(2011) 05 GUJ CK 0113

In the Gujarat High Court

Case No : Special Civil Application No. 250 of 2004

P and B Pharmaceuticals Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 02-05-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 35L, 4
Constitution of India, 1950 — Article 226

Citation : (2011) 273 ELT 34 : (2012) 27 STR 306

Hon'ble Judges : R.M. Chhaya, J;Harsha Devani, J

Bench : Division Bench

Advocate : Paresh M. Dave, for the Appellant; Gaurang H. Bhatt, for the Respondent

Final Decision : Allowed

Judgement

Harsha Devani, J.—This petition under Article 226 of the Constitution of India has been filed with the following substantive prayers:

9. In the above premises, the petitioners most respectfully pray as under :-

(A) That Your Lordships may be pleased to issue a Writ of Prohibition or a Writ in the nature of Mandamus or any other appropriate writ, direction or order, completely and permanently prohibiting the respondents, their servants and agents from taking any action against the petitioner company in pursuance of OIA No. COMMR(A)/537/VDR-I/2003 dated 21-11-2003 (Annexure- ''F'');

(B) That Your Lordships may be pleased to issue a Writ of Certiorari or any other appropriate writ, direction or order quashing and setting aside OIA No. COMMR(A)/537/VDR-I/2003 dated 21-11-200 (Annexure-''F'') by holding and declaring that the proceedings initiated against the petitioner company vide 29 show cause notices on which OIO No. 56 to 84/MP/2001/Dem dated 27-3-2001 (Annexure-''D'') was passed, stand terminated completely and permanently;

2. The petitioner No. 1-Company (hereinafter to be referred to as ''the business

of manufacturing of medicaments. The Excise Department raised a dispute about valuation of goods manufactured by the petitioner-company and sold to a partnership firm of Mumbai viz. Messrs Pharma Chem Distributors. It was the case of the department that the petitioner-company was not entitled to use logo of ''P/B'' and claim exemption as a small scale industry because the said logo belonged to a company of Mumbai, namely, Messrs P&B Laboratories Private Limited. By an order-in-original dated 26-9-2001, the Commissioner of Central Excise, Ahmadabad confirmed a total demand of Rs. 79,47,034/- against the petitioner-company in relation to the above referred two issues. The demand was confirmed for the extended period of limitation, that is, for the period from 1-5-1985 to 31-12-1989, along with penalty on the petitioner-company. Being aggrieved, the petitioner-company filed an appeal before the Tribunal, who, vide order dated 17-10-1994 confirmed the order of the Commissioner. While dismissing the petitioners'' appeal the Tribunal reduced the penalty amount to Rs. 15 lakhs and also directed the Collector to examine as to whether there was any case for redetermination of duty in view of certain deductions permissible to the petitioner-company u/s 4 of the Central Excise Act, 1944 (the Act) even if Messrs Pharma Chem Distributors were considered as petitioners'' related person. Being aggrieved by the aforesaid decision of the Tribunal, the petitioner-company filed an. appeal u/s 35L of the Act before the Supreme Court, which came to be registered as Civil Appeal No. 3969 of 1995.

3. The appeal preferred by the petitioners before the Supreme Court against the above referred order of the Tribunal came to be allowed by judgment and order dated 19-2-2003, which is reported in 2003 (153) E.L.T. 14 (S.C.).

4. In the meanwhile, pursuant to the directions issued by the Tribunal in the above referred decision directing the Collector to redetermine the amount due and payable by the petitioner-company, further adjudication took place in that connection and an order-in-original came to be passed by the same amount of Rs. 79,67,267/-. The petitioner-company preferred an appeal against the said order before the Tribunal pursuant to which the petitioner-company was directed to pre-deposit an amount of Rs. 25 lakhs by an order dated 13-5-1998.

5. During the pendency of the aforesaid proceedings, twenty-nine show cause notices came to be issued to the petitioner-company for the period from January, 1990 till June, 2000 on the basis of the order-in-original passed by the Collector of Central Excise, Ahmadabad at the relevant point of time. All the show cause notices were kept pending by the adjudicating authority for ten years during which the proceedings arising out of the order of the Collector of Central Excise culminated into various orders. Thereafter, vide order-in-original dated 27-3-2001 the demand raised under all the 29 show cause notices came to be confirmed on the ground that the Tribunal had held in favour of the revenue on both the points involved in the said notices, namely, denial of small scale exemption and assessable value on the basis of the price charged by Messrs Pharma Chem Distributors treating it as a related person of the petitioner-

company. It is the case of the petitioner that the dispute of the correct assessable value was pending before the Commissioner of Central Excise at that point of time, the Assistant Commissioner did not consider it necessary to keep the adjudication of the 29 show cause notices pending and passed the above referred order confirming the amount of duty of Rs. 2,09,99,772/- and imposing penalty of Rs. 25 lakhs on the petitioner-company.

6. After the above referred order dated 27-3-2001 came to be passed by the Assistant Commissioner, the Commissioner passed order-in-original dated 28-3-2001, accepting the calculations submitted by the petitioners and holding that against the total duty demand of Rs. 79,67,267/-, actual demand that could be confirmed was only Rs. 18,80,876/-.

7. After the above referred proceedings were over, the Supreme Court, as noted hereinabove, allowed the appeal of the petitioner-company by a judgment dated 19-2-2003 setting aside the order of the Tribunal by which it had held that the petitioner-company was not entitled to the benefit of the small scale exemption notification dated and that the petitioner-company and Messrs Pharma Chem Distributors were related persons.

8. Being aggrieved by the above referred order-in-original dated 27-3-2001 the petitioner-company filed an appeal before the Commissioner (Appeals). Before the Commissioner (Appeals) it was contended on behalf of the petitioners that the basis for raising demand in the show cause notices and confirming the same was the order of the Tribunal which was set aside by the Supreme Court and, therefore, the whole basis of the demand as well as proceedings against the petitioner-company had disappeared. The small scale exemption benefit was held to be available to the petitioner-company and, therefore, the demand confirmed by the Assistant Commissioner without allowing this benefit was illegal and that the value taken in the twenty-nine show cause notices was also incorrect in view of the order of the Commissioner of Central Excise who had accepted the claim for deductions even if it was assumed that Messrs Pharma Chem Distributors was a related person of the petitioner-company.

9. By the impugned order dated 21-11-2003, the Commissioner remitted the case back to the Assistant Commissioner of Central Excise, Anand, to work out the duty of excise at the appropriate rate for the relevant period after considering all the aspects in the said order. Penalty of Rs. 5 lakhs was sustained by reducing the penalty of Rs. 25 lakhs in the original adjudication order. Being aggrieved, the petitioners have filed the present petition seeking the reliefs noted hereinabove.

10. Mr. Paresh Dave, learned advocate appearing on behalf of the petitioners, the proceedings initiated vide twenty-nine show cause notices against the petitioner company was the order of the Collector of Central Excise, which was upheld by the Tribunal and thus, the basis for demanding duties from the petitioner-company was that it was selling its goods to or through a related person and that

the petitioner-company was not entitled to the small scale exemption benefit by virtue of the fact of its use of a logo of another person. However, the order of the Tribunal holding against the petitioner-company on both the above referred issues was set aside by the Supreme Court and, therefore, there was no order against the petitioner-company for demanding any duties from it. According to the learned advocate, the Supreme Court has allowed the appeal by setting aside the order of the Tribunal under challenge, and thus, the order of the Tribunal stands set aside without any qualifications or conditions and as such no part of the order of the Tribunal is upheld or sustained by the Supreme Court while allowing the appeal preferred by the petitioners. It was accordingly urged that the Commissioner (Appeals) therefore, had no alternative but to allow the petitioners'' appeal by setting aside the order impugned before him and that the order of the Commissioner remitting the case back for re-quantification although the whole basis of the proceedings against the petitioner-company had disappeared, is without any basis.

11. The learned advocate, in support of his submissions, placed reliance upon the decision of the Supreme Court in the case of Chandi Prasad and Others Vs. Jagdish Prasad and Others, for the proposition that when an appeal is prescribed under a statute and the appellate forum is invoked and entertained, for all intent and purport, the suit continues. When a higher forum entertains an appeal and passes an order on merit, the doctrine of merger applies. The doctrine of merger is based on the principles of propriety in the hierarchy of the justice-delivery system. The doctrine of merger does not make a distinction between an order of reversal, modification or an order of confirmation passed by the appellate authority. The said doctrine postulates that there cannot be more than one operative decree governing the same subject matter at a given point of time. When the decree of the appellate court and even if and subject to any modification that may be made in the appellate decree, the decree of the appellate court supersedes the decree of the trial Court. In other words, merger of a decree takes place irrespective of the fact whether the appellate court affirms, modifies or reverses the decree passed by the trial court. Adverting to the facts of the present case it was submitted that the Supreme Court has set aside the entire order of the trial court, in the circumstances, it cannot be construed as if the decision of the Supreme Court operates in two parts viz., for the purpose of the issue as regards related persons the order of the Tribunal would operate and that for the purpose of logo and SSI exemption, the Supreme Court decision would operate.

12. Reliance was placed upon the decision of this High Court in the case of Satellite Engineering Ltd. Vs. Asstt. Collector of Central Excise, for the proposition that once a decision is reversed and set aside, it is immaterial on which point the decision is reversed because on reversion of the decision, it ceases to be a good decision in the eye of law. Reliance was also placed upon the decision of this High Court in the case of Ramkrishna Wire Works Vs. Union of India, for a similar proposition of law. The decision of the Supreme Court in the

case of Pernod Ricard India (P.) Ltd. Vs. Commissioner of Customs, ICD Tughlakabad, , was cited for the proposition that once a statutory right of appeal is invoked, dismissal of appeal by the Supreme Court, whether by a speaking order or non-speaking order, the doctrine of merger does apply. The learned advocate submitted that in the present case the petitioners had preferred statutory appeal against the order of the Tribunal before the Supreme Court. The Supreme Court had by a reasoned order allowed the appeal preferred by the petitioners. It was submitted that insofar as the question as regards related person is concerned/ the Supreme Court had taken note of the fact that on the question as to whether Messrs Pharma Chem Distributors was a related person, the same had been when the classification was filed, when the first show cause notice was issued in 1985 and also at the stage when the second and the third show cause notices were issued in 1988. At all these stages, the necessary material was before the authorities and they had then taken the view that Messrs Pharma Chem Distributors was not a related person. It was submitted that merely because no specific findings have been recorded by the Supreme Court in relation to the said issue, it cannot be said that the issue has not been decided by the Supreme Court inasmuch as the said issue was very much before the Supreme Court and was subjected to judicial scrutiny and as such once the order of the Tribunal has been set aside by the Supreme Court, the doctrine of merger would be attracted and the respondents are estopped from raising the issue as regards the question whether Messrs Pharma Chem Distributors was a related person.

13. Reliance was placed upon the decision of the Apex Court in the case of Kunhayammed and Others Vs. State of Kerala and Another, , for the proposition that once the superior court had disposed of the lis before it either way - whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. The learned advocate submitted that the Supreme Court having set aside the order of the Tribunal, the order of the Tribunal merges with the order of the Supreme Court and has no independent existence of its own and as such the Commissioner (Appeals) was not justified in relying on the part of the order of the Tribunal to the extent the same decides against the petitioners on the question of related person. It was submitted that the order of the Tribunal having merged with the order of the Supreme Court, the department cannot raise the issue even in future proceedings.

14. Insofar as the contention raised on behalf of the Revenue that the decision of the Supreme Court qua the related person applies only to the extended period of limitation, the learned advocate invited the attention of the court Special Civil Application No. 16053 of 2003 wherein the court had observed that it was not agreeable to accept the contention of the respondents that it was open to the respondents to recover the amount which was within the normal period of

limitation. The court held that it cannot be denied that the Supreme Court had quashed and set aside the order passed by the Tribunal and, therefore, the petitioners were entitled to refund of the entire amount. It was submitted that the aforesaid order of this Court has attained finality inasmuch as the respondents have not challenged the same before the higher forum and as such now it is not permissible for the respondents to contend that the order of the Tribunal to the extent the same holds that Messrs Pharma Chem Distributors is a related person has been set aside only qua the extended period of limitation. It was submitted that the Supreme Court while reversing the order of the Tribunal was conscious of the issue as regards Messrs Pharma Chem Distributors being related person. That if the Revenue so desired they could have sought clarification from the Supreme Court on the question of related person. However, once the order of the Tribunal had been set aside by the Supreme Court, it is not permissible for the respondents to place reliance on any part of the said order and that as such the twenty-nine show cause notices and adjudication thereof have no legs to stand as the same are based on the order of the Tribunal. According to the learned counsel the impugned order of the Commissioner (Appeals) is without jurisdiction as he could not have relied upon the order of the Tribunal which had already been set aside by the Supreme Court. It was submitted that in the aforesaid premises the Commissioner (Appeals) could not have remitted the matter for calculations as the order of the Supreme Court decides all the issues in favour of the petitioners. Moreover, while sending back the matter, the Commissioner (Appeals) has reduced the penalty whereas in the facts and circumstances of the case there was no justification for upholding any penalty. In conclusion it was submitted that in the present case, in the light of the decision of the Supreme Court, the impugned order of the Commissioner (Appeals) deserves to be quashed and set aside and that the petition deserves to be allowed.

15. Opposing the petition Mr. Gaurang H. Bhatt, learned Standing Counsel appearing on behalf of the respondents invited the attention of the Court to the order passed by the Supreme Court in the appeal preferred by the petitioners against the order of the Tribunal. Referring to the contents of paragraph 14 thereof, it was submitted that insofar as the issue as regards Messrs Pharma Chem Distributors being a related person is concerned, the Supreme Court has only decided the issue from the angle of invocation of the extended period of limitation and that the said issue had not been decided on merits. According to the learned counsel, the Supreme Court has only decided the question as regards use of logo of the manufacturer by third parties as well as the entitlement to small scale industry exemption, whereas nothing has been stated on merits qua the issue as regards Messrs Pharma Chem Distributors being a related person. In the circumstances, the order of the Tribunal to the extent the same held that Messrs Pharma Chem Distributors was a related person has not been disturbed by the Supreme Court and the respondents were, therefore, justified in placing reliance upon the decision of the Tribunal to the said extent. Reliance was placed

on the affidavit-in-reply filed on behalf of the respondents wherein it has been stated that the Supreme Court had set aside the Tribunal''s order in which the extended period of five years was invoked. But the same cannot be implied for the subsequent period as the demand was issued protective and within time limit. The learned counsel for the respondents urged that the Supreme Court had set aside the order of the Tribunal to the extent the same permitted invocation of the extended period of limitation and that in the present case the twenty-nine show cause notices being within the period of limitation, the Commissioner (Appeals) was justified in holding against the petitioners on the question of related person and remitting the matter to the adjudicating authority for working out the calculation. It was, accordingly, urged that the impugned order passed by the Commissioner (Appeals) being in consonance with the order of the Tribunal to the extent the same decides the issue as regards related person which has not been discussed by the Supreme Court while setting aside the order of the Tribunal. The respondents were, therefore, justified in placing reliance on the same and as such there is no warrant for any intervention by this Court.

16. From the facts noted hereinabove, it is apparent that there was a dispute as regards the valuation of the goods manufactured by the petitioner-company and sold to a partnership firm of Mumbai, Messrs Pharma Chem Distributors. The first ground raised by the department was that the distributor of the petitioner is a related person, therefore there had been short levy of duty; and the second ground was that after insertion of para 7 in Notification No. 175/86-C.E., the petitioner-company was not entitled to exemption as a small scale industry as the petitioner and M/s. P & B Laboratories Ltd., had been using the logo of "P/B". - By the order-in-original dated 26-9-1991 the total demand of Rs. 79,47,034/- came to be confirmed against the petitioner-company in respect of the above referred two issues. The demand also came to be confirmed for the extended period of limitation, that is, for the period from 1-5-1985 to 31-12-1989. The matter was carried before the Customs, Excise and Gold (Control) Appellate Tribunal, who decided the issues against the petitioners. Being aggrieved, the petitioners preferred an appeal before the Supreme Court, which came to be allowed by the judgment and order dated 19-2-2003. Before the Supreme Court, it was the entire order of the Tribunal which was subject matter of challenge. The Supreme Court has passed a speaking order in relation to the question of availing exemption under Notification No. 175/86-C.E. and held that the petitioners were entitled to use the logo as well as to avail all benefits of exemption as an SSI unit. Insofar as the question as regards Messrs Pharma Chem Distributors being a related person is concerned, the Supreme Court has taken note of the fact that earlier show cause notices had been issued in relation to the said question wherein the department had taken a view in favour of the petitioners. However, subsequently, the case of the department is that Messrs Pharma Chem Distributors is a related person. The Court observed that so far as the assessee is concerned, it has all along been contending that they were not related persons, so, it cannot be said to be guilty of not filling up the declaration

in the prescribed proforma indicating related persons. The Court held that it was therefore futile to Chem Distributors being a related person. The Court, accordingly, held that there was no justification for invoking of the proviso to Section 11A of the Act for making the demand for the extended period. Though it is true that there is no specific discussion in respect of the issue regarding Messrs Pharma Chem Distributors being a related person, in the ultimate result, the Supreme Court set aside the order of the Tribunal in toto. Thus, the order of the Tribunal stands merged with the order of the Supreme Court and does not retain any identity of its own. The Supreme Court in the case of Pernod Ricard India (P) Ltd. v. Commissioner of Customs, ICD, Tughlakabad (supra) has held that when the appellant has preferred statutory appeal against the order of the Tribunal, dismissal of appeal by the Supreme Court, though by a non-speaking order, was in exercise of appellate jurisdiction, wherein the merits of the order impugned were subjected to judicial scrutiny. In the circumstances, the doctrine of merger would be attracted and the appellant was estopped from raising the issue, which was already considered earlier, at a subsequent point of time. Adverting to the facts of the present case, as noticed hereinabove, against the order of the Tribunal, the petitioners had preferred a statutory appeal before the Supreme Court u/s 35L of the Act. The Supreme Court in exercise of appellate jurisdiction, wherein the order of the Tribunal was subjected to judicial scrutiny, has set aside the entire order of the Tribunal. In the circumstances, the doctrine of merger would be squarely attracted in the facts of the present case and as such it is not permissible for the department to now raise the contention that part of the order of the Tribunal still survives and can be relied upon by the department.

17. A perusal of the impugned order passed by the Commissioner (Appeals) clearly shows that even though the aforesaid decision of the Supreme Court has been pointed out to the Commissioner (Appeals), he has construed the said decision as a decision holding that the petitioner-company is eligible for SSI benefit despite the fact that they had used logo ''P/B''. He has further observed that the Supreme Court in the said decision has not made any observation as regards the petitioner-company and Messrs Pharma Chem Distributors, Mumbai being related persons. The Commissioner (Appeals) has, therefore, placed reliance upon the order passed by the Tribunal to the extent it upheld the ground as regards the petitioner-company and Messrs Pharma Chem Distributors being related persons, and accordingly, held that the petitioners were obliged to discharge duty liability in view of the fact that Messrs Pharma Chem Distributors, Mumbai were related to them. The Commissioner (Appeals) has also placed reliance upon the observations and directions given by the Tribunal that the assessable value should be determined on the basis of the sale price at the hands of Messrs Pharma Chem Distributors, Mumbai but in arriving at such assessable value, permissible deductions as per law, have to be made. Thus, it is apparent that for the purpose of deciding the issue as regards Messrs Pharma Chem Distributors being a related person, the Commissioner (Appeals) has

placed reliance upon the order of the Tribunal as well as the observations made therein, despite the fact that the same stood merged in the order of the Supreme Court and had no independent existence on its own. This High Court in the case of Satellite Engineering Limited v. Assistant Collector of Central Excise (supra) as well as in the case of Ramkrishna Wire Works v. Union of India (supra) has held that once a decision is reversed and set aside, it is immaterial on which point the decision was reversed because on reversion of the decision, it ceases to be a good decision in the eye of law. In the circumstances, once the decision of the Tribunal had been reversed, the Commissioner (Appeals) could not have placed reliance upon any part of the said decision as the same ceased to be a good decision in the eye of law.

18. The Supreme Court in the case of the Government of Goa Vs. A.H. Jaffar and Sons and Another, , has held that it needs no reiteration that once the decision is rendered inter parties and attains finality, a different view cannot be taken, more so, when finality is attached by the order of the Supreme Court. In the case of Shri O.P. Choudhry Vs. Rehabilitation Ministry Employees Cooperative House Building Society and Others, wherein expulsion notice and resolutions passed by the society against the appellant therein had been set aside by filing a writ petition in the High Court and then SLP in the Supreme Court had been rejected, the court held that there was no justification for not restoring the original seniority to the appellant before it and assigning seniority from a subsequent date. The court held that once the expulsion order was set aside it had no existence in the eye of law and could not be taken notice of for depriving the appellant of his original seniority.

19. Examining the facts of the present case in the light of the aforesaid decisions, once the order passed by the Tribunal was set aside by the Supreme Court, it had no existence in the eye of law and could not be taken notice of by the respondents for the purpose of holding that Messrs Pharma Chem Distributors was a related person. In the light of the decision of the Supreme Court, all the issues which were subject matter of appeal before the Tribunal, had attained finality and as such it is not permissible for the department to thereafter reopen any of such issues against the petitioners herein, the same having attained finality by the decision of the Supreme Court. In the circumstances, the impugned order of the Commissioner (Appeals), which places reliance upon the order of the Tribunal for the purpose of holding that Messrs Pharma Chem Distributors is a related person, cannot be sustained, the same being contrary to the decision of the Supreme Court between the same parties, which has attained finality.

20. In the light of the aforesaid findings recorded by this Court, it is not necessary to go into any other issues raised in the petition. For the reasons stated hereinabove, the impugned order passed by the Commissioner (Appeals) cannot be sustained.

21. In view of the above discussion, the petition succeeds and is accordingly

Commissioner (Appeals) (Annexure-F to the petition) is hereby quashed and set aside. Rule is made absolute accordingly. There shall be no order as to costs.

