IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 6713 OF 2018

Faisal Ahmed Abdul Malik Javeri
(Prop. Aisha Electronics) .. Petitioner
vs.
Union of India and ors. .. Respondents.

WITH

WRIT PETITION NO. 6997 OF 2018

Sunil M. Jain
(Prop:M/s. Riddhi Siddhi
Collection) .. Petitioner
vs.
Union of India and ors. .. Respondents.

WITH

WRIT PETITION NO. 6960 OF 2018

Manoj Meghraj Jain .. Petitioner
vs.
Union of India and ors. .. Respondents.

WITH

WRIT PETITION NO. 4003 OF 2018

Miteshkumar Meghraj Jain .. Petitioner
vs.
Union of India and ors. .. Respondents.

Mr. Vikram Nankani, Sr. Counsel a/w. Mr. Prakash Shah, Mr. Jas Sanghavi and Ms Divyasha Mathur I/b Mr. Yogesh Rohira for the Petitioners in all petitions.
Mr. P.S. Jetly for the Respondents in all matters.

CORAM: M.S. SANKLECHA, J.
AND M.S.SONAK, J.
DATE : 26 JUNE 2019.

ORAL JUDGMENT : (M.S.SONAK,J.)

1] Heard learned counsel for the parties.

2] Learned counsel for the parties state that the issue involved in all these petitions is identical and therefore, all

these petitions can be disposed of by common order. At their request, Writ Petition No. 6713 of 2018 is treated as the lead petition for sake of convenience.

3] The challenge in Writ Petition No.6713 of 2018 is to the order-in-original dated 24th October 2017 made by the Additional Director General, DRI (Adjudication) confirming the demands made upon the petitioner for customs duty and imposing upon the petitioner penalties under the provisions of Customs Act, 1962 (said Act). In fact, the impugned order dated 24th October 2017 is a common order, which has been impugned in all these petitions.

4] There is no dispute that as against the impugned order dated 24th October 2017, the petitioners have alternate remedy of institution of an appeal to the Customs, Central Excise and Service Tax Appellate Tribunal, in terms of Section 129A of the said Act. This on deposit of 7.5% of the amount demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute in terms of Section 129E of the Act. However, it is the case of the petitioners that the impugned order-in-original dated 24th October 2017 was made in violation of principles of natural justice and by ignoring the mandate of Section 138B of the said Act and therefore, this Court should exercise its discretion and entertain these petitions under Article 226 of the Constitution of India without relegating the petitioners to avail alternate remedy of appeal as provided under Section 129A of the said Act.

5] Mr. Vikram Nankani, learned senior counsel for the petitioners, submits that availability of alternate remedy is never a bar to entertainment of a petition under Article 226 of the Constitution of India, particularly, where there is violation of principles of natural justice or where the decision making process itself is flawed. Mr.Nankani submits that in the present case, the petitioners had called upon the Adjudicating Authority to first examine the persons whose statements were alleged recorded under Section 108 of the said Act and thereafter, form an opinion as to whether their statements are required to be admitted in evidence. He submits that the petitioners had then requested that they be granted an opportunity to cross-examine the persons whose statements were proposed to be admitted in evidence. He submits that the Adjudicating Authority failed to examine such persons or form an opinion that the statements of such persons deserve to be admitted in evidence. The petitioners were also deprived effective opportunity of cross-examination. He submits that the process adopted by the Adjudicating Authority was contrary to the law laid down by the Delhi High Court in ***J & K Cigarettes Ltd. vs. Collector of Central Excise – 242 ELT 189 (Del.), Slotco Steel Products Pvt. Ltd. vs. Commissioner of C.Ex., Delhi-I (281) ELT 193 (Del.)*** and the decision of this Court in ***G.T.C. Industries Limited and anr. vs. Union of India and ors. - Original Side Writ Petition No. 1805 of 1994 decided on 5th September 1994,*** which was affirmed by the Hon'ble Supreme Court in ***Civil Appeal No 109 of 1995 (Union of India vs. GTC Industries Ltd.)*** .

6] Mr. Nankani submits that in the alternate these are fit cases where this Court should at least waive requirement of pre-deposit as prescribed in Section 129E of the said Act and direct the Tribunal to entertain the petitioners' appeals against the impugned order-in-original without insisting upon compliances with the requirement of pre-depoist. In support of this alternate contention, he relies on ***M/s IFB Industries Limited, Karnal vs. Commissioner of Central Excise and Service Tax, Panchkula - STA-12-2015 (O& M)*** decided by ***Punjab and Haryana High Court on 14th March 2019*** and ***Brij Kishore Maniyar, Proprietor of M/s. Peninsula Technologies vs. The Customs, Excise & Service Taxex Appellate Tribunal (CESTAT), Kolkata and ors. (CEXA No. 6 of 2017) decided on 23rd April 2019***.

7] Mr. P.S. Jetly, learned counsel for the respondents, submits that there is no infirmity whatsoever in the impugned orders or the decision making process leading to the impugned orders. He submits that several opportunities were granted to the petitioners, but it is the petitioners who failed to avail the same. He submits that the petitioners were clearly informed that the statements referred to in the Show Cause Notices were to be relied upon by the Adjudicating Authority. He submits that opportunity of cross-examination was also offered to the petitioners. He submits that this is not at all a fit case to bypass the alternate remedy provided under the said Act or to avoid mandatory pre-deposit in terms of Section 129E of the said Act. He relies on ***Nimbus Communications Limited vs.***

Commissioner of S.T., Mumbai-IV – 44 STC 578 (Bom) to submit that this Court has already upheld the mandatory pre-deposit conditions for institution of the appeals. For all these reasons, Mr. Jetly submits that these petitions may be dismissed *inter alia* on the ground of availability of alternate remedy under the said Act.

8] The rival contentions now fall for our determination.

9] At the very outset, we make it clear that since we do not propose to entertain these petitions on ground of availability of alternate and efficacious remedy to the petitioners, we refrain from making any observations on merits of rival contentions on the aspect of alleged breach of provisions of Section 138B of the said Act or alleged flaw in the decision making process. However, in order to indicate our reasons as to why, in the peculiar facts and circumstances of the present case, we do not propose to exercise our discretion and entertain these petitions, some reference to these aspects becomes inevitable.

10] The Show Cause Notice issued to the petitioners alleges suppression of Retail Sales Price (RSP) on imported goods like Rechargeable Torches, Rechargeable Lanterns, Emergency LED lights, Rechargeable LED Lamps etc. falling under CTH 8513 of the Customs Tariff Act, 1975 with intent of evading payment of customs duty. The Show Cause Notice alleges that the goods were being supplied by M/s. K.S. Group (H.K.) Ltd., Company based in Hong Kong, which was de *facto* controlled by brothers of the assessee. The Show Cause Notice alleges that these goods

were being sold to web portals like EBAY etc. by declaring only 20 to 25% of the actual RSP with an intend to evade customs duty.

11] Upon receipt of Show Cause Notices, the petitioners, through their advocates, engaged into correspondences with the Adjudicating Authority. The correspondence, does leave a *prima facie* impression that the petitioners were not seriously interested in contesting the Show Cause Notices on merits, but were only interested in laying some foundation for eventually alleging breach of principles of natural justice. We however, hasten to add that this is only a *prima facie* impression.

12] The petitioners by their letter dated 13th June 2016 did request the Adjudicating Authority to examine the persons whose statements came to be recorded under Section 108 of the said Act before admitting such statements in evidence and thereafter granting the petitioners opportunity of cross-examination. The Adjudicating Authority after seeking some details from the petitioners, ultimately informed the petitioners that they would be afforded opportunity to cross-examine such persons on the appointed dates. The matters were posted on certain dates when, on behalf of the petitioners, adjournments were applied for. On one of the occasions, the Adjudicating Authority was himself not present. Finally, the matters were placed on 24th July 2017, on which date, neither the petitioners nor their advocates appeared before the Adjudicating Authority.

13] The paragraphs 3.1 & 5.0.3 of the impugned order-in-original make reference to the manner in which the matter proceeded in some details. Whilst we do not wish to foreclose any of the the petitioners' contentions on the issue of alleged violation of the provisions under Section 138B of the said Act or the principles of natural justice, at least *prima facie,* we are satisfied that the complaint of the petitioners is really not that they were afforded no opportunity whatsoever to meet the case against them but it is the case of the petitioners that they were afforded '*no adequate opportunity'.*

14] The contention that the petitioners were afforded no adequate opportunity will require in depth examination, which can be effectively undertaken by the Appeal Court rather than this Court. Similarly, in such a situation, the question of prejudice also assumes importance, which again, can be effectively gone into by the Appeal Court rather than this Court. Even the question of alleged violation of provisions of Section 138B of the said Act, in the facts and circumstances of the present case, will require in depth examination, which, again, can be undertaken effectively in the exercise of appellate jurisdiction rather than in summary proceedings under Article 226 of the Constitution of India. In all such matters, it is not sufficient for a party to merely allege or even make out a case of technical breach of the principles of natural justice, but the petitioners, will have to plead and establish the consequent prejudice as well. Therefore, though we agree with Mr.Nankani's contention that powers of this Court under Article 226 of the Constitution of India are not denuded simply because of the

availability of alternate remedy, in the peculiar facts and circumstances of the present case, we do not deem it appropriate to exercise our discretion and entertain the present petitions. This is particularly, because there is no explanation whatsoever forthcoming from the petitioners as to why they chose to remain absent before the Adjudicating Authority on 24th July 2017 or to avail of opportunity for cross-examination, even though, the same was clearly offered to the petitioners.

15] In *J & K Cigarettes Ltd. (supra),* the *vires* of Section 9D(2) of the Central Excise Act, 1944, which, may, to certain extent be *pari materia* to the provisions of Section 138B of the said Act was questioned. The observations in the said decision pertain mainly to the provisions in Section 9D(1)(a) of the Central Excise Act, 1944 and not to the provisions in sub-clause (b) of the said section. In the present case, Mr. Nankani's submission mostly related to non-compliance with the provisions of Section 138B(1)(b) of the said Act, which is similar to Section 9D(1)(b) of the Central Excise Act, 1944. It is only in the course of rejoinder that Mr. Nankani attempted to urge that there was breach of Section 138B(1)(a) of the said Act as well. In paragraph 32 of this decision, which was emphasized by Mr.Nankani, the Delhi High Court has itself held that it is always open to the affected party to challenge the invocation of provisions of Section 9D in a particular case by filing statutory appeal.

16] In *Slotco Steel Products Pvt. Ltd. (supra)* entirely relies upon *J & K Cigarettes Ltd. (supra)*. There is nothing in the said

two decisions which persuades us to take view that the petitioners need not be relegated to the alternate remedy under the said Act.

17] In *GTC Industries Ltd. (supra*), this Court accepted the minutes of order and directed the Adjudicating Authority not to rely upon or take into account for passing the adjudication order the statements of any witness who is not tendered for cross-examination by the petitioners. Such order, was upheld by the Apex Court in its order dated 3rd January 1995. In the facts of the present case, the complaint is not really about taking into consideration of the statements of witnesses, who were not tendered for cross-examination by the petitioners. In fact, in the present case, the Adjudicating Authority had clearly allowed the petitioner to cross-examine such persons but it is the petitioners, who failed to avail of such opportunity by not remaining present on the crucial date. Accordingly, the decisions in *GTC Industries Ltd. (supra)* are really not sufficient to conclude that in the peculiar facts of the present case, there has been a patent breach of provisions of Section 138B of the said Act or that there has been any failure of natural justice. We hasten to add that all these are only *prima facie* observations and all these contentions will have to be examined in some details by the Appellate Authority should the petitioners avail of alternate and statutory remedy of appeal provided under the said Act.

18] Accordingly, for all the aforesaid reasons, we are satisfied that this is not fit case to exercise our discretion and entertain

the present petitions, when, the petitioners have an alternate and efficacious remedy of appeal available to them under the said Act.

19] For substantially the very same reasons, we also do not think that this is a fit case to consider the petitioners alternate relief of waiver of pre-deposit in the institution of appeals. To issue any such writ to the Appellate Authority would virtually amount to directing the Appellate Authority to act contrary to the statutory mandate of Section 129E of the said Act. The constitutional validity of this provision has already been upheld in ***Haresh N. Vora vs. Union of India – 353 E.L.T. 154 (Bom)*** as well as *Nimbus Communications Limited (supra).*

20] In ***Murari S. Sawant vs. Commissioner of Customs (Export) and anr. (Civil Writ Petition No. 2405 of 2019 decided by us on 20th June 2019)***, we declined to issue a writ requiring the Appellate Authority to waive the requirement of pre-deposit in terms of Section 129E of the said Act.

21] No doubt, there are certain decisions, in which it has been held that the provisions of Customs Act will not affect the powers of jurisdiction of this Court under Article 226 of the Constitution of India. There is absolutely no dispute as regards such proposition. This however, means that in a given case there can be absolutely no bar to this Court examining orders made by statutory Authoritities without requiring the petitioners to avail of alternate remedies that may be available

under the Statute. In the facts and circumstances of the present case, however, no case is made out to entertain these writ petitions when there is really nothing demonstrated as to why the petitioners cannot avail the alternate remedy of appeal, which is very much available to them. The contention that the requirement of pre-deposit itself constitutes a hardship, is neither pleaded nor elaborated. In any case, once the constitutional validity of such provision is upheld, we are not inclined to issue any writ or direction to the Appellate Authority to waive such mandatory requirement and entertain the petitions.

22] In *IFB Industries Limited (supra)* and *Brij Kishore Maniyar (supra),* there was no discussion on the issue as to whether a writ Court can direct statutory Authority to entertain an appeal by ignoring mandatory requirement of pre-deposit, though, it does appear that such directions were issued in the said decisions. However, we chose to follow our decision in *Murari Sawant (supra)* and declined to issue a writ requiring the Adjudicating Authority to ignore the mandate of Section 129E of the said Act.

23] We make it clear that the observations in this order are only *prima facie* and the same are in no manner intended to foreclose the contentions of either parties, should, the petitioners chose to institute appeals against the impugned orders. The observations are only in the context of examining as to whether any case is made out for exercise of discretion to

entertain these petitions rather than relegate the petitioners to avail alternate remedy available under the said Act.

24] All the petitions are accordingly, dismissed. There shall be, however, no order as to costs.

(M.S.SONAK, J.) **(M.S.SANKLECHA, J.)**