
(2014) 08 MAD CK 0299

In the Madras High Court

Case No : Civil Miscellaneous Appeal Nos. 3335-3337 of 2013 and M.P. Nos. 1 of 2013 (3 Nos.)

Pentafour Products Ltd.

APPELLANT

Vs

CESTAT

RESPONDENT

Date of Decision : 07-08-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 34, 38A
Customs Act, 1962 — Section 111(o), 112, 12, 125, 58
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(4)
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15(1)

Citation : (2014) 310 ELT 667 : (2015) 34 GSTR 183

Hon'ble Judges : R. Sudhakar, J;G.M. Akbar Ali, J

Bench : Division Bench

Judgement

R. Sudhakar, J.—The appellant in C.M.A. No. 3335 of 2013 is a 100% export oriented company under the EHTP scheme for the manufacture and export of Copper Clad Laminates and prepregs falling under CETH 7406 of the Central Excise Tariff Act, 1985 and are holders of Licence No. 3/95 issued under Sections 58 and 65 of the Customs Act, 1962. The case of the department is that the assessee company imported plant and machinery, capital goods and raw materials without payment of customs duty and procured indigenous goods under CT-3 without payment of Central Excise duty from the year 1994 onwards by availing the benefit under EHTP scheme. However, they did not commence manufacture and had disposed of some of the capital goods and raw materials. This conduct of the assessee, according to the department, is in violation of the provisions of the Customs Act and the Central Excise Act and the conditions imposed for the purpose of import.

2. In view of the above stated position, the factory premises was visited by the department on 11-9-2002 and at the said time, the premises was found to be locked. The department found that there was no activity in the factory and that

the power connection was also disconnected. The generator sets, which were also purchased duty free under CT-3 were not available. On the contrary, it was found that the same were removed without any proper authorisation. The statements were recorded from various persons and, thereafter, a show cause notice was issued demanding (i) customs duty of Rs. 26,01,60,106/- (Rupees Twenty Six Crores One Lakh Sixty Thousand One Hundred and Six only) - on capital goods; (ii) demand of Central Excise Duty of Rs. 19,55,494/- (Rupees Nineteen Lakhs Fifty Five Thousand Four Hundred and Ninety Four only) on indigenous materials procured under CT3 certificate; (iii) Penalty under Section 112 of the Customs Act, 1962; (iv) Penalty under Rule 209 of the Central Excise Rules, 1944 read with Section 38A of the Central Excise Act, 1944; (v) plant and machinery, raw materials, components, consumables should not be confiscated under erstwhile Rule 209 of the Central Excise Rules read with Section 38A of the Central Excise Act and (vi) Interest on duty demanded on customs duty and central excise duty as per Notification No. 13/81-Cus., read with Notification No. 53/97-Cus., and Notification No. 96/93-Cus., dated 2-3-1993 as amended and Notification No. 1/95 C.E., as amended respectively read with terms of the bond for contravention of the above notifications. Further show cause notices were also issued to the Chairman and Managing Directors and also the Director of the respondent company as to why penalty should not be imposed on them under Section 112 of the Customs Act and under Rule 209A of the erstwhile Central Excise Rules read with Section 38A of the Central Excise Act.

3. The above show cause notice, dated 5-12-2005, was issued, inter alia contending that the appellant had violated post-import conditions of Notification No. 13/81-Cus., read with Notification No. 53/97-Cus., and Notification No. 96/93-Cus., dated 2-3-1993 as amended and also the terms of the bond for contravention for having violated the customs and central excise duty to the extent indicated above.

4. After receipt of the above notice, it appears that by letter, dated 4-1-2006, the appellants sought for three months time to reply to the show cause notice and the matter stood thus. Thereafter, another notice was issued informing the appellant assessee about the three days fixed for hearing, viz., 26-10-2009, 28-10-2009 and 30-10-2009. Since there was no response to this notice, the Commissioner proceeded to adjudicate the matter and held that there is clear violation of the various provisions of the Customs Act and Central Excise Act and the notifications and by a detailed order, confirmed the demand of both the Customs Duty and Central Excise duty and ordered confiscation of the goods, plant and machinery, the relevant portion of which reads thus:-

"Order

(i) I confirm the demand of Customs Duty of Rs. 26,49,18,319/- (Rupees Twenty Six Crores Forty Nine Lakhs Eighteen Thousand and Three Hundred and Nineteen only) on PPL in terms of the conditions of the Notification (Notification No. 13/81-Cus., read with Notification No. 53/97-Cus., dated 3-6-1997 and 96/93-Cus."

dated 2-3-1993 as amended) and in terms of the conditions of the bond executed for contravention of the said notification read with Section 12 of the Customs Act, 1962.

(ii) I confirm the demand of excise duty of Rs. 19,55,494/- (Rupees Nineteen Lakhs Fifty Five Thousand and four Hundred and Ninety Four only) on PPL in terms of conditions of Notification No. 1/95 C.E., and under Rule 196 of the erstwhile Central Excise Rules, 1944, read with Section 38A of the Central Excise Act, 1944, and in terms of the bond executed.

(iii) I impose a penalty of Rs. 50,00,00,000/- (Rupees Fifty Crores only) on PPL under Section 112 of the Customs Act, 1962.

(iv) I impose a penalty of Rs. 4,50,00,000/- (Rupees Four Crores Fifty Lakhs only) on PPL under Rule 209 of the erstwhile Central Excise Rules, 1944 read with Section 38A of the Central Excise Act, 1944.

(v) I order the confiscation of the plant and machinery and raw materials, components, consumables under Section 111(o) of the Customs Act, 1962, and under Rule 209 of the erstwhile Central Excise Rules, 1944 read with Section 38A of the Central Excise Act, 1944, and allow them to be redeemed on payment of redemption fine of Rs. 6,50,00,000/- (Rupees Six Crores Fifty Lakhs only) under Section 125 of the Customs Act, 1962 and Section 34 of the Central Excise Act, 1944. In respect of the goods that are not available for confiscation, I impose a redemption fine of Rs. 11,60,000/- (Rupees Eleven Lakhs Sixty Thousand only) under Section 125 of the Customs Act, 1962 and Section 34 of the Central Excise Act, 1944.

(vi) I order that appropriate interest under Notification No. 13/81-Cus., read with Notification No. 53/97-Cus., and Notification No. 96/93-Cus., dated 2-3-1993 as amended and Notification No. 1/95 C.E., as amended respectively read with terms of the bond for contravention of the above notifications to be paid by PPL on the duty demanded in para (i) and para (ii) above.

(vii) I impose a personal penalty of Rs. 50,00,00,000/- (Rupees Fifty Crores only) on Shri V. Ramakrishnan, Chairman & Managing Director of PPL under Section 112 of the Customs Act, 1962 and under Rule 209A of the erstwhile Central Excise Rules, 1944 read with Section 38A of Central Excise Act, 1944.

(viii) I impose a personal penalty of Rs. 25,00,00,000/- (Rupees Twenty Five Crores only) on Shri S.N. Rajan, Director of PPL under Section 112 of the Customs Act, 1962 and under Rule 209A of the erstwhile Central Excise Rules, 1944 read with Section 38A of Central Excise Act, 1944."

5. Against the said order of the Commissioner, the appellants filed appeals before the Tribunal on 26-10-2010 along with applications for waiver of pre-deposit. The said applications were considered by the Tribunal and the same were disposed of by order, dated 8-4-2013 made in Misc. Order No. 40922 to 40924 of 2013 ordering pre-deposit of the entire customs and excise duty along with interest

within six weeks and report compliance on 28-5-2013. The order insofar as penalty imposed on the Chairman & Managing Director and the Director was waived pending the appeals. Aggrieved against the said order of the Tribunal, the present appeals have been filed.

6. The points raised by the learned counsel appearing for the appellants is three-fold. The first contention raised by the learned counsel for the appellants is that the order passed by the Commissioner is an ex-parte order and the specific request was made by the counsel for the appellants on 30-10-2009 stating that they need further time to verify the documents, which are essential to advance their case and they also sought for copies of relevant documents on the ground that those documents were not supplied along with the show cause notice issued and, therefore, they are prejudiced.

7. The second contention advanced by the learned counsel for the appellants is that the plea made in the said letter is that the company is declared as a sick industry by the Board for Industrial and Financial Reconstruction and the assets were taken over by the Official Receiver under orders of the Hon'ble High Court of Bombay and, therefore, they are not in possession of any documents. It is further contended that in view of the orders of the Board for Industrial and Financial Reconstruction, further proceedings should have been stayed by the Tribunal, which fact has also been highlighted in the said letter. This letter, according to the appellant, was not considered by the Commissioner and he came to pass the ex-parte order and, therefore, prima facie, there is violation of principles of natural justice affecting the rights of the party and, therefore, the appellants are entitled to seek total Waiver of customs duty and excise duty, interest, etc. It is further submitted that in view of the order, dated 8-1-2013 passed by the Board for Industrial and Financial Reconstruction, which was filed as additional document before this Court, waiver should have been granted and to support the said stand, reliance was placed on the decision of the Apex Court in Sangroid Remedies Ltd. Vs. Union of India (UOI) and Others, .

8. The third contention advanced by the learned counsel for the appellants is that since the goods have been confiscated, the Revenue is safeguarded and, therefore, there was no need to pass the above order, ordering payment of pre-deposit.

9. Heard the learned counsel appearing for the appellants and the learned standing counsel appearing for the respondents and perused the materials placed in the typed set of papers.

10. Even at the outset, it may be mentioned that none of the grounds raised by the appellants merit consideration for the following reasons:-

On the plea of violation of principles of natural justice, we find that the show cause notice was issued on 5-12-2005 and the department clearly contends that they have sent the notices with four sets of documents to the company and the Directors of the company and the respondent company has responded by letter,

dated 4-1-2006 seeking three months time to reply to the show cause notice on the ground that the factory has been raided by various Government departments. This letter, has not been produced by the appellants, though the said letter emanates from the appellants. Nevertheless, this letter does not complain about the non-receipt of the documents. The subsequent plea taken in the letter, dated 30-10-2009, addressed by the counsel for the appellants is an afterthought, as is evident from the recording of the order of the Tribunal that there is no material to show that the letter of the counsel, dated 30-10-2009 was received by the Commissioner on the said date. There is no proof that sum and substance of the said letter was sent by fax message as alleged. Even otherwise, the Tribunal records, on the basis of the findings of the Commissioner, that the so-called letter of the counsel, dated 30-10-2009 was received only on 31-11-2009, i.e., post the order in original passed by the Commissioner. Therefore, this Court has no hesitation to hold that it is only an after-thought and there is no substantial material to plead violation of principles of natural justice.

11. Further, the Commissioner has given three dates for hearing and the appellants failed to appear. They could have appeared and sought for adjournment. Having not availed the opportunity, the appellants cannot now plead violation of principles of natural justice based on a letter, which never reached the authority in time. Therefore, we reject the plea of violation of principles of natural justice and further hold that the decision of the Supreme Court, relied on by the counsel for the appellants, does not apply to the facts of the present case as in para 6 of the relied upon judgment it has been clearly stated that there is no dispute that the impugned order therein was passed without affording opportunity. In the present case, opportunity was given, but not availed.

12. The next contention advanced by the learned counsel for the appellants is that in view of the proceedings of the Board for Industrial and Financial Reconstruction, the proceedings should have been stayed. We find from para 6 of the order of the Tribunal that in the earlier proceedings, Board for Industrial and Financial Reconstruction, vide order dated 21-12-2011 has recorded that the assets of the company have been taken over by M/s. Kotak Mahindra Bank under SARFAESI proceedings and the Board for Industrial and Financial Reconstruction further observed that the secured creditors and the Government Departments are at liberty to initiate action for recovery of dues.

13. For more clarity on the above two points, it would be relevant to extract the para 6 of the order passed by the Tribunal:-

"6. After hearing both sides and on perusal of the records, we find force in the submission of the learned AR. The main submission of the learned counsel is that the impugned order was passed without giving adequate opportunity of hearing. In this context, the learned counsel submits that the letter, dated 30-10-2009 was sent by fax. But no evidence was placed before us. On the contrary, the learned AR has produced a copy of the letter, dated 30-10-2009 received as

3-11-2009 in the Commissioner's office. It is noted that after receipt of the show cause notice, the applicant vide letter, dated 4-1-2006 had not intimated the non-availability of the relied upon documents but they only requested for extension of time to file reply to the show cause notice. However, they have not filed any reply to show cause notice. We have also noticed that the jurisdictional Superintendent vide letter, dated 6-4-2013 stated that in the factory location, there is no building or machinery belonging to the applicant but a housing project is being executed at that site by another company by name M/s. Akshaya Pvt. Ltd. We have also noticed that BIFR vide order dated 21-12-2011, recorded that the possession of the assets of applicant-company has been taken over by M/s. Kotak Mahindra Bank Ltd., under Section 13(4) of SARFAESI Act and abated the reference in accordance with third proviso to Section 15(1) of SICA. It has also observed that the secured creditors and Government Departments are at liberty to file/pursue suit, if already filed, before the competent court of law to recover the dues from the company. We have seen the letter, dated 9-12-2011 addressed to the jurisdictional Deputy Commissioner of Central Excise issued by M/s. Kotak Mahindra Bank Ltd., requesting them to take up the matter with the applicant-company as they have already taken possession of the substantial property."

14. The present proceedings before the Board for Industrial and Financial Reconstruction, dated 8-1-2013 is a recent order, which has no relevance for the purpose of adjudication before the Tribunal. Even otherwise, this order has not been produced before the Tribunal to counter the earlier BIFR proceedings dated 21-10-2011. Therefore, we are not inclined to accept the present contention raised by the appellants. When the order of the Board for Industrial and Financial Reconstruction, dated 21-10-2011 provides for recovery of statutory dues, which applies to the present case, we find no reason to hold that Tribunal's order is bad.

15. The third contention relates to confiscation of goods, and it is pleaded that since the goods have been confiscated, the Revenue is safeguarded. However, we find from the records of the original authority that the goods have been removed in violation of the undertaking given and the conditions imposed in the various notifications. Therefore, in such a scenario, the appellants cannot be allowed to say that the interest of the Revenue is safeguarded.

16. For the reasons stated above, we hold that the Tribunal is justified in ordering pre-deposit in the manner stated above. The Tribunal, however, has granted waiver of pre-deposit of penalty amount, amounting to Rs. 50 crores. Therefore, this Court finds that no interference is called for with the order passed by the Tribunal. Accordingly, all the appeals fail and the same are dismissed. Consequently, connected miscellaneous petitions are also dismissed. However, there shall be no order as to costs. Since the Tribunal has already granted waiver of pre-deposit of the penalty amount, the same shall not stand in the way of the Directors of the company in pursuing their appeals before the Tribunal.