IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 20016 of 2016

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS.JUSTICE HARSHA DEVANI

and
HONOURABLE MR.JUSTICE A.S. SUPEHIA

==

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

==

MESSRS OM SIDDH VINAYAK IMPEX PVT. LTD. & 1....Petitioner(s)
Versus
UNION OF INDIA & 1....Respondent(s)

==

Appearance:
AMAL PARESH DAVE, ADVOCATE for the Petitioner(s) No. 1 - 2
MR PARESH M DAVE, ADVOCATE for the Petitioner(s) No. 1 - 2
JAIMIN A GANDHI, ADVOCATE for the Respondent(s) No. 2
NOTICE SERVED for the Respondent(s) No. 1

==

CORAM: **HONOURABLE MS.JUSTICE HARSHA DEVANI**
and
HONOURABLE MR.JUSTICE A.S. SUPEHIA

Date : 21/03/2017

ORAL JUDGMENT
(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. The show cause notice No.S/10-23/2007-Adj. dated 06.09.2007 (Annexure "H" to the petition) issued by the Commissioner of Customs, Kandla (the second respondent herein) is subject matter of challenge in this petition under Article 226 of the Constitution of India.

2. The facts stated briefly are that a Letter of Permission (LOP) came to be issued in favour of the petitioner company by the Development Commissioner, Kandla Special Economic Zone, thereby licensing and permitting the petitioner company to operate a unit for manufacturing various textile goods as an SEZ unit; and this LOP has been extended from time to time and is still in operation. On 25.09.2003, the petitioner company filed a Bill of Entry No.2376 for 2563.2 kilograms of Synthetic Fabric/Stock Lots imported from China, declaring classification under Sub-Heading No.54075290 and claiming concessional rate of customs duty. The Customs Officer received a report dated 16.10.2003 from the Kandla Customs Laboratory in connection with the above goods. He, however, did not agree with the report and hence, sent the samples to the Textile Committee, Mumbai for ascertaining the nature of the goods. In the meanwhile, the Assessing Officer made an order of provisional assessment on the Bill of Entry stating on the bill itself that provisional assessment was for awaiting the report of the Textile Committee, Mumbai.

3. In February, 2004, the petitioner company paid the duty assessed provisionally and cleared the goods to their unit, and a small quantity of the imported materials was sold in the local market on payment of central excise duty under two central excise invoices. The Assessing Officer, by an order dated 09.03.2007, unilaterally finalized the assessment by adopting the assessable value as Rs.20,66,877/- and determined the import duty chargeable at Rs.71,57,744/- It appears that thereafter, a show cause notice dated 06.09.2007 came to be issued to the petitioner proposing confiscation of 25,603.2 kilograms of Synthetic Fabric Stock Lot under sections 111(j), 111(m) and 111(o) of the Customs Act, 1962 (hereinafter referred to as “the Act”) and proposing to recover customs duties amounting to Rs.71,57,744/- (calculated in the same manner as calculated in the order dated 09.03.2007 of Finalisation of Provisional Assessment) not paid at the time of clearance of the goods into DTA with interest and imposition of penalty under sections 114A, 112 (a) of the Act.

4. Being aggrieved, by the above order dated 09.03.2007, unilaterally finalizing their assessment, the petitioners preferred an appeal before the Commissioner of Customs (Appeals), who, by an order dated 20.03.2008, set aside the order of final assessment on the ground that while finalizing the assessment, the adjudicating authority had placed reliance upon the report dated 16.10.2003 of the Kandla Customs Laboratory, a copy whereof was not furnished to the petitioners, and remanded the matter for finalization after following the principles of natural justice. Pursuant to the order dated 20.03.2008 passed by the Commissioner of Customs (Appeals), a show cause notice dated 18.12.2008 came to be

issued to the petitioners by the Deputy Commissioner of Customs, to show cause as to why (i) the declared classification should not be changed and while enhancing declared value of the goods; (ii) the Bill of Entry No.2376 dated 25.09.2003 should not be finally assessed by enhancing the assessable value to Rs.20,66,877/-; (iii) why the duty of amount of Rs.71,57,744/- should not be levied under section 18(2) of the Customs Act; and (iv) interest on the duty should not be recovered under section 18(3) of the Act. The above show cause notice culminated into an order dated 12.11.2015 whereby, the Deputy Commissioner of Customs, Kandla Special Economic Zone ordered change of classification and enhancement of value, and while denying the claim for concessional rate of customs duty, confirmed the duty demand of Rs.71,57,744/-.

5. The petitioners carried the matter in appeal before the Commissioner of Customs (Appeals), who, vide order dated 11.05.2016, allowed the appeal filed by the petitioners and set aside the adjudication order regarding change in classification and enhancement of value as well as differential duty demand. Against the said order, the Commissioner of Customs, Kandla has preferred an appeal before the Customs, Excise and Service Tax Appellate Tribunal, Ahmedabad (hereinafter referred to as “the Appellate Tribunal”). Vide order dated 04.10.2016, the Appellate Tribunal has allowed the application for condonation of the delay caused in filing the appeal, and the appeal is now pending for decision on merits.

6. As noticed hereinabove, previously a show cause notice dated 06.09.2007 had been issued to the petitioners,

containing proposals for change in classification of the goods and demand of differential customs duty at Rs.71,57,744/-. In response to the show cause notice dated 06.09.2007, the petitioners filed a substantive reply dated 30.08.2016, *inter alia,* pointing out that the proceedings have now culminated into revenue's appeal before the Appellate Tribunal and that the show cause notice dated 06.09.2007 deserves to be vacated and dropped at once because demand of customs duty and also confiscation of the materials imported vide Bill of Entry No.2376 dated 25.09.2003 have already been ordered by another competent Customs Officer, namely, Deputy Commissioner of Customs, Kandla SEZ and the appeal of the petitioner company has been allowed by the Appellate Commissioner, for which the revenue is now contesting the case before the Appellate Tribunal.

7. It appears that pursuant to the show cause notice dated 06.09.2007, the second respondent fixed personal hearing on 08.09.2016, for which a notice of hearing dated 11.08.2016 was issued from his office. In response thereto, the petitioners filed their substantive reply. Thereafter, the petitioner company through its advocates, appeared before the second respondent at Kandla on 08.09.2016, wherein various submissions were made by the petitioners' advocates during the course of personal hearing, when the second respondent stated that he would not conclude the hearing and adjudication of the show cause notice, but the same would be kept pending until the Appellate Tribunal decided the revenue's Appeal No.C/11604/2016. It is the case of the petitioners that though the petitioners' advocate requested for formally withdrawing the show cause notice dated 06.09.2007

because it was nothing but duplication and repetition of revenue’s case, wherein the orders have already been passed by the competent authorities including the Appellate Commissioner, but the second respondent did not agree to such submission and request, and has kept the show cause notice dated 06.09.2007 in abeyance. It is in this backdrop that the petitioners have, therefore, approached this court contending that the proceedings pursuant to the show cause dated 06.09.2007 are wholly illegal and without jurisdiction and that the proceedings are also in the nature of abuse of the process of law.

8. Mr. Paresh Dave, learned advocate for the petitioners invited the attention of the court to the proposals contained in the show cause notice dated 18.12.2008 as well as to the proposals contained in the impugned show cause notice dated 06.09.2007, to point out that by and large, the proposals contained in both the show cause notices are identical. It was submitted that once pursuant to the directions issued by the Commissioner of Customs (Appeals), a show cause notice has already been issued by the Deputy Commissioner of Customs, and a regular adjudication order on such show cause notice has also been made by whereby differential customs duty of Rs.71,57,744/- with interest has been demanded, it is not permissible for the Commissioner of Customs, Kandla to pursue another show cause notice issued by him for the same subject matter, namely, demand of differential customs duty aggregating to Rs.71,57,744/- for the same goods covered under the above referred Bill of Entry. It was contended that when a regular adjudication for the same subject matter has already been made by a competent customs officer and the

orders made in such adjudication and appeal proceedings are now pending before the Appellate Tribunal for deciding whether the above referred duty demand on the materials imported vide Bill of Entry dated 25.09.2003 was legally correct or not, the same authority who has filed the appeal before the Appellate Tribunal on behalf of the Customs Department has no jurisdiction to continue with another show cause notice involving the same cause and the same subject matter. It was contended that initiating parallel and multiple proceedings against a citizen for the same cause and subject matter is contrary to the sound public policy, and such parallel proceedings are also in the nature of abuse of the process of law.

8.1 It was submitted that in case the respondents succeed in their appeal before the Appellate Tribunal, the petitioners would be liable to pay the customs duty as determined under the order-in-original passed by the Deputy Commissioner of Customs, and that in case the respondents lose in the proceedings before the Appellate Tribunal, it would not be permissible for them to demand such customs duty by merely placing reliance upon the show cause notice dated 06.09.2007. It was urged that therefore, continuing with the show cause notice dated 06.09.2007 is illegal and without authority of law.

9. Opposing the petition, Mr. Jaimin Gandhi, learned Senior Standing Counsel for the respondents submitted that the show cause notice dated 18.12.2008 related to a dispute regarding (i) classification of goods imported by Bill of Entry No.2376 dated 25.09.2003, and (ii) valuation of goods imported by Bill of Entry No.2376 dated 25.09.2003. It was submitted that the

said show cause notice dated 18.12.2008 resulted into an adjudication order dated 12.11.2015, wherein it was held that the goods imported by Bill of Entry No.2376 dated 25.09.2003 were falling under Chapter Sub Heading 54078290 of the Customs Tariff Act and unit price declared was undervalued to evade customs duty and accordingly, it was enhanced. It was submitted that the first show cause notice dated 06.09.2007 was issued in the context of Bill of Entry No.2376 dated 25.09.2003 but on different issues, and the same mainly investigates the issue regarding clearance of goods imported by Bill of Entry No.2376 dated 25.09.2003 into Domestic Tariff Area without payment of customs duty. It was submitted that the show cause notice also investigates the breach of condition of Notification No.137/2000 dated 19.10.2000 as well as, as to whether the goods were required to be confiscated or not, and that the same further investigates the issue whether Shri Naresh Sharaf (Director of M/s Om Siddhi Vinayak), Shri Rajindra Jain (Director of M/s Gautam Spinners) and Shri Prakash Punia (Owner of M/s New Standard Roadways) were liable to penal action under section 112(b) of the Act. It was submitted that therefore, the scope of the show cause notice dated 06.09.2007 is different and distinct from the scope of the show cause notice dated 18.12.2008, and hence, the contention of the petitioners that the subject matter of both the show cause notices is the same, does not merit acceptance. It was, accordingly, urged that the petition being devoid of any merit or substance, deserves to be dismissed.

10. A perusal of the record of the case reveals that in show cause notice dated 06.09.2007 which has been issued first in point of time, the Deputy Commissioner of Customs had, *inter*

alia, noted that the unit imported the impugned goods without payment of duty by claiming exemption under notification dated 19.10.2000; as per the terms and conditions of the said notification, the said goods were exempted when imported into India for the purpose of manufacture of goods and export thereof; and that in this case, the said purpose of manufacture of goods out of the imported goods and export thereof was not achieved. It is further noted in the show cause notice that in this case, the unit had removed the imported goods as such into DTA. In other words, no production or manufacturing activity was undertaken on the imported goods. Ultimately, by the said show cause notice, the petitioner was called upon to show cause as to why (i) the said 25,603.2 kg imported Synthetic Fabric Stock Lot (100% Polyester Plain Dyed Fabric) should not be held as liable to confiscation under the provisions of section 111(j), section 111(m) and section 111(o) of the Act (however, the goods are not available for confiscation); (ii) the customs duties totally amounting to Rs.71,57,744/- not paid at the time of clearance of the impugned goods into DTA should not be demanded and recovered from them with interest in terms of the proviso to section 28(1) of the Act, section 28AB of the Act as well as in terms of the bonds executed by them, and (iii) as to why penalty should not be imposed upon them under the provisions of section 114A /112(a) of the Act.

11. It may be noted that at the time when the petitioners cleared the goods, provisional assessment was made, however, the final assessment whereby the assessable value of the Synthetic Fabric was enhanced, was based upon a test report obtained by the adjudicating authority. However, such

report had not been furnished to the petitioners. The order of final assessment came to be challenged by the petitioners before the Commissioner (Appeals), who by an order dated 20.03.2008, set aside the order and remanded the matter for finalization of assessment after following the principles of natural justice. A perusal of the record further reveals that in the remand proceedings, the adjudicating authority instead of confining the proceedings to the determination of the assessable value of the Synthetic Fabric, issued show cause notice dated 18.12.2008, calling upon the petitioners to show cause as to why: (i) the imported goods should not be classified under Chapter Sub Heading 54078290 of the Customs Tariff Act as per the test report mentioned above and not under Chapter Sub Heading 54075290 as claimed by them; (ii) the Bill of Entry No.2376 dated 25.09.2003 should not be finally assessed by enhancing the assessable value to Rs.20,66,877/-; (iii) the duty amount to Rs.71,57,744/- should not be levied under section 18(2) of the Customs Act, 1962, and (iv) why they should not be liable to pay interest on the duty from the first day of the month of the provisional assessment, that is, 01.09.2003 till the date of actual payment under section 18(3) of the Customs Act, 1962.

12. The above referred show cause notice dated 18.12.2008 culminated into an order-in-original dated 16.11.2015, whereby the adjudicating authority ordered thus:

> *"18 [a] I order to classify the imported goods mentioned in the said Bill of Entry No.2376 dated 25.09.2003 under chapter sub-heading No.57078290 of the Customs Tariff Act as per the test report mentioned above and not under chapter sub-heading No.54075290*

as claimed by the unit;

[b] I order for finalization of provisional assessment of Bill of Entry No.2376 dated 25.09.2003 by enhancing the assessable value to Rs.20,66,877/- as explained at above;

[c] I order to confirm the duty amount of Rs.71,57,744/- explained at above on the unit under section 18(2) of the Customs Act, 1962; and

[d] I order for recovery of interest at the applicable rates on the duty amount mentioned at (c) from the first day of the month of the provisional assessment i.e. 01.09.2003 till the date of actual payment under the provisions of section 18(3) of the Customs Act, 1962."

13. The petitioners carried the matter in appeal before the Commissioner (Appeals), who, vide order-in-appeal dated 11.05.2016, set aside the order-in-original, holding thus:

"10. In view of the above discussion and findings, I hold that the Department has not established by any reliable and acceptable evidence that the goods imported by appellant are classifiable under SH No.57078290. I hold that appellant is entitled to exemption from customs duty for the goods in question under Notification No.137/2000-Cus so long as such goods are used for authorized operations under LOP which is manufacture of ready-made garments duly stitched. Enhancement of value by the adjudicating authority is unsustainable and demand of duty and interest are also unsustainable. I also hold that this order is confined to demand of duty for import of the concerned materials, and not for any other case for diversion, if any, of imported materials in DTA or otherwise any contravention of other provisions of the Act and the law applicable by the appellant."

14. The Commissioner of Customs, Kandla has challenged the above order of the Commissioner (Appeals) before the Appellate Tribunal, which has condoned the delay in filing the appeal, and at present the appeal is pending before the

Appellate Tribunal.

15. However, at this stage, a notice of hearing dated 11.08.2016 came to be issued to the petitioners in connection with the previous show cause notice dated 06.09.2007, in response to which, the petitioners requested the adjudicating authority to drop the proceedings as two parallel proceedings in respect of the same cause of action are not permissible. However, the adjudicating authority refused to accept such request and has kept the show cause notice dated 06.09.2007 in abeyance pending the decision of the Appellate Tribunal.

16. It may be noted that initially at the time of finalizing the assessment of the Bill of Entry in question vide order dated 09.03.2007, the same was limited to determining the assessable value of the imported goods. However, when the matter was remanded to the adjudicating authority to comply with the principles of natural justice, instead of confining the matter to the determination of the assessable value of the imported goods, the Deputy Commissioner of Customs, KASEZ, Gandhidham, issued the show cause notice dated 18.12.2008, whereby he widened the scope of the proceeding by proposing to confirm the duty demand with interest. Thereafter, the adjudicating authority passed an Order-In-Original dated 16.11.2015 wherein the adjudicating authority took into consideration events that had transpired after the goods were cleared and, inter alia, recorded that no manufacturing activity was permitted from new clothes and no special permission was given by the Specified Officer to import the said goods either. Even though not permitted, no manufacturing activities were undertaken by the unit, as they have no manufacturing facility

but were having only rags cutter machines and bailing machines in their sheds and they did not use the goods for the intended purpose. That instead of using the said goods for the intended purpose for which they were imported, they cleared such goods in the original form into DTA by mentioning CTSH no.6309/631090 (as old and used worn clothes) with payment of duties and without the knowledge of the department. The adjudicating authority also recorded a finding that the sale/diversion of the imported goods imported vide the said Bill of Entry as such in original form was enquired and found to be correct by the DRI during their investigation, which was accepted by the Directors of the unit, and a case was booked against the said unit. The adjudicating authority has referred to the pendency of the show cause notice dated 06.09.2007, and has observed that it is clearly understood that, the unit had sold/diverted the imported goods as such in original form in DTA, in violation of Notification No.137/2000 dated 19.10.2000. The adjudicating authority has thereafter recorded a finding that the eligibility of exemption from customs duty as claimed under Notification No.137/2000 dated 19.10.2000 does not arise, as the unit has not utilized the said imported goods in their authorised operations even when not eligible for import of such goods nor utilized for their intended purpose. The adjudicating authority has thereafter referred to diversion of the goods imported and has stated that it restrains itself to the issue, as the issue of diversion of goods in original form without subjecting to any manufacturing process in DTA in the original form was investigated by DRI and is being separately dealt in the form of show cause notice being adjudicated by the Commissioner of Customs, Kandla. However, on the basis of the findings recorded by it, the adjudicating authority has

held that the petitioners are not entitled to the benefit of Notification No.137/2000 dated 19.10.2000. The adjudicating authority has further recorded that there is a clear violation of the provisions of the Notification No.137/2000-Cus. and has thereafter worked out the assessable value of the imported goods and has held that higher duty of Rs.71,57,744/- is leviable and in the operative part of the order, classified the goods mentioned in Bill of Entry No.2376 dated 25.09.2003 under Sub-Heading 57078290 of the Customs Tariff Act as per the test report and not under Chapter Sub-Heading No.54075290 as claimed by the petitioners; ordered finalisation of provisional assessment of Bill of Entry No.2376 dated 25.09.2003 by enhancing the assessable value to Rs.20,66,877/-; confirmed the duty demand of Rs.71,57,744/- under section 18(2) of the Customs Act; and ordered recovery of interest at applicable rates on the duty amount of Rs.71,57,744/-.

17. It may be noted that the proceeding in relation to which show cause notice dated 18.12.2008 came to be issued related to finalisation of the assessment and in those proceedings all the that adjudicating authority was required to do was determine the assessable value of the goods. It cannot be gainsaid that at the stage of import of goods, the question of diversion would not arise, as that would be a stage subsequent to the import of goods. The adjudicating authority, however, while deciding the show cause notice dated 18.12.2008, included the issue of diversion, which was already subject matter of the show cause notice dated 06.09.2007 and in the order-in-original made pursuant thereto, has given specific findings on the aspect of diversion and has confirmed the duty

demand with interest.

18. On a conjoint reading of the show cause notices dated 18.12.2008 and 07.09.2007, it is apparent that both arise out of the same subject matter, viz., Bill of Entry No.2376 dated 25.09.2003. In both the show cause notices, a duty demand of Rs.71,57,744/- is sought to be made under section 18(2) of the Act together with interest. In the show cause notice dated 07.09.2007, additionally there are proposals for confiscation of goods and imposition of penalty. However, insofar as the duty which is sought to be levied is concerned, the scope of both the show cause notices is identical. It cannot be gainsaid that one of the basics issue that arises in the context of both the show cause notices is as to whether the duty demand should be confirmed. Since the levy of duty is based on the premise that the goods imported vide Bill of Entry No.2376 dated 25.09.2003 have been diverted to the DTA, it cannot be said that the subject matter of both the show cause notices are different. While it is true that the show cause notice dated 06.09.2007 also proposes to confiscate the goods (which are not available for confiscation) and impose penalty, the question of confiscation of the goods and levy of penalty would be dependent on the adjudication of the issue regarding diversion of the imported goods to the DTA. As noticed earlier, though the show cause notice dated 06.09.2007 was issued prior in point of time, pursuant to the subsequent show cause notice dated 18.12.2008, the adjudicating authority has proceeded further and has recorded findings on the question of diversion and has held against the petitioners; the order passed by the adjudicating authority was subject matter of challenge before the Commissioner (Appeals); and the

petitioners having succeeded before the Commissioner (Appeals), the matter is pending before the Appellate Tribunal at the instance of the Commissioner (Appeals). Therefore, the issue of diversion has already been adjudicated upon and the matter is pending at the stage of Tribunal.

19. In the opinion of this court, once the question of duty liability based upon the allegation of diversion of the goods to the DTA in relation to the goods imported vide Bill of Entry No.2376 dated 25.09.2003 has already been adjudicated upon, it is not permissible for the respondents to pursue another proceeding in relation to the same subject matter as it is not permissible for the authorities to prosecute two parallel proceedings in relation to the same subject matter. While it is true that the show cause notice dated 18.12.2008 does not propose confiscation of goods and levy of penalty, an order of confiscation or penalty would be only consequential to the confirmation of the duty liability. In the facts of the present case, having regard to the fact that the adjudicating authority, albeit beyond the scope of the proceeding before him, has thought it fit to issue a show cause notice in respect of levy of duty and interest, and has already proceeded to adjudicate upon the same, it is now not permissible for the respondent authorities to proceed further to adjudicate upon the same controversy in another parallel proceeding.

20. Insofar as confiscation of the goods is concerned, the learned advocate for the petitioners has pointed out that in the proposal itself, it has been noted that the goods are not available for confiscation and hence, the question of confiscation would not arise. Be that as it may, though there

may be additional proposals in the subsequent show cause notice, the basic proposal relates to confirmation of duty and interest based upon the allegation of diversion, which has already been adjudicated upon pursuant to the show cause notice dated 18.12.2008. The adjudicating authority having already adjudicated upon the issues, it is not permissible for it to keep the proceedings of the show cause notice dated 06.09.2007 in abeyance till the culmination of the proceedings arising from the show cause notice dated 18.12.2008. The continuance or otherwise of the show cause notice dated 06.09.2007 cannot be contingent upon the outcome of the proceedings arising out of the show cause notice dated 18.12.2008. Under the circumstances, further proceedings pursuant to the show cause notice dated 06.09.2007, which relate to a subject matter which already stands adjudicated, stand vitiated. The impugned show cause notice, therefore, cannot be sustained.

21. For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The impugned show cause notice dated 06.09.2007, only to the extent the same relates to the petitioners herein, is hereby quashed and set aside. Rule is made absolute accordingly with no order as to costs.

(HARSHA DEVANI, J.)

(A. S. SUPEHIA, J.)

parmar*