

**(2015) 05 BOM CK 0060**

**In the Bombay High Court**

**Case No : Central Excise Appeal No. 169 of 2014**

Arjandas Metal Industries Pvt. Ltd.

APPELLANT

Vs

The Commissioner of Central Excise

RESPONDENT

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**Date of Decision : 08-05-2015**

**Acts Referred:**

Central Excises and Salt Act, 1944 — Section 11A(4), 11AC, 14, 35G

**Citation : (2015) 324 ELT 381**

**Hon'ble Judges : B.R. Gavai, J;A.S. Gadkari, J**

**Bench : Division Bench**

**Advocate : Vikram Nankani, Senior Counsel and Jayesh Motwani i/b Economic Laws Practice, for the Appellant; Y.R. Mishra and Nilesh Kalantri, Advocates for the Respondent**

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## **Judgement**

A.S. Gadkari, J.—The appellant by the present appeal filed under Section 35G of the Central Excise Act, 1994 has questioned the correctness of the order dated 10th February 2014 passed by the learned Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai in Stay Application No.E/ST/92158/14 in Appeal No.E/85073/14, thereby directing the appellant to make a pre-deposit of 50% of the duty demand confirmed against the appellant within a period of 8 weeks and to report compliance by 10th April 2014.

2. A show cause notice was issued to the appellant and others dated 8th May 2012 by the Additional Director General, DGCEI, Zonal Unit, Mumbai after it was revealed in the investigation that the appellant received Cenvatable invoices from the Jammu based manufacturers in favour of itself without undertaking delivery of the goods mentioned thereunder. While arriving at the said conclusion, the said authorities recorded the statements of Shri Kevalchand G. Jain (the Noticee No. 8 therein) the broker of the appellant, amongst other statements and evidence collected by the said authorities. After issuance of the notice, the appellant filed his written submissions to the same. The Commissioner of Central Excise, Mumbai-II, the respondent herein, after hearing the parties to the show

cause notice dated 8th May 2012 passed an order-in-original dated 30th September 2013 thereby confirming and ordering the recovery of wrongly availed CENVAT credit totally amounting to Rs.96,31,754/-on the 20 consignments from the appellant under the provisions of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11A(4) of the Central Excise Act, 1994. It was further ordered that the appellant is also liable to pay the interest on the amount aforesaid. The Commissioner of Central Excise in its order-in-original also imposed a penalty of Rs.96,31,754/-on the appellant under Rule 15(2) of the Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1994. The Authority also imposed a penalty of Rs.50,000/-on the appellant. It was further held in the said order-in-original dated 30th September 2013 that the final products which had been cleared by the noticee therein, without payment of central excise duty in contravention of the provisions of Rule 4 of the Central Excise Rules, 2002, are liable to confiscation under the provisions of Rule 25 of the Central Excise Rules, 2002, however, it was further held that, as the said finished goods are not available for confiscation, the said authority did not impose any redemption fine. The said Authority was further pleased to impose penalty of Rs.5 lakhs on the Managing Director (the Noticee No. 7 therein) of the appellant under Rule 26 of the Central Excise Rules, 2002.

3. The appellant preferred an appeal before the Customs, Excise and Service Tax Appellate Tribunal (for short "CESTAT"), West Zonal Bench, Mumbai against the order-in-original dated 30th September 2013. The appellant also preferred an application for stay/grant of waiver of pre-deposit of dues therein. By an order dated 10th February 2014, the said stay application was partly allowed by directing the appellant to make a pre-deposit of 50% of the duty demand confirmed against it within a period of eight weeks, as stated herein above.

The appellant has impugned the said order dated 10th February 2014 passed by the CESTAT in the present appeal.

4. Heard Mr. Nankani, the learned Senior Counsel appearing for the appellant and Mr. Mishra, the learned Counsel appearing for the Revenue at length. We have also perused the record annexed to the present appeal. Mr. Nankani, the learned Senior Counsel submits that, the substantial question of law on which the present appeal has been filed are mentioned in para-5 of the appeal memo. The learned Senior Counsel further submits that the Commissioner of Central Excise before passing the order-in-original dated 30th September 2013 ought to have allowed the appellant to cross-examine Mr. Kevalchand G. Jain, the broker/supplier of the material of the appellant and the concerned officer/authority who during the course of investigation has found that the Octroi firm which cleared the consignments of the appellant at the check-naka at Mulund or other check-nakas in Mumbai is not in existence and in fact it is a bogus entity. He further contended that the learned Tribunal in appeal ought to have appreciated the said aspect and ought not have directed the appellant to make a pre-deposit of 50% of the duty demand confirmed against the appellant. He further submitted that

as the principles of natural justice, thereby allowing the appellant to cross-examine the necessary witness have not been followed, the present matter requires reconsideration at the hands of the Commissioner of Central Excise before passing the order-in-original and confirming the demand. The learned Senior Counsel in support of his contention relied on the following judgments:

(i) Swadeshi Polytex Ltd. Vs. Collector of Central Excise, Meerut [2000 (122) E.L.T 641 (S.C.)];

(ii) Union of India (UOI) Vs. Rajendra Bajaj, (2010) 253 ELT 165

(iii) Gyan Chand Sant Lal Jain Vs. Union of India [2001 (136) E.L.T. 9 (Bom.)];

(iv) G.T.C. Industries Ltd. Vs. Union of India, (1991) 37 ECR 186 : (1991) 56 ELT 29 .

5. Per contra, Mr. Mishra, the learned Counsel appearing for the Revenue, inter alia, supported the impugned order passed by the CESTAT and submitted that after taking into consideration various aspects of the present case, the CESTAT was kind enough to direct the appellant to make only a pre-deposit of 50% of the duty demand. He further submitted that after taking into consideration the malpractice adopted by the appellant, in fact the learned CESTAT ought not have interfered with the directions given in the order-in-original and ought to have directed the appellant to deposit the entire amount as has been directed in the order-in-original. Mr. Mishra further submitted that the appeal arises out of an interlocutory order and unless discretion which has been exercised by the learned CESTAT is found to be exercised in perverse manner, this Court would not interfere with the same.

6. It is to be noted here that the Commissioner of Central Excise in para-43 of the order-in-original dated 30th September 2013 has recorded a finding on the basis of the evidence available before it that Mr. Kevalchand G. Jain had arranged supply of Cenvatable invoices from Jammu based manufacturers in favour of the appellant, without undertaking delivery of the goods mentioned thereunder and the appellant used to pay him the amount indicated in these invoices including CE duty, through account payee cheque issued in the name of concerned Jammu based supplier, after such cheques were encashed by them, the concerned Jammu based units deducted and retained 30% of the Cenvat amount and returned the balance cash to him and out of such cash received by him from the said Jammu based units, he deducted his own commission, which ranged from Rs.2/-to Rs.4/-per kg purportedly sold to the appellant under these invoices whereas the remaining cash was returned to the appellant. The Respondent No. 1 has also recorded a finding that, the appellant availed the CENVAT credit without receiving the corresponding goods in their factory premises. It has been further observed that, the appellant in its defence could not provide any plausible clarification to the fact that neither the appellant nor any of the said manufacturers based at Jammu arranged the transport to deliver the said goods at the factory of the appellant at Mumbai. A finding has been recorded that there

is no substance in the contention of the appellant that the production reflected in their balance-sheet indicated the receipt of the said goods in their factory premises. That there is no substance in the contention of the appellant that they had discharged the Octroi duty as the investigation has clearly established that neither any of the vehicle related with the said invoices crossed the check-naka at Mulund nor any Octroi thereon was paid. It has been held that, as there is no retraction of the statements recorded under Section 14 of Central Excise Act, 1994 and therefore it was not necessary to accede to the request of the appellant for cross-examination, as it was redundant exercise according to the said authority.

7. The learned CESTAT in the impugned order has recorded a finding with respect to the plea of the appellant, to cross-examine the said Mr. Kevalchand G. Jain or a supplier, who facilitated the transactions thereby contending that if the opportunity is not granted, the denial pre-judicially affects the appellant. It has been held that when the matter was verified with the Octroi authorities to ascertain whether the Trucks bearing registration numbers mentioned in the transport documents actually crossed the Octroi check-naka, the Octroi authorities confirmed that the agent appointed by the appellant for complying with the Octroi formalities was not in existence and from the records available with them the alleged transportation has not taken place in respect of 16 consignments. The Tribunal has held that non-receipt of the goods by the appellant is duly supported by the statement of the transporter, the type of vehicles used and the communication received from the Octroi authorities and this is sufficient to prove the case against the appellant that they did not receive the goods. The Tribunal has therefore recorded a finding that the denial of the cross-examination of the broker or the supplier has not pre-judicially affected the appellant as the case against the appellant is established without these statements. The Tribunal has further come to the conclusion that it is clear that the entire avilment of the credit by the appellant is only on the strength of the document without actual receipt of the goods. Therefore, the Tribunal has further recorded a finding that, the appellant has not made out any case for grant of pre-deposit of dues confirmed against the appellant.

We may note here that the decisions relied upon by the appellant are on the basis of the facts mentioned therein and we are of the considered opinion that the said authorities are of no help to the appellant, in view of the peculiar facts and circumstances of the present case.

8. At this stage, a useful reference can be made to the celebrated judgment of the Apex Court reported in in the case of K.L. Tripathi Vs. State Bank of India and Others, AIR 1984 SC 273 : (1984) 48 FLR 38 : (1983) LabIC 1680 : (1984) 1 LLJ 2 : (1983) 2 SCALE 587 : (1984) 1 SCC 43 : (1984) 1 SCR 184 : (1983) 2 SLJ 623 , wherein the Apex Court has held that in quasi-judicial adjudication, neither cross-examination nor opportunity to lead evidence is an integral part of the adjudicating process while arriving at the conclusion by the said authorities.

It has been further held by the Apex Court that, it is true that all the actions against a party which involve penal or adverse consequences must be in accordance with the principles of natural justice but whether any particular principle of natural justice would be applicable to a particular situation or the question whether there has been any infraction of the application of that principle has to be judged in the light of facts and circumstances of each particular case. That the basic requirement is that there must be fair play in action and the decision must be arrived at in a just and objective manner with regard to the relevance of the materials and reasons. The Apex Court has further held that, it must reiterate again that the rules of natural justice are flexible and cannot be put on any rigid formula. In order to sustain a complaint of violation of principles of natural justice on the ground of absence of opportunity of cross-examination, it has to be established that prejudice has been caused to the appellant by the procedure followed.

In the case in hand, we are of the opinion that as alleged Octroi firm through which the appellant cleared the goods by paying the Octroi duty while entering into the limits of Mumbai, during investigation, is found to be not in existence itself and/or a bogus entity, and therefore we find that no prejudice of whatsoever nature has been caused to the appellant because of denial of the cross-examination by the Commissioner of Central Excise before passing an order-in-original. It appears that the Commissioner of Central Excise while passing order-in-original has based his finding on the basis of evidence and/or material in the form of documents available before it and therefore the contention of the appellant that it ought to have granted an opportunity to cross-examine said Shri Kevelchand Jain or other suppliers has no substance at all in it.

9. The impugned order dated 10th February 2014 passed by the Tribunal clearly discloses that the Tribunal, after taking into consideration various aspects of the matter, has directed the appellant to make only a pre-deposit of 50% of the duty demand confirmed and in its discretion has waived the balance of 50% of the duty demand confirmed in order-in-original. The appellant has also raised the contention of financial hardship thereby stating that his factory is under closure and therefore he is unable to make pre-deposit. It is now settled position of law that, while considering the application for waiver of pre-deposit, the learned Tribunal or the Appellate Authorities are directed to take into consideration three factors namely, prima facie case, undue hardship and the interest of Revenue. A useful reliance can be made at this stage on the judgment of the Apex Court in the case of Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another, (2006) 113 ECC 314 : (2006) ECR 314 : (2006) 204 ELT 513 : (2006) 12 SCALE 303 : (2006) 9 SCR 341 Supp : (2008) 12 STR 104 : (2006) 2 UJ 1526 : (2009) 20 VST 297 , wherein it has been held that on merely establishing a prima facie case, interim order of protection should not be passed. That while dealing with the application twin requirements of consideration i.e. consideration of undue hardship aspect and imposition of conditions to safeguard the interest of Revenue have to be kept in view. It has been further held that the

word "undue" would mean something more than just hardship. It means an excessive hardship or hardship greater than the circumstances warrant. In the present case, the learned Tribunal while considering the application of the appellant has held that, the appellant has not made out any case for grant of waiver of pre-deposit dues as confirmed against the appellant and has failed to bring on record any evidence in support of his contention that he is facing financial hardship as his factory is under closure. The learned Tribunal has further held that in the absence of any prima facie case, the interest of Revenue needs to be protected and therefore directed the appellant to make a pre-deposit of 50% of the duty demand confirmed against the appellant within a period of 8 weeks.

10. We are of the considered opinion that the learned CESTAT has recorded the finding correctly on the basis of the material available before it and has also taken into consideration the interest of the Revenue in that behalf. We are further of the considered opinion that, it cannot be said that the view taken by the learned CESTAT is perverse or is against the settled principles of law.

11. In the present case, the learned CESTAT has found some substance in the contention of the appellant and has directed him to pre-deposit only 50% of the duty demand confirmed against the appellant and not the entire 100% of the amount. It can thus be seen from the facts and circumstances of the present case that the learned CESTAT has taken into consideration all the three factors i.e. prima facie case, undue hardship and the interest of Revenue.

Insofar as the factor i.e. undue hardship is concerned, it does not appear that the said contention was duly established by the appellant by producing sufficient evidence before the learned Tribunal. We do not find any error in the findings recorded by the learned Tribunal in the impugned order.

12. In view of the above, we see that, no case is made out for the interference at the hands of this Court as there is no substantial question of law involved in the present appeal for consideration of this Court. The appeal being sans of merits deserves to be dismissed and is accordingly dismissed.

13. It is needless to mention here that the observations made herein above are with respect to the order impugned in the present appeal pertaining to the directions of pre-deposit by the learned Tribunal and we have not dealt with the merits involved in the appeal pending before the Tribunal. The Tribunal will hear the appeal on its own merits after the appellant makes the pre-deposit as is directed in the impugned order.