

(2002) 03 BOM CK 0085

In the Bombay High Court

Case No : Writ Petition No. 1023 of 2002

Union of India (UOI)

APPELLANT

Vs

Dabhol Power Company

RESPONDENT

Date of Decision : 26-03-2002

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35F
Customs Act, 1962 — Section 129E

Citation : (2006) 199 ELT 782

Hon'ble Judges : V.C. Daga, J;H.L. Gokhale, J

Bench : Division Bench

Advocate : Soli Sombjee, AG, A.J. Rana, M.I. Sethna and R.V. Desai and R. Asokan and H.O. Rathod, for the Appellant; Shreedharan, Prakash Shah, Suhas Tulzapurkar and Vishwnathan, instructed by Anderson Legal India, for the Respondent

Judgement

1. Heard Shri Sorabji, learned Attorney General for the petitioner and Shri Shreedharan, learned Counsel for the Respondents.

2. The petitioner is aggrieved by the order passed by CEGAT on 28th December, 2001 under the provisions of Section 129E of the Customs Act, 1962 which was passed in appeal preferred by the respondent against the order of the Commissioner of Customs, dated 12th November, 2001. The impugned order has permitted the appeal of the respondent to be entertained without the pre-deposit of the amount of duty of over Rs. 275 Crores and penalty of Rs. 45 Crores.

3. The short facts leading to this petition are as under:

(a) Last year, i.e. on 31st July, 2001, the Customs department issued to the respondent - Dabhol Power Company (DPC) a show cause notice, demanding amongst others Rs. 316,36,15,295 (283,39,45,406 + 920,57,184 + 23,76,12,705) as duty for imports made for its Liquidated Natural Gas (LNG) terminal at Dabhol. In adjudication, the Commissioner of Customs by his order dated 12th November, 2001 confirmed the duty demand to the extent of Rs.

275,34,45,737 (245,58,73,987 + 8,30,94,084 + 21,44,77,666) and issued penalty of Rs. 45 Crores. The order was passed after considering the reply of the respondent and after affording a full hearing and giving reasons running into 128 pages.

(b) In the meanwhile the respondent had lodged two bank guarantees worth Rs. 72.50 Crores at the time of provisional clearance of the goods when they were imported. After the duty demand was confirmed in November, 2001 Customs invoked the bank guarantees. But before the guarantor, the State Bank of India, could complete the formalities, the respondent moved a vacation Judge of the Bombay High Court and obtained an ex parte order on 15th November, 2001 restraining Customs from encashing the bank guarantees.

(c) Thereafter, when the Customs moved the High Court to get the injunction vacated, the respondent submitted before the High Court that they had challenged the adjudication order before CEGAT. They therefore argued that the outcome of the CEGAT hearing should be awaited. Section 129E of the Customs Act, 1962 requires an appellant to make a pre-deposit of duty before the appeal at the tribunal can be heard. The respondent did not make the deposit, but sought total waiver of the duty and penalty pending outcome of its appeal, on grounds of undue hardship as provided in the proviso to Section 129E. By its order dated 28th December, 2001, the CEGAT Bench, Mumbai, granted this prayer of the respondent with a direction that the bank guarantees be kept alive.

4. The CEGAT in its above referred order has come to a prima facie conclusion that in the facts and circumstances of the case. Insistence of pre-deposit will result in grave financial hardship and, therefore, it is specifically stated in the order that without going into merits of the matter, requirement of pre-deposit of duty and penalty was waived on 2 conditions viz. (1) that the respondent shall not clear the goods till the disposal of the appeal and (2) the respondents shall keep the bank guarantees alive during the period of pendency of the appeal.

5. Shri Sorabji, learned Attorney General for India appearing for the Petitioner submitted that mere prima facie finding of hardship was not sufficient to waive condition of pre-deposit of the duty and penalty. Whether the appellant had made out a prima facie case on merits was a necessary prerequisite. Shri Sorabji submitted that in the instant case, respondents were claiming concessional power project rate of Customs duty for the import of equipments on the ground that it was expansion of phase I while executing Phase II of the project. The Commissioner had given a finding of fact that it was not a case of expansion and that the respondents were not entitled to concessional rate of Customs duty, the respondent, the petitioner had a right to encash them. His submission was that the petitioner had waited till the determination before the original Authority and after that state they wanted to encash the bank guarantees. He submitted that the petitioner could have insisted on pre-deposit of the entire duty which was over Rs. 275.34 Crores and the penalty of Rs. 45 Crores. They were however seeking to invoke only the bank guarantees which were to the tune of Rs. 72.50

Crores. In his submission, the order of CEGAT did not specifically prevent encashment but by way of caution the petitioner had sought the necessary interim relief.

7. On his first submission viz. that merits of the matter ought to have been seen while passing order u/s 129E of the Act. Shri Sorabji relied upon two Division Bench Judgments of Delhi High Court. In para 2 of its judgment in Uptron Powertronics Vs. Collector of Central Excise, Meerut, , the Division Bench has observed that in every case when the appellant wants any discretionary relief in his favour, he has first to show prima facie substance in his claim. On this being done, he then has to further show undue hardship to him. The reverse was not to be done. The other Division Bench decision of Delhi High Court relied upon by Shri Sorabji was in the case of Sri Krishna Vs. Union of India (UOI), , wherein, in para 8 the Division Bench has observed that that the order of the Tribunal should show if the pleas raised before it have any merit prima facie or not. If the appellant has such a strong prima facie case then he would be entitled to be exonerated from the payment.

8. As far as this aspect is concerned, Shri Shreedharan, learned Counsel for the Respondent relied upon 4 other judgments. Firstly in the case of Escorts Limited and Another Vs. Union of India and Others, a Division Bench of the Delhi High Court has referred to a judgment of the CEGAT in para 13, with approval, wherein it is stated that where financial hardship has been established, that would be sufficient for whole or partial waiver of pre-deposit. The second judgment relied upon by Shri Shreedharan was of Allahabad High Court in the case of Udai Zinc Limited Vs. Commissioner of Cus. and C. Ex., . In para 4 of the said judgment the Allahabad High Court observed that the petitioner has a statutory right of appeal and financial hardship is the main cause in almost every case for claiming dispensation of the condition of pre-deposit and it is on the financial considerations that the appellate authorities exercise this discretion. The 3rd judgment relied upon by him was of Orissa High Court in the case of Indian Charge Chrome Limited Vs. Union of India (UOI), . In paras 9 and 11 of the said judgment is observed by the Orissa High Court that if the financial position of the appellant is precarious and it is not possible for it to comply with the requirement of deposit of the disputed amount or it may do so by irreparable loss, it will be a factor to be considered. The last judgment relied upon by Shri Shreedharan was of Delhi High Court in the case of Maruti Udyog Ltd. Vs. Union of India, , where in para 123 the Division Bench of Delhi High Court has observed that though petitioner has not pleaded financial hardship, undue hardship u/s 35F of the Central Excise Act, 1944 is not restricted to financial hardship and it can be extended to other cases of strong prima facie cases as well. Shri Sorabji countered the reliance on those judgments by submitting that none of them dislodge his submission that merits of the matter have to be seen and Tribunal has to be satisfied on merits of least prima facie before going into the merits of hardship. Even in the case of Maruti Udyog Ltd., relied upon by Shri Shreedharan, the Delhi High Court had in terms recorded in para 11 of that

judgment that the Tribunal had found that the petitioner had a prima facie case. Hence, in his submission, these judgments do not help the respondents.

9. Shri Sorabji secondly submitted that the bank guarantee given in this case was unconditional one, and without any demur and on demand the amount concerned had to be paid, the moment circumstances for demand were established. He particularly emphasised Clause 6 of the two Guarantees which reads as follows:

The rights of the President to recover the said amount from the surety in the manner aforesaid will not be affected or suspended by reason of the fact that any dispute or disputes has been raised by the importer with regard to the liability or that any proceedings are pending before any officer, Tribunal or Court with regard thereto or in connection therewith.

Shri Sorabji submitted that there are a large number of judgments on the approach to be adopted by the Courts when it comes to the encashment of bank guarantees. He particularly made a reference to the judgment of the Apex Court in the case of Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, . In para 21 of the said judgment reference is made to earlier decisions of the Apex Court and a paragraph is quoted with approval from earlier decision in the case of AIR 1997 1644 (SC) to the effect that in the course of commercial dealings when unconditional bank guarantee is given, the bank guarantee will have to be permitted to be encashed. He then emphasised para 22 of the said judgment which states that the second exception to the rule of granting injunction i.e. irretrievable injury was that there has to be such a circumstance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. In the present case, since the Central Government was concerned in the matter, such a situation would not arise.

10. Shri Shreedharan the learned Counsel for the Respondent, on the other hand, drew our attention to some other clauses of the bank guarantee. Clause 6 will have to be read along with Clause 11 and it only means that the bank guarantee will have to be kept alive and will have to be renewed when proceedings are pending. In his view, the effect of Clause 6 was that merely because some proceedings were pending rights were not to be affected. In the present case, there was stay of recovery granted by the Tribunal and, therefore, there was no question of invoking bank guarantee. Shri Shreedharan secondly submitted that the principles laid down in Dwarikesh case (supra) and the judgment apply normally to commercial transactions and not to statutory demands and guarantees given for specific requirements of these authorities. He, therefore, submitted that in the event these bank guarantees are allowed to be encashed, the respondents will suffer irreparable loss. Shri Shreedharan submitted that the order of CEGAT had stayed the entire recovery pending the appeal and therefore, the bank guarantees for a part of the claim could not be encashed.

9. Shri Sorabji on the other hand submitted that whereas the respondent was under a duty to keep the bank guarantees alive, in view of Clause 6 of the bank guarantees, there was no restriction on petitioner not to encash them. Shri Sorabji submitted that Petitioner's demand is only for a part of duty which was guaranteed through the bank guarantees which were sought to be encashed at this point of time. He submitted that the petitioner had waited till the decision of the Commissioner of Customs and was not inclined to wait any further. With respect to the alleged distinction between bank guarantees for commercial requirements and statutory requisitions, he relied upon the judgment of the Apex Court in the case of Oil and Natural Gas Corporation Ltd. Vs. State Bank of India, Overseas Branch, Bombay, wherein in para 7 it is observed by the Apex Court as under:

No distinction can also be made between the bank guarantee for due performance of a work contract and a guarantee given towards security deposit for a contract or any other kind of guarantee.

Shri Sorabji relied upon the ratios of the Apex Court in catena of judgments viz. in the case of Svenska Handelsbanken v. Charge Chrome, Larsen & Toubro Ltd. Maharashtra SEB, Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd. and U.P. State Sugar Corporation v. Sumao International Ltd. referred to in para 21 of the judgment in Dwarikesh Sugar Industries Ltd. (supra) and submitted that the bank guarantees be allowed to be encashed subject to the undertaking given on behalf of the petitioner that in the event, decision goes in favour of the respondent the amount will be returned back to the respondent with interest at the appropriate rate to be decided by the Court. Shri Sorabji relied upon judgment of the Apex Court in Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, and submitted that Governments are not run on bank guarantees and revenue will suffer if bank guarantees are not allowed to be encashed.

11. In our view, both these questions require consideration, viz., (1) whether prima facie case on merits is necessary to be seen while granting interim order u/s 129E of the Customs Act; and (2) whether any distinction is permissible in bank guarantees given for commercial transactions and those for statutory requisitions? Hence Rule on the petition. Shri Shah waives service for the sole respondent.

13. Inasmuch the petition is admitted we have to consider the prayer or interim relief. We are in agreement with Shri Sorabji that the bank guarantees have to be permitted to be encashed, but the respondents also ought to be protected. Inasmuch as we are of the view that interest of the revenue is required to be protected, while securing the interest of the respondent, we permit encashment of two bank guarantees by way of interim measure on the statement of Shri Sorabji, learned Attorney General that in the event the matter is decided in favour of the respondent the amount payable will be returned to the respondent within 12 weeks from the date of judgment with interest at the rate to be

decided by the Court concerned.

14. Shri Shreedharan for the respondent submitted that grant of interim relief would amount to allowing the petition itself. That is not so, and that is because whereas the order of the Commissioner imposes a duty of over Rs. 275 Crores and penalty of Rs. 45 Crores, the bank guarantees which are being encashed are only for Rs. 72.50 Crores. Interest of the respondents is protected in view of the statement made by the learned Attorney General which is recorded hereinabove.

14. We clarify that the Tribunal will proceed to hear the appeal in the meanwhile, without being influenced in any manner with any of the observations made in this order.

14A. Shri Shreedharan applies for stay of this order for a period of 3 weeks. Shri Sorabji leaves it to the Court to pass appropriate order. Accordingly, this order is stayed for a period of 3 weeks. Respondent will give prior notice to the petitioner before moving the Apex Court against this order.

15. Writ Petition to be placed for final hearing on 1st July, 2002.

16. Authenticated copy of this order be made available to the parties.