

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 26TH DAY OF JUNE 2013

PRESENT

THE HON'BLE MR.JUSTICE K.L.MANJUNATH

AND

THE HON'BLE MR. JUSTICE L. NARAYANA SWAMY

WRIT APPEAL NOS.3693-94 OF 2009 (GM-RES)

BETWEEN:

1. THE DEPUTY COMMISSIONER OF CUSTOMS,
CUSTOMS DIVISION,
BASAVESWARA BUILDING,
CRESCENT ROAD,
BANGALORE.
2. SUPERINTENDENT OF CUSTOMS,
100% EOU's,
CUSTOMS DIVISION,
KENDRIYA SADAN,
KORAMANGALA,
BANGALORE.

...APPELLANTS

(BY SRI N.R.BHASKAR, SR.CGC)

AND:

1. M/S.SHRISHAILA GRANITES &
MARBLES (P) LIMITED,
HOTEL GAUTAM,
NO.17, MUSEUM ROAD,
BANGALORE-560 025

REPRESENTED BY ITS
MANAGING DIRECTOR,
SRI V.LAKSHMIPATHY.

2. UNION OF INDIA,
MINISTRY OF COMMERCE AND INDUSTRY,
(DEPT. OF INDUSTRIAL POLICY
AND PROMOTION),
UDYOG BHAVAN,
NEW DELHI - 110 001
REPRESENTED BY ITS
UNDER SECRETARY TO GOVT.
3. COCHIN SPECIAL ECONOMIC ZONE,
THE SUB OFFICE FOR 100%
EOU IN KARNATAKA,
MINISTRY OF COMMERCE,
GOVERNMENT OF INDIA,
365, 4TH CROSS, 8TH MAIN,
VIVEKNAGAR,
BANGALORE-560 047.
4. MUJIBULLA,
S/O.SHAIK MAHOOB ALI,
BUSINESSMAN, AGE 49 YEARS,
ROYAL TRADERS, 5-6 P S LANE,
OPP. RAJDHANI LODGE,
CHICKPET, BANGALORE-560 053.

...RESPONDENTS

(BY SRI S.V.BHAT & B.T.GIRISH, ADV. FOR R1)

THESE WRIT APPEALS FILED UNDER SECTION 4 OF THE
KARNATAKA HIGH COURT ACT PRAYING TO SET ASIDE THE
ORDER PASSED IN THE WRIT PETITION NO.18425/2009 DATED:
30/07/2009.

THESE WRIT APPEALS COMING ON FOR HEARING THIS
DAY, **MANJUNATH J.**, DELIVERED THE FOLLOWING:

JUDGEMENT

The legality and correctness of the order passed by the learned Single Judge in W P No.18425/2005 dated 30.7.2009 is called in question by the appellants herein.

2. Heard the learned counsel for the parties.

3. The facts leading to these appeals are as hereunder:

The writ petition came to be filed by the respondent No.1 to issue a writ of certiorari and quash tender notice bearing No.1/2005-06 dated 15.6.2005 so far it relates to machineries of the writ petitioner. According to the petition averments, the petitioner is a company incorporated under the provisions of the Companies Act, 1956 and engaged in producing and exporting best quality ornamental granite and in this regard it has obtained a status of 100% Export Oriented Unit (E.O.U). Under the relevant policy devised by the first respondent under the Customs Act, 1962 vide

Permission dated 5.6.1989, petitioner was entitled to import machinery and other items without payment of customs duty subject to full fulfillment of export obligation unit the entire quantity of granite manufactured shall be exported for a period of 10 years from the date of commencement of commercial production.

4. According to the petitioner, for the reasons beyond its control, there was a delay in obtaining the industrial land from the Karnataka Industrial Area Development Board, mining lease from the State of Karnataka and financial assistance from banks and financial institutions. Therefore, the writ petitioner could not commence production within the time granted under the licence.

5. It was informed to the writ petitioner by the respondent that the permission granted as per Annexure-A has come to an end since the project of the petitioner was not been implemented. Therefore, a reply was sent on 20.1.1995 explaining the reasons for not commencing

operation and sought for extension of validity of the permission. According to the writ petitioner, there was no response from the first respondent. The petitioner had exported processed granite worth Rs.30 lakhs between 1995 and 1998 on the strength of the permission granted to the petitioner vide Annexure-A. According to the petitioner, it was a great surprise for him to receive the demand-cum-show cause notice dated 26.5.2000 from the third respondent claiming customs duty of Rs.44,81,664.00 and other charges on the ground that there was failure on the part of the petitioner to fulfill the export obligations and the petitioner was called upon to appear for hearing.

6. The petitioner requested the respondent to explain the validity of the permission and gave representation on 23.6.2000 and further correspondences were made to see that permission granted is extended and ultimately Annexure-A came to be canceled in 1995.

7. Since the extension was not granted, the petitioner filed writ petition before this Court in W P No.33818/2002 seeking a direction to the respondent to extend the validity of the permission and for other reliefs, which petition came to be allowed on 5.3.2003 and a direction was issued to the respondent to consider the application of the petitioner for renewal of the permission/licence.

8. Based on the show cause notice issued calling upon the petitioner to pay the custom duty, an order of assessment came to be passed. Thereafter the petitioner had filed an appeal before the Customs Appellate Tribunal with a delay of six months, which appeal came to be dismissed on 4.3.2003 by the CESTAT in Appeal No.108/2001-1928/2003.

9. Aggrieved by the original order which has been confirmed by the appellate tribunal without condoning the delay, the petitioner filed writ petition before this Court challenging the order of assessment in W P No.8772/2004,

which petition came to be dismissed on March 8th, 2004. Aggrieved by the order of dismissal of the writ petition, the matter was carried in appeal before the Division Bench in W A No.3910/2004, which appeal also came to be dismissed on 9.12.2004. Again the matter was taken up by the petitioner to the Hon'ble Supreme Court in SLP © No.8285/2005 which also came to be dismissed on 25.4.2005.

10. When the matters stood like this, the present petition came to be filed to stall the action on the ground that the machineries of the petitioner has been brought for auction by the department for recovery of Rs.44,81,664.00 towards the customs duty on the ground that on account of direction issued by the learned Single Judge in W P No.33818/2002 the permission/licence granted to the petitioner has been extended as per Annexure-R which is valid up to 2008. Therefore, it was contended by the petitioner that the original order demanding the writ

petitioner to pay the customs duty on account of non fulfillment of export obligation is nonest in the eye of law due to extension of licence period.

11. The writ petition was opposed by the Department on the ground that the writ petition was not maintainable because the order in original demanding customs duty has attained finality on account of dismissal of special leave petition by the Hon'ble Supreme Court and when once the said order has attained finality way back in the year 2004, the said matter cannot be reopened on the ground that licence has been later renewed for a further period of 5 years.

12. The learned Single Judge has allowed the writ petition and quashed the notice dated 15.6.2005 and demand notice dated 26.8.2004 by allowing the writ petition. This order is called in question in this appeal.

13. The learned counsel for the appellant submits that the learned Single Judge did not consider the effect of the

order passed by the Assessing Officer, which order was confirmed by the Customs Appellate Tribunal and further confirmed by the learned Single Judge and affirmed by the Division Bench of this Court and attained finality on account of dismissal of the special leave petition filed by the petitioner before the Hon'ble Supreme Court. According to him, the learned Single Judge without considering the effect of confirmation of the order of assessment the Supreme Court has granted relief only on the ground of renewal of licence by the department at a later date would validate non payment of customs duty which according to him is an error committed by the learned Single Judge which requires to be set aside by this Court.

14. Per contra, Mr.Bhat learned counsel submits that when a direction was issued in W P No.33818/2002 directing the appellants herein to consider the application of the writ petitioner to extend the licence or permission for a further period, any order of assessment passed on account

of lapse of licence, has to be considered as nonest in the eye of law on account of extension of lease, as the licence being in force till the period of expiry of the extended period. In the circumstanes, he requests the Court to dismiss this appeal.

15. Having heard the learned counsel for the parties, the only point to be considered in these appeal is, whether the learned Single Judge is justified in allowing the writ petition without considering the effect of the order of assessment by the customs appellate tribunal, learned single Judge in the writ petition and the order of the Division Bench has been confirmed by the Hon'ble Supreme Court?

16. As stated supra, the facts in these appeals are not in dispute to the following extent:

The licence/permission was granted to the writ petitioner considering the said unit as a 100% Export Oriented Unit. The

permission was valid up to 2003. It is also not in dispute that the first respondent has imported certain machineries to utilize the same for export E.O U purpose without payment of customs duty. It is also not in dispute that as per the permission granted by the appellants, there was an obligation on the part of the first respondent to perform its duties as 100% E.O.U and it is also not in dispute that there is failure on the part of the first respondent in not fulfilling export obligation before expiry of the permission granted in 2003.

17. It is also not in dispute that on account of failure on the part of the first respondent in not fulfilling the export obligation, there was demand made by the assessing authority for recovery of customs duty and ultimately an order of assessment came to be passed which order was questioned by the first respondent by filing an appeal before the customs appellate authority and the same came to be dismissed on the ground of delay, which matter was

taken up to the Hon'ble Supreme Court and has reached its finality.

18. It is also not in dispute that the writ petition had been filed requesting this Court to issue a direction to consider the application for extension of letter of permission which writ petition came to be disposed of with a direction to consider the application on merits and in accordance with law by the order dated 5.3.2003. A day prior to the afore said order, the appeal had been dismissed by the appellate tribunal.

19. Therefore, it is clear that when a direction was issued by this Court in W P No.33818/2002 on 5.3.2003 and order of assessment had become final due to dismissal of the appeal filed by the first respondent. When the order passed by the customs appellate tribunal was questioned by the first respondent before the learned Single Judge in W P No.8772/2004, there was no difficulty for the first respondent to bring to the notice of the learned Single Judge about the order passed by the learned Single Judge

in directing the authorities to re-consider the order of assessment after considering his application for extension of licence period or at least should have requested the writ court to observe that the order of assessment passed by the department for recovery of customs duty would be subject to the result of consideration of application for extension. Unfortunately, such an exercise has not been undertaken by the first respondent and similar exercise could have been undertaken by the first respondent when the matter was pending before the Division Bench or before the Hon'ble Supreme Court. Be that as it may, when the writ petition was pending in W P No.33818/2002, the order of assessment had already completed and there was demand to make payment of the customs duty. At least while disposing of the said writ petition, the first respondent could have sought such a permission. No such permission has been obtained by the respondent.

20. When the Supreme Court has dismissed the special leave petition the order of assessment has become final. Therefore, question of reopening the said order on the ground of renewal of licence by a later date would not arise at all, in other words, we are of the view that allowing of the writ petition by the learned Single Judge relying upon extension of the licence period is nothing but setting aside the order of the court which according to us, is impermissible while exercising writ jurisdiction.

Accordingly, these appeals are allowed and the order of the learned Single Judge passed in W P No.18425/2005 dated 30.7.2009 is hereby set aside.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

AKD