(2014) 09 BOM CK 0066

In the Bombay High Court

Case No : Customs Appeal Nos. 3 and 4 of 2014

Prime Mineral Exports Pvt. Ltd. APPELLANT

Vs

Commissioner of Customs RESPONDENT

Date of Decision : 23-09-2014

Acts Referred:
Customs Act, 1962 — Section 12, 129(5), 129D, 130, 130(1)

Citation : (2015) 320 ELT 499 : (2016) 36 GSTR 55

Hon'ble Judges : B.P. Dharmadhikari, J;A.S. Gadkari, J

Bench : Division Bench

Advocate : C.A. Ferreira, H.K. Maingi and Rajiva Sirvastana, Advocate for the Respondent

Judgement

B.P. Dharmadhikari, J.—This appeal u/s 130 of the Customs Act, 1962 is field by an exporter challenging the order dated 28/3/2014 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai (Court No. I) in Appeal No. C/76 and 123/10. The appeals before the CESTAT was arising out of order dated 30/10/2009 passed by Commissioner of Customs and Central Excise (Appeals), Goa whereby said appellate authority upheld the adjudication order rejecting the refund claims filed by the present appellant.

2. Briefly stated, the facts show that the appellant exported on seven occasions ROM i.e. (mixture of iron ore fines and lumps). The appellant paid the normal customs duty on each shipment under protest. However, after export the appellant lodged claim for refund seeking benefit under notification No. 62/2007-Cus dated 3/5/2007 whereby the concessional rate of duty at Rs.300/- per M.T. was allowed in respect of iron ore fines. The said claim was rejected by adjudicating authority and the rejection was upheld by Commissioner The CESTAT has maintained the order of the Commissioner (Appeals).

3. Contention of the learned counsel for the appellant is that the order passed by the CESTA on 28/3/2014 impugned before this Court is a non speaking order. It is contended that the appellant filed written submissions and explained the

position to CESTAT. The averments or stand in those written submissions has been totally lost sight of leading to an erroneous or perverse finding. Learned counsel also states that thus there is a failure on the part of CESTAT to excise jurisdiction in the matter.

4. To rebut the preliminary objections to the maintainability of these appeals raised by learned counsel for the department, appellant has placed reliance upon a Division Bench judgment reported in Anil Products Limited Vs. Commissioner of Central Excise, A Division Bench judgment of this Court reported in Mahindra Ugine Steel Co. Ltd. Vs. Commissioner of C. Ex., in the case of "Mahindra Ugine Steel Co. Ltd. Vs. Commissioner of C. Ex., Pune-1." As also a Division bench judgment delivered by Madras High Court and reported in 2014 (303) ELT 492 is also relied upon to urge that the appeal filed before this Court in substance questions a non speaking order and therefore there is no challenge which has got any bearing on issue of classification or valuation. It is urged that thus it is not necessary for the appellant to approach the Hon''ble Apex Court in the matter and this Court can take cognizance and pass appropriate orders so that CESTAT can thereafter adjudicate the controversy in accordance with law.

5. Learned counsel for the department relies upon the impugned order. He invites our attention to the observations which are made therein and submits that reliance upon the judgment of the Gujarat High Court in the case of "Anil Products Ltd." (supra) or "Mahindra Ugine Steel Co. Ltd." (supra) is unwarranted. He further contends that in case of "Penshibao Wang" (supra) decided by Madras High Court no objection was raised to the maintainability of the appeal.

6. He has invited the attention of this Court to the provisions of sections 12, 14 of the Customs Act r/w section 129D to buttress his contentions. He also draws support from the judgment of the Hon''ble Apex Court reported in 1993 (68) E.L.T. page 3 (CS) in the case of ''Navin Chemicals MFG. and Trading Co. Ltd. Vs. Collector of Customs" to explain the scope of the phrase "Relation thereto" employed in section 129(5) as also section 130(1). He points out that dispute raised in refund claim is about the classification of the commodity exported. A Division Bench judgment of this Court reported in Commr. of C. Ex. Vs. Universal Ferro and Allied Chem. Ltd., and 2007 (213) E.L.T. 658 (Bom.) in the case of "Sterlite Optical Technologies Ltd. Vs. Commr. of C. Ex., Aurangabad" is also relied upon by him to point out that in dispute of such a nature, the appeal as filed is not maintainable.

7. Only substantial question to be decided is about the tenability of these appeals.

8. With the assistance of the respective counsel, we have perused the impugned order as also the judgment delivered by CESTAT on 28/3/2014. Said judgment show that after taking note of the facts, the contentions of the appellant has been reproduced. The contention was that the refund claim has been rejected on the ground that assessment orders in respect of imported goods were never challenged. Appellant attempted to demonstrate before CESTAT that there was

no order u/s 17(5) of the Customs Act and, as such, they were justified in seeking refund. They relied upon the judgment of the Calcutta High Court in the case of "Kothari Metals Ltd. Vs. Union of India" reported in 2011 (274) ELT 488.

9. CESTAT thereafter has noted the contention of the revenue that appellant/ exporter had never challenged the assessment orders passed by the assessing officer and that the appellant had declared consignment as ROM and never declared it as iron ore fines. Revenue also pointed out board circular no.14/2008 to it.

10. In the light of these contentions, CESTAT has applied its mind from para 9 of its judgment onwards. While dismissing the appeal, it has found that commodities exported were declared in the shipping bills as ROM i.e. Mixture of Iron Ore Fines and Lumps, and accordingly the duty was paid at applicable time rate. It has taken note of the requirement of notification No.62/2007 dated 3/5/2007 extending concessional rate and found that it exempted iron ore fines of Fe content 62% and below falling under heading no.11 of the Second Schedule to the Customs Tariff Act, 1975. It then took note of the public notice of no.14/2011, in relation to iron ore fines. It found that said public notice clarified that in case lumps were found in the consignment, the same are to be segregated to arrive at the quantity of fine and in case the segregation is not possible, the duty is to be charged on the entire consignment. taking into consideration the consignment as of ores other than fines. It has then looked into declaration as ROM by the present appellant. It found in this background that assessment order passed by the assessing authority was appealable u/s 28 of the Act and was never challenged by the appellant. It also noted that the assessment order cannot be challenged in the refund claim. It has relied upon the judgment cited by the revenue in the case of Collector of Central Excise, Kanpur Vs. Flock (India) Pvt. Ltd. C-7, Panki Industrial Area, Kanpur, delivered by the Hon''ble Apex Court for said purpose.

11. It then proceeded to consider the subsequent judgment of the Hon''ble Apex Court in the case of Priya Blue Industries Ltd. Vs. Commissioner of Customs (Preventive), The interpretation therein put on the words "in pursuance of an order of assessment" in section 27 of the Customs Act has been then looked into and a conclusion has been reached that a claim for refund cannot be maintained in such circumstances, unless the order of the assessment has been modified. It has also looked into the judgment of Kolkatta High Court in the case of Kothari Metals (supra) in para 13 and distinguished the same by pointing out that the above mentioned judgments of the Hon''ble Apex Court were not pointed out to Kolkata High Court. Thereafter it also found that present appellant did not pay the duty under protest. The appellant before this Court has invited our attention to the letters given while paying duty on each occasion to demonstrate that in fact duty was paid under protest and therefore, said observation of CESTAT is incorrect or perverse.

12. Learned counsel for the appellant has invited our attention to the written

submissions filed before CESTAT on 4/4/2013, more particularly to para 10.1 therein. There, after referring to provisions of para 10 (i) and (ii) of the public notice no.14/2008 certain arguments are advanced. In order to demonstrate how the appellant is entitled to the benefit of concessional rate as per notification no.62/2007, in that para appellant has mentioned that appellant exporter purchased the iron ore i.e. mixture of iron fines without segregation. They did not have screening facility for segregation of the iron in fines and lumps but because of huge demand from China on account of Olympics, the appellant was required to export the iron ore in its virgin form which was acceptable to the buyer, who could segregate the iron ore at their end by process of screening for benefaction. The appellant submitted before CESTAT in those written submission that they properly declared iron ore exported as comprising of 60% fines and 40% lumps and there were no mala-fides involved. Submission is that as this argument has not been looked into by CESTAT, the impugned order is rendered a non- speaking order.

13. The judgment of the Hon''ble Apex Court in "Navin Chemicals MFG and Trading Co. Ltd.", in para 7 considers the expression "determination of any question having relation to the value of goods for the purposes of assessment". The Hon''ble Apex Court found that the key lines in the words "for the purpose of assessment". It is held that where the appeal involves the determination of any question that has a relation to the custom duty for the purposes of assessment, the appeal must be heard by a Special Bench as per law then prevailing. Similarly where the appeal involves determination of any question that has relation to value of goods for the purposes of assessment that appeal also must be heard by a special bench. In para 8, the Hon''ble Apex Court has considered provisions of section 130(1) and section 130E clause (b) of the Customs Act. It has found that these provisions respectively refer to the statement of case to the High Court on reference by CESTAT and an appeal to Supreme Court directly. It has found that section 130(1) states that the Collector of Customs or the other party may require CESTAT to refer to the High Court any question of law arising out of an order under appeal before it provided it is not an order relating among other things, to the "determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment". It has also noted that as per section 130E Clause (b) an appeal shall lie to the Supreme Court from any order passed by the Appellate Tribunal relating, among other things, to the determination of any question having relation to the rate of duty of customs or to the value of goods for purposes of assessment".

14. In para 11, the Hon''ble Apex Court has considered sub-section 5 of section 129D and held that expression used in said provision should to be interpreted similarly. The said expression is already mentioned by us supra. This judgment is followed by the Division Bench of this Court in case of Sterlite Optical Technologies ltd. (supra). There noting intention of the parliament in its wisdom to provide appeal to the highest Court of land by incorporating section 35L this Court found appeal before High Court not maintainable. The arguments in

defence raised by the appellant are mentioned in paras 15 and 16 and then the above mentioned decision of Hon''ble Apex Court in case of Navin Chemicals (supra) finds mention in para 20. In paragraph 21 said Division Bench has found that following this decision of the Hon''ble Apex Court, Bombay High Court in case of Union of India Vs. Auto Ignition ltd. has ruled that wherever the dispute as to whether notification is applicable or not is raised, then the appeal would not be maintainable before High Court. In para 22, the Division bench has found that the term "levy" is wider in itself than the term "assessment''. Levy may include "imposition" of tax as well as "assessment" . Thus the Division Bench sustained the preliminary objection raised by the department and held that subject appeal was not maintainable before High Court. Very same view is re iterated by the Division Bench in the case of "Asst. Collector of Central excise V. National Tobacco of India Ltd." (supra). Relevant discussion is contained in paras 7 to 9 of the said judgment.

15. Counsel for the appellant has relied upon Madras High Court judgment in case of "Penshibao Wang P. Ltd." (supra). There the High Court has gone into question of need of recording reasons. The perusal of the judgment does not show that any preliminary objection about maintainability of appeal was raised by the revenue before said High Court and, therefore, High Court was not required to examine said aspect. Division Bench judgment of Bombay High Court in case of "Mahindra Ugine Steel Co. Ltd." (supra) shows that there the division bench has referred to the judgment of Hon''ble Apex Court in case of "Navin Chemicals MFG. and Trading Co. Ltd." (supra), however, while rejecting preliminary objection to maintainability of appeal, the Division Bench noted the contentions of the appellant that there was excess payment by it and hence a finding has been recorded that substantial question therein did not pertain to "valuation" at all. Therefore, the appeal before the High Court has been held maintainable.

16. Insofar as Judgment of Gujarat High Court in the case of "Anil Products Ltd." (supra) is concerned, though the Gujarat High Court has looked into the issue of classification dispute, it has found that the orders of appellate authority impugned before it was a non speaking order. Because it found the impugned order to be non speaking order the Division Bench of Gujarat High Court took cognizance of the appeal.

17. We have already briefly mentioned the impugned judgment deliver by CESTAT on 28/3/2014. In the said judgment CESTAT has found that the appellant before it i.e. the appellant before us themselves declared commodities as ROM and not as iron ore fines. It thereafter found that public notice no.14/2011 contemplated segregation of a mixture to arrive at a quantity of fine for which a concessional rate was available and when segregation was not possible, the higher duty was to be charged. It also found that assessment order in case of present appellant was never challenged by it and it also relied on the judgment of the Hon''ble Apex Court to conclude that such assessment order cannot be

allowed to be challenged in refund claim. It found that unless and until such assessment order is modified, claim for refund cannot be entertained. It also distinguished the judgment of the Calcutta High Court in case of " Kothari Metals Ltd. Vs. Union of India". (supra).

18. In the situation, we are not in a position to hold that said judgment passed by CESTAT is a "non speaking order". The so called erroneous observation that the appellant had paid duty without any protest, is an observation on merits of the matter and it does not in any way enable the appellant to deviate from the scheme provided for in the Enactment. Said observation even if presumed to be incorrect, does not enable this Court to entertain the appeal as filed. Defect of this nature must be demonstrated to Hon''ble Court competent to entertain statutory appeal against it.

19. We are making these observations only to demonstrate that even if such finding is presumed to be perverse, on that ground appeal before Hon''ble Apex Court cannot be avoided. We are not, therefore, recording any conclusive finding on issue of payment of duty without protest or with protest as we do not have that jurisdiction in the present proceedings. But omission of CESTAT to consider some contentions or an erroneous finding on merit by it, does not render its order "a non speaking" one.

20. As we find the order passed by CESTAT to be reasoned, it is apparent that appeals as filed are not maintainable before this Court. Preliminary objection raised by the Revenue is accordingly upheld. The appeals are accordingly dismissed. No costs.