REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3478 OF 2006

RBF Rig Corporation, Mumbai …….. Appellant

versus

The Commissioner of Customs (Imports), Mumbai …….Respondent

J U D G M E N T

H.L. Dattu, J.

1) This appeal is directed against the Order of the Customs, Excise and Gold (Control) Appellate Tribunal, West Zonal Bench [hereinafter referred to as 'the Tribunal'] dated 12.05.2006.

2) The issue raised for our consideration and decision in this appeal is: 'Whether the adjudicating authority was justified in rejecting the appellant's claim for refund of the duty paid under

the Customs Act, 1962 (hereinafter referred to as, "the Act") without considering Essentiality Certificates, produced on a later date, particularly, in view of the specific and positive directions issued by the Delhi High Court.'

3) The brief factual matrix involved in this appeal are:

The appellant is an importer of spares and stores for use on rigs for petroleum operations pursuant to contract with Oil and Natural Gas Corporation Limited [hereinafter referred to as 'ONGC']. The appellant has imported three consignments of spares and duly filed the Bills of Entry dated 10.06.2002 and 25.06.2002 in respect of these imported goods. These imported goods are covered by List 12 of Notification No. 21/2002, Customs, dated 01.03.2002 as goods exempted from customs duty on fulfilling Condition 29 of the said Notification, which requires the importer to produce Essentiality Certificates issued by Director General of Hydrocarbons [hereinafter referred to as 'the DGH'] to the effect that these imported goods were required for the petroleum operations. The DGH issues the

SUPREME COURT OF INDIA
JUDGMENT

Essentiality Certificates only on the strength of recommendatory letters issued by ONGC.

4) The appellant had requested ONGC to issue recommendatory letters in order to enable the DGH to issue the Essentiality Certificates, which were not granted. The DGH, in the absence of such recommendatory letters, refused to entertain the appellant's request for the Essentiality Certificates.

5) In this backdrop, the appellant requested the Customs authority, *vide* endorsement on Bill of Entry presented on 10.06.2002 for one consignment and *vide* letter dated 28.06.2002 for other two consignments, to make provisional assessment of the said imported goods in view of the pending proceedings for procurement of the Essentiality Certificates. However, these requests were not acceded to, and the appellant, on account of commercial exigencies, had cleared the said three consignments of the imported goods on full payment of the customs duty pursuant to the Order of the Customs Authority dated 15.06.2002, 03.07.2002 and 09.07.2002.

SUPREME COURT OF INDIA
JUDGMENT

6) In the month of July 2002, the appellant filed a Writ Petition before the Delhi High Court *inter-alia* challenging the refusal of ONGC to issue the requisite recommendatory letters and also the refusal of the DGH to issue the Essentiality Certificates. The High Court, by its *ad-interim* order dated 30.07.2002, directed ONGC to take a final decision in the matter within a fixed time frame and granted liberty to the appellant to clear consignments on payment of duty under protest and subject to further orders of the High Court.

7) Subsequently, ONGC, whilst complying with the abovementioned directions of the High Court, issued recommendatory letters and on the strength of these recommendatory letters, the DGH issued Essentiality Certificates to the appellant. In view of this, the said Writ Petition was finally disposed of by the High Court by its order dated 11.03.2003, wherein the High Court directed the customs authorities to dispose of the appellant's refund claim of customs duty paid by taking into consideration the Essentiality Certificates issued by the DGH in the following terms:

SUPREME COURT OF INDIA
JUDGMENT

"Mr. Setalvad, learned senior counsel for the petitioners, on the other hand, submits that in view of the fact that almost all essentiality certificates have been issued by Respondent No. 2 on the recommendation of Respondent No. 3 the only controversy which survives for consideration is with regard to the disposal of the refund applications filed by the petitioner with the customs authorities. He, therefore, prays that instead of adjourning the matter, it may be disposed of with a direction to the custom authorities to take final decision on the refund applications filed by the petitioner.

We find substance in the suggestion made by learned counsel for the Petitioner. Accordingly, we dispose of the Writ Petition with a direction to the customs authorities to consider and dispose of such refund claims as had been preferred by the petitioner with them by taking into consideration the essentiality certificates, issued on the petitioners by Respondents No. 2. We further direct that the said applications shall be disposed of by a speaking and reasoned order after giving an opportunity of hearing to the petitioners. The applications shall be disposed of as expeditiously as practicable but in any case not later then eight weeks from the date of receipt of a copy of this order."

(Emphasis supplied)

8) Accordingly, the appellant filed refund claim dated 06.05.2003 and 04.06.2003 in respect of the customs duty paid on the import of the said three consignments, which was rejected by the Deputy Commissioner of Customs *vide* its order dated 23.12.2004 on the ground of unjust enrichment and failure to

challenge the assessment of the Bills of Entry by filing an appeal before the Appellate Forum. Reliance was also placed on the judgment of this court in *CCE v. Flock (India) (P) Ltd.*, (2000) 6 SCC 650 and *Priya Blue Industries Ltd. v. Commissioner of Customs (Preventive)*, (2005) 10 SCC 433. Being aggrieved, the appellant preferred an appeal against the Order of Deputy Commissioner of Customs before the Commissioner (Appeals). This appeal of the appellant was rejected by the Commissioner (Appeals) vide Order dated 18.04.2005. The appellant, aggrieved by the Order of Commissioner (Appeals), further preferred an appeal before the Tribunal. The Tribunal, by its impugned Order dated 12.05.2006, dismissed the appeal. Aggrieved by these orders, the appellant is before us in this appeal filed under Section 130-E of the Act.

9) Shri Harish N. Salve, learned senior counsel and Shri Amar Dave, learned counsel, appear for the appellant and the Revenue is represented by Shri K. Swamy, learned counsel. We will refer to their submissions while dealing with the issue canvassed before us.

SUPREME COURT OF INDIA
JUDGMENT

10) This Court in *Flock* (*supra*) has held that a refund claim under the Central Excise Act, 1944 is not maintainable, if an assessment order, which is appealable, has not been challenged. In other words, it was held that such assessment order is not liable to be questioned and reopened in a proceeding for refund, which is in the nature of execution of a decree or order. Further, this Court in *Priya Blue* (*supra*), adopting the ratio of the *Flock* (*supra*), has held that a refund claim under the Act is not an appeal proceeding and the officer considering a refund claim cannot sit in appeal or review an assessment order made by a competent authority. Such assessment order is final unless it is reviewed and/or modified in an appeal.

11) The learned senior counsel Shri. Harish N. Salve submits that the decisions of this court in *Flock (supra*) and *Priya Blue* (*supra*) are incorrectly decided and require reconsideration. He submits that the present appeal should be referred to a larger bench to finally and correctly decide the questions of law arising in this appeal. He further submits that the appellant is entitled to claim refund by virtue of Section 27 of the Act, even after the assessment order of imported goods has attained the

SUPREME COURT OF INDIA
JUDGMENT

finality. He contends that the claim of refund under Section 27 after final assessment order is different from the refund claim under Section 18, which is after provisional assessment of the imported goods. He submits that Section 27 of the Act provides that the claim for refund shall be made within a period of one year or six months. This short period of limitation indicates that a claim for refund is maintainable even without preferring an appeal against the assessment order. In other words, if the claim for refund is permissible only after filing of an appeal by the party, then Section 27 of the Act will become redundant as the appeal proceedings would never be over within abovementioned period. In this regard, learned senior counsel further argues at great length by analyzing Section 27 of the Act in view of its legislative history and the philosophy and the broad scheme of the Act *vis-à-vis* Central Excise Act, 1944 and Income Tax Act, 1961. He further contends that decisions of this Court in *Flock (supra*) and *Priya Blue* (*supra*) have ignored or not considered the decision of nine Judge-Bench of this court in *Mafatlal Industries Ltd. v. Union of India*, (1997) 5 SCC 536, which suggests that if the duty has

SUPREME COURT OF INDIA
JUDGMENT

been collected contrary to law, i.e., on account of a misinterpretation or misconstruction of a provision of law, rule, notification or regulation and the assessment order has attained finality, then the assessee is entitled to claim refund in accordance with section 11B of Central Excise Act, 1944 read with Rule 11 of the Central Excise Rules, 1944 on account of subsequent discovery of such mistake of law by any judgment of High Court or of this Court.

12) Shri K. Swamy, learned counsel for the Revenue, justifies the reasoning and the conclusions reached by the Tribunal.

13) In our considered view, the elaborate submissions made by the learned senior counsel for the appellant challenging the correctness of *Flock (supra)* and *Priya Blue (supra)* may not be necessary to be considered in the light of the peculiar facts involved in the present appeal. *Ergo*, we are not inclined to go into the merits of Shri Salve's arguments.

14) The facts in the present case are that, since the request of the appellant for issuance of Essentiality Certificates was delayed, the appellant was constrained to approach the Delhi High Court

SUPREME COURT OF INDIA
JUDGMENT

by filing a petition under Article 226 of the Constitution of India, *inter-alia* requesting the Court to direct ONGC to consider the request of the appellant for issuance of Essentiality Certificates vide its letter dated 21st May, 2002. On a concession made by learned counsel for ONGC, the Court, while permitting the parties to file their pleadings, further observed that the appellants, if they are willing to get their consignment of spare parts released, may do so by paying the customs duty as demanded under protest subject to final orders in the petition. The writ petition was finally disposed of by the Court by its order dated 11th March, 2003, in the presence of learned counsel for respondents, wherein the Court specifically directed the respondents to consider the refund claims preferred by the petitioners taking into consideration the Essentiality Certificates issued by ONGC.

15) Article 226 of the Constitution confers powers on the High Court to issue certain writs for the enforcement of fundamental rights conferred by Part-III of the Constitution or for any other purpose. The question, whether any particular relief should be granted under Article 226 of the Constitution, depends on the

SUPREME COURT OF INDIA
JUDGMENT

facts of each case. The guiding principle in all cases is promotion of justice and prevention of injustice. In *Comptroller and Auditor-General of India v. K.S. Jagannathan,* (1986) 2 SCC 679, this Court has held:

> "*20. There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the court may itself pass an order or give directions which the government or the public authority should have passed or given had it properly and lawfully exercised its discretion.*"

16) In *Dwarkanath* v. *ITO,* AIR 1966 SC 81, this Court pointed out that Article 226 is designedly couched in a wide language in

order not to confine the power conferred by it only to the power to issue prerogative writs as understood in England, such wide language being used to enable the High Courts "*to reach injustice wherever it is found*" and "*to mould the reliefs to meet the peculiar and complicated requirements of this country.*"

17) In *Halsbury's Laws of England,* 4th Edn., Vol. I, para 89, it is stated that the purpose of an order of mandamus

> *"is to remedy defects of justice; and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."*

18) The High Court, in the present case, has moulded the relief in such a manner to meet out justice to an aggrieved person. It is not open to the subordinate Tribunal to examine whether a direction issued by the High Court under its writ powers was correct and refuse to carry it out as such amounts to denial of justice and destroys the principle of hierarchy of courts in the administration of justice. This court in *Bishnu Ram Borah v. Parag Saikia,* (1984) 2 SCC 488, has held:

SUPREME COURT OF INDIA
JUDGMENT

> "*11. It is regrettable that the Board of Revenue failed to realize that like any other subordinate tribunal, it was subject to the writ jurisdiction of the High Court under Article 226 of the Constitution. Just as the judgments and orders of the Supreme Court have to be faithfully obeyed and carried out throughout the territory of India under Article 142 of the Constitution, so should be the judgments and orders of the High Court by all inferior courts and tribunals subject to their supervisory jurisdiction within the State under Articles 226 and 227 of the Constitution. We cannot but deprecate the action of the Board of Revenue in refusing to carry out the directions of the High Court. In Bhopal Sugar Industries Limited v. ITO, (1961) 1 SCR 474, the Income Tax Officer had virtually refused to carry out the clear and unambiguous directions which a superior tribunal like the Income tax Appellate Tribunal had given to him by its final order in exercise of its appellate powers in respect of an order of assessment made by him. The Court held that such refusal was in effect a denial of justice and is furthermore destructive of one of the basic principles in the administration of justice based as it is in this country on the hierarchy of courts. The facts of the present case are more or less similar and we would have allowed the matter to rest at that but unfortunately the judgment of the High Court directing the issue of a writ of mandamus for the grant of a liquor licence to Respondents 1 and 2 cannot be sustained.*"

19) We hasten to add, if for any reason, the subordinate authority is of the view that the directions issued by the Court is contrary to statutory provision or well established principles of law, it can approach the same Court with necessary application/petition for

clarification or modification or approach the superior forum for appropriate reliefs. In the present case, as we have already noticed, the respondents have not questioned the order passed by the High Court, which order has reached finality. In such circumstances, we cannot permit the adjudicating authority to circumvent the order passed by the High Court.

20) Therefore, in our view, the refund claim of appellant has been erroneously rejected by the Deputy Commissioner of Customs *vide* its order dated 23.12.2004 ignoring the specific directions issued by the Delhi High Court vide its order dated 11.03.2003, to the customs authorities to dispose of the appellant's claim of refund by taking into consideration the Essentiality Certificates issued by the DGH. The Deputy Commissioner of Customs has rejected the refund claim of appellant on the ground of unjust enrichment and failure to challenge the assessment of the Bills of Entry at the appellate stage, without even considering the Essentiality Certificates in the light of specific and binding directions of the High Court.

SUPREME COURT OF INDIA
JUDGMENT

21) In view of the above, we allow this appeal and direct the Customs authorities to consider the appellant's claim of refund of customs duty paid under protest in accordance with the directions issued by Delhi High Court vide its order dated 11.03.2003 as expeditiously as possible. In the facts and circumstances of the case, we direct the parties to bear their own costs.

……J.
[D.K. JAIN]

……J.
[H. L. DATTU]

New Delhi,
February 08, 2011.

SUPREME COURT OF INDIA
JUDGMENT