taken by the respondent authorities. In support of said stand taken, he would draw the attention of court to the detailed statement of objections filed contending that when the Order-in-Original dated 29-3-2012 came to be passed, it was ordered that provisionally assessed Bills of Entry are to be finalized and in pursuance thereof provisionally assessed Bills of Entry have been finalized on 20-5-2013 Annexure-F the copy of said order at the request of petitioner was dispatched by fax on 21-5-2013, which has been suppressed by the petitioner and as such, he contends that there is no illegality in the action of the respondents in invoking the Bank Guarantees and receiving the proceeds thereof pursuant to the Order-in-Original dated 20-5-2013 since it was agreed to under the Provisional Duty. Bonds that on finalization of provisional Bills of Entry the respondents would be entitled to recover the duty so assessed with interest and as such Bank Guarantees have been rightly invoked. He would further contend that at the time of obtaining the release of goods they were provisionally assessed and petitioner had undertaken to pay the differential duty after finalization of provisional assessment and had executed a bond as per Annexure-R5 and he specifically draws the attention of the court to Clause 6 of the said Bond, which empowered the respondent authorities to recover the duty finalized pursuant to the provisional assessment being finalized and contends that there has been no violation of any provisions of the Customs Act. He would also contend that Customs Act does not mandate issuance of notice to the assessee before provisional assessment is being finalized nor it would mandate extending any personal hearing to the assessee and as such, he contends that in the instant case question of giving any opportunity of personal hearing or issuing notice to the assessee before finalization of the provisional assessment, did not arise at all and as such it was not given to the assessee. He would contend that bank guarantee was furnished only as security for realisation of duty to be recovered, if any, after finalization of provisional assessment and as such, bank guarantees furnished as security became liable for encashment by the respondent-authorities consequent to the duty determined on petitioner-assessee after the provisional assessment was finalized. He would further submit that when there is no order of stay or restraint to the officers to finalize the provisional assessment and same was made pursuant to directions issued in the Order-in-Original dated 29-3-2012. He would also contend feebly that petitioner is having an alternate remedy against Order-in-Original dated 29-3-2012 and petitioner should not be permitted to invoke the extraordinary jurisdiction of this court on the ground that alternate remedy is available to the petitioner. Hence, he prays for writ petition being dismissed.

13. Having heard the learned Advocates appearing for the parties and on perusal of the pleadings, I am of the view that following point would arise for my consideration in this writ petition:

Whether respondent-Department was entitled to invoke Bank Guarantees after passing the Order-in-Original and finalizing the provisional assessment even before said order is communicated to the assessee or even before completion of the statutory period as prescribed in the Circular dated 1-1-2013 issued by the Board?

14. Petitioner is the successor in interest of M/s. Sun Microsystems India Pvt. Ltd., which was issued with show cause notice on 27-2-2009 on the basis of the investigation conducted by the Department of Revenue Intelligence (DRI) demanding differential customs duty based on the assessable value redetermined at the US List price. Under the said show cause notice duty was demanded on the clearances made even for the period post-May, 2007 which came to be provisionally assessed and as such, there was no adjudication of these Bills of Entry in the Order-in-Original No. 1/2012, dated 29-3-2012 on the ground that said assessments were provisional and they were pending finalization. As such, authority while adjudicating and passing the Order-in-Original No. 1/2012, dated 29-3-2012 - Annexure-B ordered for finalizing the provisionally assessed Bills of Entry in terms of Section 18(2) of the Customs Act, 1962 (hereinafter referred to as the "Act") and further directed that on such finalization, the noticee has to pay the duty along with interest in terms of Section 18(3) of the Act. It is not in dispute that at the time of release of the goods when it was provisionally assessed, said company had executed Provisional Duty Bonds (PDB) as contemplated under the Customs (Provisional Duty Assessment) Regulations, 2011. Copies of the said Provisional Duty bonds executed by the petitioner is produced collectively by the respondent along with statement of objections at Annexure-R5. Petitioner had also executed six bank guarantees for a total amount of Rs. 24,50,00,000/-, the details of which are as under:

15. Petitioner-assessee who is the successor in interest of M/s. Sun Microsystems India Pvt. Ltd., Bangalore being aggrieved by the Order-in-Original No. 1/2012, dated 29-3-2012 has filed an appeal before CESTAT, Bangalore Bench, u/s 129A of the Act. The application for stay of the Order-in-Original as also been filed along with the said appeal. Said application came to be adjudicated by CESTAT and by its order dated 18-3-2013 directed the petitioner-assessee to pre-deposit a sum of Rs. 75 Crores u/s 129E of the Act within six weeks and there is no dispute to the fact that said Rs. 75 Crores as ordered by the CESTAT having been deposited by the petitioner. This is evidenced from Challan produced by the petitioner as per Annexure-E dated 28-3-2013. By virtue of the direction given in the Order-in-Original No. 1/2012, dated 29-3-2012 (Annexure-B) the adjudicating authority has finalized the provisional assessment of Bills of Entry by Order-in-Original No. 554/2013 on 20-5-2013 vide Annexure-F.

16. Though learned Advocates appearing for petitioner has contended that non-issuance of notice and/or not affording the petitioner-assessee opportunity of personal hearing before passing of order-in-original dated 20-5-2013 (Annexure-F) is vitiated since it is in violation of principles of natural justice and same is

rebutted by Sri N.R. Bhaskar, learned Advocate appearing for respondents. I am not inclined to consider the rival contentions raised in this regard or examine the said issue, inasmuch as, there is no challenge to the said order nor it is the scope of the present writ petition. In the present petition, only validity of invocation of Bank Guarantees and its encashment thereof by the respondents is questioned, which requires to be considered. Hence, this order is limited to the examination of the said issue and contentions raised in this regard.

17. u/s 18 of Customs Act, 1962 proper officer is empowered to direct the duty leviable on such goods whichever imported or exported to be assessed provisionally for the reasons enumerated in clauses (a) to (c) of sub-section (1) and direct such importer or exporter as the case may be, to furnish security as the proper officer deems fit for the payment of deficiency, if any, between the duty as may be finally assessed or duty provisionally assessed. Under sub-section (2) of Section 18 of the Act, final assessment or reassessment is made by the proper officer under clause (a) or (b) of the said sub-section. Under sub-section (3) interest is payable on such amount determined. Against such order passed finalizing the provisional assessment, the assessee would have a right of appeal as provided under Chapter XV of the Act and against an order passed by any Officer of the Customs lower than the rank of Commissioner, appeal would lie to the Commissioner (Appeals). u/s 129A of the Act, any person aggrieved by an order or decision passed by the authorities enumerated in clauses (a) to (d) to sub-section (1) would be entitled to file an appeal to the Appellate Tribunal namely, Customs, Excise and Service Tax Appellate Tribunal (CESTAT) constituted under the Act. Section 129E of the Act mandates that where any such appeal is preferred against any duty and interest demanded in respect of the goods which are not under the control of the customs authorities or any penalty levied thereunder is required to be deposited with the proper officer such duty and interest demanded or penalty levied. Proviso to Section 129E enables such person to file an application before the appellate authorities to dispense with the deposit of duty and interest demanded or penalty levied, and said application is required to be disposed of within 30 days in case the application is filed before Commissioner (Appeals).

18. Section 157 of the Act empowers the Board to make regulations consistent with the Act and the Rules to carry out purpose of the Act. Pursuant to such power conferred u/s 157 of the Act, read with Section 18 of the Act, Central Board of Excise and Customs has made Customs "(Provisional Duty Assessment) Regulations, 2011" vide Notification No. 81/2011-Cus. (N.T.), dated 25-11-2011 which provides the procedure being followed insofar as provisional duty assessment. Regulation 2 stipulates the conditions for allowing provisional assessments. Under Regulation 4 proper officer can call upon the importer or exporter as the case may be, to execute the bond with such surety or security or both at the time of provisional assessment.

19. The Board had issued circulars from time to time with regard to final

recovery proceedings, which were subject matter of consideration by various High Courts. The Division Bench of High Court of Judicature at Bombay in the case of Mahindra and Mahindra Ltd. Vs. Union of India, opined that it was improper on the part of the Collector and Assistant Collector of Customs to encash the Bank Guarantees furnished by the assessee even before expiry of statutory period of three months for filing appeal. In the said case petitioner had specifically informed the authorities that stay application had been fixed for hearing on 17-2-1992 and despite such request respondents therein encashed the Bank Guarantees on 3-2-1992. Hence, Division Bench directed the respondents to pay back the entire amount recovered by encashing the bank guarantees and also directed the petitioner therein to execute fresh bank guarantee.

20. Pursuant to the said judgment of Bombay High Court, office of the Commissioner of Customs (Import), Mumbai issued a Standing Order bearing No. 7967/2007 with regard to the mode and manner in which enforcement and encashment of Bank Guarantee during the pendency of appeal can be made by authorities. Contents of said circular reads as under:

OFFICE OF THE COMMISSIONER OF CUSTOMS (IMPORT) NEW CUSTOM HOUSE,
BALLARD, ESTATE, MUMBAI - 01 F. No. S/26-89/2007 Apprg. (General)

Date: 26-4-2007

STANDING ORDER 7967/2007

Subject: Enforcement/encashment of tank Guarantee during pendency of appeal
- reg.

As per Board's Circular No. 788/21/2004-Cx dated 25-5-2004 coercive measures should not be initiated during the period prescribed in the said circular. It is observed that some officers are enforcing the Bank Guarantees within the appeal period. This matter had come before the Hon'ble Mumbai High Court in the case of Ocean Driving Center Ltd. Vs. Union of India (UOI), The Commissioner of Customs, The Asstt. Commissioner of Customs and Dena Bank, Indl. Finance Branch, , Noble Asset Company Ltd. Vs. Union of India (UOI), and Mahindra and Mahindra Ltd. Vs. Union of India, wherein it has been held that encashment/enforcement of Bank Guarantee tantamount to resorting to coercive measures and this should not be done within the appeal period.

2. This instructions should be strictly complied with. Any deviation would be viewed seriously.

Sd/- (A.K. Prasad) Commissioner of Customs (Import) Mumbai.

21. Subsequently on 1-1-2013 a circular came to be issued by Central Board of Excise & Customs, New Delhi bearing No. 967/1/2013-CX whereunder it has been specifically enumerated as to when recovery proceedings should be initiated against confirmed demand made in terms of the orders specified thereunder. This

circular rescinded all its previous circulars. Relevant entry in the said circular which would have a bearing to the present facts of the case are at Sl. Nos. 2 and 3 and as such they alone are extracted below:

22. There is no dispute that at the time of release of goods Bills of Entry were provisionally assessed in the facts on hand and the petitioner's predecessors in title had executed Provisional Duty Bond in terms of Regulation 4 of the Customs (Provisional Duty Assessment) Regulations, 2011 and simultaneously it had furnished the Bank Guarantees in favour of respondents.

23. Show cause notices which had been issued to the petitioner on account of investigations conducted during October, 2006 by Department of Revenue Intelligence (DRI) to ascertain the correct value of the spares imported by M/s. Sun Micro Systems India (P) Ltd., at Bangalore and Chennai, Additional Director General, DRI issued show cause notices on 27-2-2009 inter alia seeking to demand the differential customs duties based on the assessable value redetermined at US List price and same was the subject matter of adjudication by the Commissioner of Customs, Bangalore and it culminated in passing of the Order-in-Original No. 1/2012, dated 29-3-2012 - Annexure-B demanding tax and interest and penalty levied thereunder. On account of said show cause notice having demanded the duty on the imports made at Bangalore even for the period post-May, 2007 and certain imports having taken place during July, 2007 to March, 2008 at Chennai, said goods imported under Bills of Entry were provisionally assessed during the relevant period of time and as such it was not adjudicated in Order-in-Original No. 1/2012 and as such a direction came to be issued by 2nd respondent for finalization of the said provisional assessments vide order dated 29-3-2012 (Annexure-B). Pursuant to the said direction third respondent proceeded to finalize the provisional assessment by Order-in-Original No. 554/2013, dated 20-5-2013 u/s 18(2) of the Act. Said order having been passed by the Additional Commissioner of Customs, Air Cargo Complex Division, Bangalore, an appeal lies to the Commissioner of Customs (Appeals) u/s 128(1) of the Act and said appeal has to be preferred within sixty days from the date of communication of such decision or order. Though issue regarding communication of order is seriously disputed by both the parties and as already opined by me that said issue is not in the realm of the present writ petition, I do not propose to examine the said question of fact and it is left open for being urged by the parties to be adjudicated in appropriate forum.

24. Now turning my attention back to the issue on hand, namely as to whether respondents could have invoked the Bank Guarantees immediately i.e., on the very next day (21-5-2013) after finalization of provisional assessment it can be noticed that it is no doubt true that petitioner-assessee against the Order-in-Original No. 1/2012, dated 29-3-2012 had preferred an appeal before CESTAT u/s 129A of the Act and also sought for stay of said order which came to be granted conditionally by directing the petitioner to deposit a sum of Rs. 75 Crores. Said order has been complied with. In the meanwhile, Order-in-Original

No. 554/2013 finalizing provisional assessment has been passed by the third respondent against which order undisputedly petitioner-assessee has a right of appeal which can be preferred u/s 128. It is also not in dispute that Bank Guarantees which were furnished by the petitioner-assessee at the time of provisional assessment was in force, vogue and alive as also on the date of the Order-in-Original No. 554/2013, dated 20-5-2013 (Annexure-F) came to be passed. As already noticed herein above, petitioner had furnished Bank Guarantees for a total sum of Rs. 24,50,00,000/- and first amongst the said Bank Guarantees was to expire on 26-7-2013. When the petitioner had a right of appeal against said Order-in-Original passed u/s 18(2) of the Act by invoking appellate jurisdiction u/s 128 of the Act and when the interest of the revenue is secured by bank guarantees already having been furnished same could not have been encashed for the following reasons.

Though plethora of cases are relied upon by learned advocate appearing for petitioner, I am of the considered view that judgment of High Court of Mumbai in the case of Larsen and Toubro Limited Vs. The Union of India and Others, wherein constitutional validity of the circular dated 1-1-2013 issued by the Board came to be considered and answered, has a direct bearing on the facts of the present case. A perusal of the said Circular dated 1-1-2013 made available by the learned Counsel for petitioner/assessee would indicate that Ministry of Finance through Central Board of Excise and Customs, New Delhi has clarified to its officers as to the manner and stage at which recovery of confirmed demand is to be made and in what situation the recovery can be initiated and the period for which such recovery should not be initiated. Said circular at Sl. No. 10 provided for recovery to be initiated against assessee by the department immediately on the issue of Order-in-Appeal where the order of Commissioner (Appeals) confirmed the demand made in Order-in-Original was held to be in terrorem as in effect it would deprive the assessee of the remedy provided to under the law, like moving further appellate forums like CESTAT, the High Court or the Supreme Court against an order of adjudication. Division Bench also considered and answered by holding that if the assessee is not responsible for delay in disposal of stay application within 30 days of the filing of such appeal and where reasons for such delay is not attributable to the conduct of assessee, the initiation of recovery proceedings against the assessee would be arbitrary and unfair. It has been held as under:

14. Sr. No. 10 of the circular of the Board deals with an appeal to the CESTAT where the Commissioner (Appeals) has confirmed a demand in an Order-in-Original of the adjudicating authority. The circular stipulates that recovery has to be initiated immediately on the issue of the Order-in-Appeal. In a situation where the Commissioner (Appeals) has confirmed the demand made in the order of adjudication, the assessee is permitted by the provisions of Section 35F to move the Tribunal for a dispensation of the requirement of deposit But the circular mandates that recovery shall be made immediately on the issue of an order-in-appeal implying thereby that recovery would be initiated without allowing the

assessee, the time which is allowed by the statute for filing an appeal and for applying for a waiver of pre-deposit. Similarly, Sr. No. 11 stipulates that where the Tribunal has confirmed the demand, a recovery would be initiated immediately on the issuance of the order of the Tribunal. The assessee is therefore deprived of even a reasonable period of time to move the High Court against the order of the Tribunal-In out view, the circular which is issued by the Board is in terrorem and its plain effect and consequence is to deprive the assessee of the remedy which is provided under the law of moving, as the case may be, the CESTAT, the High Court or the Supreme Court against an order of adjudication of the competent appellate forum. Initiating recovery proceedings because a stay application has not been disposed of within thirty days of the filing of an appeal would be to penalize an assessee for the inability of the judicial or, as the case may be, quasi-judicial authority to conclude the disposal of the stay application within that period. If the assessee is not responsible for the delay in the disposal of the stay application and the application remains pending for reasons not attributable to the conduct of the assessee, initiation of recovery proceedings would be arbitrary and unfair. However, if the failure to dispose of an application for stay is because of the conduct of the assessee, such as by a resort to dilatory tactics, the revenue would in such a situation be justified in commencing recovery action. Moreover, there is no justification to commence recovery immediately following an Order-in-Appeal where a period of limitation is laid down by the relevant provision of law for challenging the decision of the Appellate Authority.

(Emphasis supplied by me)

25. There is no dispute as already observed herein above that order dated 20-5-2013 (Annexure-F) passed by third respondent u/s 18(2) of the Act is an appealable order u/s 128 of the Act which appeal can be filed within sixty days from the date of decision or communication thereof. Said 60 days is to expire on 26-7-2013 even if it is construed that limitation would commence from 20-5-2013.

26. The Circular dated 1-1-2013 issued by the Board in exercise of its power u/s 151A of the Act requires to be observed and strictly followed. The object of such circulars is to ensure there is uniform approach and to drive home the point to the assessees as to how the officers would take steps to initiate recovery proceedings and as such the said circulars are not only binding on the officers but required to be followed implicitly without giving scope for any infraction in this regard. The undisputed policy of the Department is not to resort to coercive methods for recovering the duty and interest demanded or penalty levied during the currency of appeal period. In the instant case, Bank Guarantees have been furnished at the time of provisional release of the goods and at the time of executing Provisional Duty Bond which was on 26-2-2008 and the respondent-authorities have accepted said Bank Guarantee, acted upon it for almost 3? years and as such this Court fails to understand as to what prejudice that would have

caused to the Department if the Bank Guarantee is not allowed to be encashed for a period of 8 weeks or 2 months which is the period allowed u/s 128(1) of the Act to an aggrieved person to challenge the order passed u/s 18(2) of the Act. In fact, very circular issued by the Board dated 1-1-2000 fortify this view for the following reasons:

There may be a situation where assessee may file an appeal without application for stay and in such a situation department has directed its officers to initiate recovery proceedings without waiting for the statutory period of 60 days to be exhausted; and, in a case where appeal is filed with an application for stay against Order-in-Original, authorities are empowered to initiate recovery of confirmed demand after 30 days after filing of the appeal and if no stay is granted or after disposal of the stay application in accordance with conditions for stay if any that may be specified.

27. Now turning my attention back to the facts on hand, it can be noticed that Order-in-Original dated 20-5-2013 (Annexure-F) finalizing the provisional assessment came to be passed u/s 18(2) of the Act undisputedly without issuing any notice to the petitioner. In fact, respondents in their statement of objections have nowhere stated that notice of personal hearing or notice of hearing was issued to assessee before finalization of provisional assessment. On the other hand it is the specific stand of the respondents that when there is no stay of Order-in-Original dated 29-3-2012 which directed finalization of provisional assessment or an injunction restraining respondents from finalizing provisional assessment the authorities were bound to pass such order. It is also asserted that no personal hearing needs to be extended to an assessee (Vide Paragraph 10 of their statement of objections). Additional documents produced by the respondents along with I.A. 3/13 which has been allowed by this Court by order of even date namely, "Activity Log" would indicate that at job No. 11079 on 21-5-2013 order dated 20-5-2013 (Annexure-F) is said to have been dispatched about 12:53:45 HRS running into 5 pages. Though it is contended by the respondents that Bank Guarantees were invoked after dispatching to petitioner the order dated 20-5-2013 (Annexure-F) records would speak otherwise. As noticed hereinabove order dated 20-5-2013 has been dispatched by Fax at about 12.53 p.m. on 21-5-2013 and much prior to it letters have been issued by 4th respondent invoking Bank Guarantees as per communication dated 21-5-2013 - Annexures-A1 & A2 i.e., even before the said order could have been dispatched to the petitioner. This I say so, on account of the seal affixed by the two Banks indicating the time at which said communication invoking the Bank Guarantees have been received by them has been indicated in the very same letters in Annexure-A1. The time at which Annexure-A-1 has been received has been reflected by computer generated entry as 11-37 a.m. on 21-5-2013. Likewise the time indicated in the seal fixed in Annexure-A2 would indicate that it has been received by Bank of America, Bangalore branch on 21-5-2013 at 11.05 a.m. This would clearly indicate that even prior to dispatching the order dated 21-5-2013 to the petitioner by fax at 12:53:45 HRS as claimed by respondents themselves,

Bank Guarantees in question have been invoked. This would virtually pre-empt or nullify very right of the assessee to file an appeal against the Order-in-Original and very proviso to Section 129E of the Act would render nugatory or it would become otiose as this is not the intention of the Legislature nor intention of the Central Excise and Customs Board namely to frustrate the right of assessee to file an appeal and seek order of stay. This act of respondents is also contrary to circular dated 1-1-2013.

28. Action of the respondents invoking the Bank Guarantees will have to be viewed with utmost circumspection. Mere furnishing or execution of Provisional Duty Bond and agreeing thereunder to pay differential duty between what has been provisionally assessed and what would be assessed finally would itself not provide the department a handle to nullify the appeal provisions or the right of the assessee to seek waiver of pre-deposit as provided to under proviso to Section 129E of the Act and such appropriate relief in appellate proceedings. Said bonds executed and the Bank Guarantees furnished by assessee pursuant to provisional assessment is to ensure that interest of the revenue is secured and its right to recover the duty and interest is not frustrated. Though on account of provisional assessment getting merged with the final assessment, as such bond would come to an end will not relieve the assessee of its obligation particularly when Bank Guarantees have also been executed. When it is a declared policy of the department not to resort to coercive recovery proceedings during the appeal period, plea of the respondents that by virtue of provisional assessment having been finalized under the final assessment it would entitle them to invoke the Bank Guarantee cannot be accepted as it would virtually take away the right of the assessee to pursue its remedy in accordance with the provisions of the Act. The very circular dated 1-1-2013 issued by the Board would be a complete answer to the acts of the respondents.

29. In the present case the sequential events as narrated hereinabove would clearly indicate that at the time of passing Order-in-Original finalizing the provisional assessment dated 20-5-2013 no notice has been issued to the petitioner (which is not disputed by learned Advocate appearing for the revenue) and even before the said order could be communicated to the petitioner-assessee, Bank Guarantees have been invoked thereby rendering the statutory right available to the petitioner infructuous which cannot be countenanced by this Court. This action of the respondent is contrary to the statutory provisions. Petitioner has a statutory right of appeal, which period is not yet expired. It is the declared policy of the respondent-department not to initiate recovery proceedings during the currency of appeal period. In this view of the matter it was not proper on the part of the respondents to encash the Bank Guarantees even before the period of appeal was over or the conditions stipulated in circular dated 1-1-2013 is not attracted. Respondents' action in invoking the Bank Guarantees is contrary to their own declared policy. As such, I am of the considered view that respondents-authorities are required to be directed to remit the proceeds of the Bank Guarantees so recovered and collected to the

respective bank accounts of the petitioner within seven days from today and simultaneously the petitioners shall furnish Bank Guarantees for a sum of Rs. 24,50,00,000/- also within seven days from today and said Bank Guarantees shall be kept current and alive for such period as may be called upon by the respondents. The respondents would be at liberty to initiate recovery proceedings in accordance with the circular dated 1-1-2013 as observed hereinabove. Hence, the point formulated hereinabove is answered in favour of the petitioner partly for the reasons aforestated.

30. In the result, following order is passed:

ORDER

(1) Writ petition is hereby allowed in part.

(2) Notices F. No. S/5/103/08-Bonds, dated 21-5-2013 - Annexure-A1 and Annexure-A2 issued by fourth respondent is hereby quashed.

(3) Fourth respondent is directed to refund the amounts recovered by enforcing Annexures-A1 and A2 by remitting the proceeds of Bank Guarantees to the respective bank accounts of the petitioner within seven days from today. Simultaneously, petitioner shall also furnish Bank Guarantee for a sum of Rs. 24,50,00,000/- in favour of the President of India, Acting through the Commissioner of Customs, Bangalore-second respondent within seven days from today and said Bank Guarantees shall be kept current and alive.

(4) In the event of petitioner filing an appeal against Order-in-Original No. 554/2013, dated 20-5-2013 - Annexure-F before the Commissioner of Customs (Appeals), Bangalore with an application for stay/waiver as may be advised, it would be needless to state that said authority will consider the appeal as well as the application on merits and in accordance with law without being influenced by any of the observations made herein above.

(5) Parties to bear their respective costs.

31. In view of the writ petition having been disposed of on merits, all pending applications stand dismissed. Registry shall make available the operative portion of this order to the learned Advocates appearing for both the parties to enable them to comply with the directions issued.