

Niti

**IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO.39 OF 2022**

1. S. J. Enterprises
Prop; Sushant Subhash Jadhav
Branch at No.3, Ganesh Chawl,
Opp.Datta Mandir Ashok Nagar
Datar Colony, Bhandup (E)
Mumbai — 400 042.

2. Marks Global Logistics
a Partnership firm, registered
under Indian Partnership Act,
Partner Ms. Kusum R. Chauhan
2TM Floor, 208, Mehta House
Vasco-Da-Gama, Goa-403 802.

...Petitioners

Versus

1. Union of India
Represented by its Under
Secretary Ministry of Finance
Department of Revenue,
North Block, New Delhi - 110 001.

2. The Commissioner of Customs
Custom House, Harbour,
Marmagoa. Goa - 403 803.

3. The Assistant Commissioner
of Customs, Harbour
Custom House, Marmagoa,
Goa- 403 803.

4. Senior Branch Manager,
HDFC Bank Limited,
Shop No.4,5,6, ground floor,

Siolim Plaza, Siolim,
Goa – 403 517.

... Respondents

Mr. Manoj Ramsurat Chauhan i/b MRC Legal, *Advocate for the Petitioners.*

Ms. Asha Desai, Senior Standing Counsel *for the Respondents.*

**CORAM: DIPANKAR DATTA, CJ. &
M. S. SONAK, J.**

DATED: 5th AUGUST 2022

JUDGMENT : (*Per M.S. Sonak, J.*)

1. Heard Mr. Chauhan instructed by MRC Legal for the petitioners and Ms. Asha Desai, Senior Standing Counsel for the respondents.

2. Rule. The rule is made returnable immediately at the request of and with the consent of the learned Counsel for the parties.

3. The petitioners seek the following substantive reliefs:

"(a) that this Hon'ble Court may be pleased to quash the impugned letter/order dated 15.7.2020 issued from F. No. S/99-03/2020-Appg/1791 to the HDFC Bank Ltd., Siolim branch, Goa;

(b) that the impugned letter/order dated 15.7.2020 issued from F. No. S/99-03/2020-Appg/1791 to the HDFC Bank Ltd., Siolim branch, Goa, are illegal and arbitrary and deserve to be quashed. Also applying the principles of restitution, it necessary to direct the respondents to refund/restore the bank guarantee and maintain the status quo till final disposal of the appeal pending in the Customs, Excise and Service Tax appellate Tribunal."

4. The above reliefs are applied in the context of the respondents adopting coercive measures and encashing the Bank Guarantee furnished by the petitioners on the date of service of the Order in Original dated 30.06.2020 upon the petitioners and before the petitioners could avail of the opportunity to appeal the order dated 30.06.2020.

5. The petitioners contend that such coercive action contradicts the Central Board of Excise and Customs (CBEC) circular no.984/08/2014-CX dated 16.09.2014. Mr. Chauhan has relied on several decisions where this circular or similar circulars have been enforced and directions issued to the respondents to refrain from taking coercive action before the expiry of limitation to institute an appeal or during the pendency of the appeal.

6. Ms. Asha Desai objected to the maintainability of this petition by pointing out that the petitioners have an alternate and efficacious remedy of appeal against the Order in Original dated 30.06.2020. She submitted that the respondents had merely addressed a letter to the HDFC Bank seeking encashment of the Bank Guarantee as it was expected that the encashment formalities would take some time. Therefore, she maintained that the petitioners should be relegated to avail of the alternate remedy of appeal. Moreover, if such an appeal succeeds, the petitioners can always be refunded the recovered amounts with interest.

7. Rival contentions now fall for our determination.

8. Mr. Chauhan, the learned Counsel for the petitioners, clarified that the petitioners were not challenging the Order in Original dated 30.06.2020 in this petition. He submitted that the petitioners had already instituted an appeal before the appellate authority challenging said order. He offered that the challenge in this petition was limited to the coercive action of encashment of Bank Guarantee with tearing hurry and even before the petitioners could institute the appeal within the prescribed period of limitation. As noted above, he referred to several decisions where Courts in similar circumstances have not only entertained Writ Petitions but also interfered with the respondents' action.

9. Regarding the above position, we do not think that any case is made to uphold the preliminary objection raised by Ms. Desai about the alternate remedy. In the undisputed facts from the record, the remedy of appeal can hardly be regarded as efficacious to seek redress against the coercive action of encashment of the Bank Guarantee.

10. Admittedly, the Order in Original dated 30.06.2020 was issued on 06.07.2020 but served on the petitioner only on 15.07.2020. The order states that any person aggrieved by the same may prefer an appeal to the Appellate Tribunal under Section 129(3) of Customs Act, 1962 within three months from the date of the communication of the order with the Assistant Registrar, Customs, Excise and Service Tax Appellate Tribunal (CESTAT), Western Bench, Mumbai.

11. Respondent no.3, however, on the same day, on 15.07.2020, addressed a communication to the Senior Manager of the HDFC Bank Ltd. to encash Bank Guarantees dated 12.06.2019 furnished by the petitioner. As a result, based on the communication dated 15.07.2020, the HDFC Bank (respondent no.4) transferred the amounts of ₹35,25,160/- and ₹10,58,000/- with the respondents to cover the demands in the Order in Original dated 30.06.2020. Thus, by adopting such coercive

measures and even before the petitioner could appeal, the respondents recovered the said amounts in executing the Order in Original.

12. To prevent the above situations, the CBEC has issued a circular dated 16.09.2014. Paragraph 4 of this Circular is relevant, and the same is transcribed below:

"4. Recovery of the Amounts during the Pendency of Appeal:

4.1 Vide Circular No.967/1/2013 dated 1st January, 2013, Board has issued detailed instructions with regard to recovery of the amounts due to the Government during the pendency of stay applications or appeals with the appellate authority. This Circular would not apply to cases where appeal is filed after the enactment of the amended Section 35F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962.

4.2 No coercive measures for the recovery of balance amount i.e., the amount in excess of 7.5% or 10% deposited in terms of Section 35F of Central Excise Act, 1944 or Section 129E of Customs Act, 1962, shall be taken during the pendency of appeal where the party/assessee shows to the jurisdictional authorities:

(i) proof of payment of stipulated amount as pre-deposit of 7.5%/10%, subject to a limit of Rs.10 crores, as the case may be; and

(ii) the copy of appeal memo filed with the appellate authority.

4.3 Recovery action, if any, can be initiated only after the disposal of the case by the Commissioner (Appeal)/Tribunal in favour of the Department. For example, if the Tribunal decides a case in favour of the Department, recovery action for the amount over and above the amount deposited under the provisions of Section 35F/129E may be initiated unless the order of the Tribunal is stayed by the High Court/Supreme court. The recovery, in such cases, would include the interest, at the specified rate, from the date duty became payable, till the date of payment."

13. Circular presupposes a grant of reasonable time for instituting the appeal together with the stipulated pre-deposit. Furthermore, the Circular provides that no coercive measures for recovery of the balance amount that is in excess of the pre-deposit amount should be taken during the pendency of the appeal, and recovery action, if any, can be initiated only after the disposal of the appeal in favor of the Department.

14. In somewhat similar circumstances, a Co-ordinate Bench in *Mahindra & Mahindra Ltd. V/s. Union of India*¹ deprecated the encashment of Bank Guarantees even before the expiry of the

¹ MANU/MH/0316/1992

statutory period of three months for instituting appeals against orders. The relevant observations in paragraph 4 read as follows:

"4. In our opinion, it was highly improper on the part of the Collector and Assistant Collector to encash the bank guarantees before expiry of the statutory period of three months and in particular when petitioners had specifically informed that the stay application is fixed for hearing on 17th February 1992. Be that as it may, we accordingly direct Respondents Nos. 2 and 3 to pay entire amount recovered by encashing bank guarantees to the petitioners within 10 days from today. On receipt of the said amount by the petitioners, they shall execute bank guarantee in favour of the Collector of Central Excise within two weeks thereafter. It is also made clear that until disposal of the stay application bank guarantee will continue and in the event if the Tribunal rejects the application for stay, the said order shall not be executed for a period of two weeks from the date of its service on the petitioners."

15. In *N.G. Enterprises V/s. Commissioner of Customs (Appeals)*², the Division Bench of the Delhi High Court, by referring to the Board's circular dated 02.06.1998, held that the revenue could not be permitted to take a stand contrary to the instructions issued by the Board. It is a different matter that an assessed can contest the validity or legality of a departmental instruction. But that right cannot be conceded to the

² MANU/DE/1152/2000

Department, more so when others have acted according to such instructions. The circular, in terms, provided that coercive measures to recover duty demanded as a result of adjudication ought not to be taken until the Commissioner's disposal of the stay application. Moreover, the Circular took cognizance of the Bombay High Court ruling that no coercive action should be taken to realize the dues during the pendency of the stay application before appellate authorities.

16. In similar facts, a similar view was taken by the High Court of Karnataka in *M/s. FCI Oen Connectors Ltd. V/s. Union of India & Ors.*³ & *Oracle India Pvt. Ltd. V/s. Union of India*⁴.

17. In *Ocean Driving Centre V/s. Union of India & Ors.*⁵, another coordinate Bench, after referring to the declared policy of the Customs Authorities not to resort to coercive action to recover duty during the appeal period, held that the authorities cannot encash the Bank Guarantee given by the Assessee before the expiry of the statutory period available for filing an appeal along with an application for stay or waiver to pre-deposit.

3 WP No.5901/2021 decided on 23.12.2021

4 2013 SCC OnLine Kar 10723

5 2004 (3) Mh.L.J. 55

18. A similar view was taken in *Nobel Asset Company Ltd. V/s. Union of India*⁶ by a Coordinate Division Bench.

19. Despite circulars and instructions by the CBEC or the Board and decisions of the several High Courts, the Customs department continued to adopt coercive measures or encash Bank Guarantees even before the expiry of the period for the institution of statutory appeals or during the pendency of such appeals. A coordinate Division Bench noticed this in *Legrand (India) Pvt. Ltd. V/s. Union of India*⁷.

20. The Division Bench felt that such conduct on the part of the Customs Authorities, at least *prima facie*, amounted to wilful and deliberate disobedience on the part of the Assistant Commissioner of Customs (Import) to the law laid down by this Court in *Mahindra and Mahindra Ltd.* (supra) and *Nobel Asset Company Ltd.* (supra). Therefore, the Assistant Commissioner of Customs (Import) was directed to deposit in this Court the encashed Bank Guarantee worth of ₹14,33,000/- and a show cause notice was issued as to why action under the provisions of the Contempt of Courts Act should not be initiated for *prima*

6 2005 SCC OnLine Bom 1710

7 2007 (6) Mh.L.J. 146

facie wilful disobedience of the law laid down by this Court in the above decisions.

21. However, the Assistant Commissioner of Customs (Import) tendered an unconditional apology, and the learned Senior Counsel appearing for Union of India assured the Court that in the future, adequate care would be taken to follow the law laid down by this Court scrupulously. Accordingly, the contempt notice was discharged.

22. Despite the above assurance, we find that in the present case, the respondents have acted not only in breach of the Circular of CBEC, which was binding on them but also in breach of the law laid down by the several decisions referred to above. The CBEC circular and the instructions bind the Customs Authorities. In any case, the Customs Authorities are bound by the various decisions referred above, not to mention the solemn assurance on behalf of the Union of India that in the future, adequate care would be taken to follow the law laid down by this Court scrupulously. Therefore, the impugned action is unsustainable.

23. For all the above reasons, we quash the impugned letter/order dated 15.07.2020 and direct the respondents to

restore the petitioner's Bank Guarantee and maintain status quo *ante* till the disposal of an appeal instituted by the petitioners before the appellate authority.

24. The respondents must take necessary steps to restore the Bank Guarantee and, consequently, the status quo *ante* as expeditiously as possible and, in any case, not later than 15 days from the uploading of this order.

25. Further, we direct the Commissioner of Customs (respondent no.2) to circulate this judgment and order to all Assistant Commissioners or adjudicating Officers so that in future, there are no similar instances of breach of CBEC instructions or the disobedience of judicial orders. If the Commissioner finds any further cases of violation, we expect the Commissioner to take necessary action against the errant officers.

26. The rule is made absolute in the above terms. There shall be no order for costs.

M. S. SONAK, J.

NITI K
HALDANKAR

Digitally signed by NITI
K HALDANKAR
Date: 2022.08.06
10:30:20 +05'30'

CHIEF JUSTICE