

IN THE HIGH COURT OF BOMBAY AT GOA

EXCISE APPEAL NO. 03 OF 2008

Commissioner of Central Excise,
ICE, House EDC Complex, Patto Plaza,
Panaji, Goa, 403 001.

... Petitioner

V e r s u s

M/s. Seagull Threads (India) Ltd.,
Seagull House, Plot Nos 63 to 65,
and 74 & 75, Sancoale Industrial Estate,
Zuari Nagar, Goa, 403726

... Respondent

Ms. Susan Linhares, Central Government Standing Counsel for the Petitioner.

Mr. Sudin Usgaonkar with Ms. Tanvi Kamat Ghanekar, Advocate for the Respondent.

Coram :- **F. M. REIS,**
 M. S. SANKLECHA, JJ.

Date : **17th April, 2015**

JUDGMENT (Per F. M. Reis, J.)

Heard Ms. Susan Linhares, learned Central Government Standing Counsel appearing for the Petitioner and Shri Sudin Usgaonkar, learned Counsel appearing for the Respondent.

2. The above Appeal came to be admitted by an Order dated 27.01.2009 on the following substantial question of law :

(1) Whether it is permissible in law to consider the issue afresh in a proceeding which has already been settled by the same authority by its earlier order and had attained finality for want of any appeal against the original/earlier order, as no party to the litigation has

challenged in any appellate forum ? And, if the answer to this question is negative, the order dated 24.7.2007 passed by CESTAT is liable to be set aside ?

(2) Whether the CESTAT was correct in coming in the conclusion that there was a direction in its earlier order dated 19.07.2004 for de novo consideration of the issue involved in the Show Cause Notice or mere direction to compute and communicate to the respondent, Central Excise duty payable on Viscose Yarn and other amount in terms of the said Order ?

(3) Whether the CESTAT was justified in setting aside the Order dated 24.3.2006 passed by the Commissioner in view of the facts and circumstances as set out in this appeal ?

3. Briefly, the facts of the case as stated by the Petitioner are that the Factory premises of the Respondent Company M/s. Seagull Threads (I) Ltd. was visited by the Central Excise (Preventive and Intelligence) Unit of the Appellants Office. Records and materials were seized under Panchanama somewhere around 13.08.1996 and 16.08.1996. After due investigation, the Respondent was issued a show cause notice alleging clandestine manufacture and clearances of excisable goods manufactured by the Respondent without payment of duty on 04.02.1997. The Commissioner of Central Excise Goa, by its Order dated 24.03.2006 confirmed and communicated the demand of Rs,7,12,765/-. The Respondents preferred an Appeal before the CESTAT against the Order dated 24.03.2006 which was allowed on 24.07.2007 thereby the Order demanding duty, penalty and interest was set aside. Being aggrieved by the said Order, the Appellant has preferred the present

Appeal.

4. The learned Central Government Standing Counsel appearing for the Appellant, in support of the aforesaid substantial questions of law, has pointed out that the team of the Central Excise Officers visited the premises of the Respondent and prepared a panchanama dated 13.08.1996 and 16.08.1996 whereby, the excisable goods manufactured by the Respondents along with the raw materials and the finished products were sealed on a reasonable belief that they were required for further investigation. Learned Counsel further pointed out that after such investigations, the Appellant issued show cause notice to the Respondents demanding Central Excise duty of Rs.40,18,686/- and an additional duty of Excise of Rs.6,02,803/-. Learned Counsel further pointed out that upon adjudication, the Commissioner by an Order dated 31.10.1997 held that the Respondents had indulged in clandestine manufacture and clearance of excisable goods by suppressing figures of production and sale and, consequently, confirmed the demand of Rs.40,18,686/- as basic excise duty and Rs.6,02,803/- as additional duty of Excise and also imposed penalty of equivalent amount under Section 11AC of the Central Excise Act, 1944, whereby, the Polyester sewing thread totally valued at Rs.19,690.29 was ordered to be confiscated which was allowed to be redeemed with a fine of Rs.5,000/- in lieu of confiscation. Learned Counsel further pointed out that being aggrieved by the said Order, the Respondents filed an Appeal before the Customs, Excise & Service Tax Appellate Tribunal (CESTAT), which Appeal was allowed in part and, consequently, the demand of duty for Polyester Yarn was set aside and the demand of Viscose Yarn was confirmed; the penalty imposed under Section 11AC of the Central Excise Act was set aside; the penalty imposed under

Rules 173Q was reduced to Rs. 2 lakhs; the Respondents were called upon to pay the duty on Viscose Yarn as and when it was worked out. The learned Counsel further pointed out that the Order dated 19.07.2004 passed by the CESTAT was duly accepted by the Commissioner and accordingly a demand of Rs.7,12,765/- was communicated to the Respondents by letter dated 13.05.2005. It is further the contention of the learned Counsel for the Appellant that the Respondent called upon the Joint Commissioner to drop the demand for reasons stated in their letter dated 06.06.2005, 09.06.2005 and 29.08.2005. The Respondent also sought for a speaking order from the Joint Commissioner. But, however, the learned Counsel pointed out that by letter dated 07.07.2005, the Respondent was again advised to pay the said sum of Rs.7,12,765/-. But, however, the Respondent insisted that the Commissioner should pass a speaking Order. Learned Counsel further pointed out that for abundant caution, a speaking Order was passed by the Commissioner after giving a personal hearing to the Respondent. But, however, by letter dated 13.05.2005, the said sum of Rs.7,12,765/- was re-confirmed by the Appellant. The learned Counsel further submits that aggrieved by the Order, the Respondent preferred an Appeal before the CESTAT which was opposed by the Appellants and ultimately by impugned Order dated 24.07.2007, the Appeal was allowed and the Order dated 24.03.2006 passed by the Commissioner, came to be set aside. Learned Counsel further pointed out that the Tribunal has erroneously appreciated the evidence on record and has failed to consider that there was a shortfall which was established by the Appellants which made the Respondents liable to pay excise duty claimed along with penalty and interest. Learned Counsel further submitted that as the original Order was accepted by the Respondent, the question of now disputing the correctness of the earlier findings by the Commissioner is

totally erroneous. Learned Counsel has also taken us through the Order passed by the CESTAT and pointed out that the evidence has been misconstrued and, as such, the Appeal deserves to be allowed and the substantial questions of law be allowed and answered in favour of the Appellant.

5. On the other hand, Shri Sudin Usgaonkar, learned Counsel appearing for the Respondents, has disputed the said contentions. Learned Counsel as pointed out that on the basis of the material on record, it has been conclusively established that there was no shortfall at all during the relevant period. Learned Counsel further pointed out that the allegations of the Appellant that there was any manipulation or diversion of the inward records is totally perverse. Learned Counsel has taken us through the CESTAT Order and stated that the Tribunal has rightly appreciated the evidence to come to the conclusion that the Order passed by the Appellants is totally erroneous. Learned Counsel further submits that the substantial question of laws be answered against the Appellant. Learned Counsel has taken us through the balance sheet to point out that the adjudicating authority has considered only the production portion and has not considered the fact that there was a closing balance of the very same product indicated in the balance sheet. The learned Counsel has further pointed out that the adjudicating authority has failed to note that there is a closing balance on 31.03.1996 which clearly points out that the allegation of the Appellant that there was any clandestine removal of such thread is totally incorrect.

6. We have considered the submissions of the learned Counsel. We have also gone through the records. On perusal of the Order passed by the

CESTAT, we find that the Tribunal has found that there were two aspects to be considered on the basis of the contention of the Appellants and the Respondents. First is the scope of the remand Order of the Tribunal and the next is as to whether the claim of duty penalty and interest is justified. The Tribunal has rightly noted that on perusal of the Order of the remand, it clearly says that the demand thereof is to be re-visited on the basis of total Viscose Yarn manufactured by the Respondent during the year in question. The Tribunal, as such, found that the show cause notice issued to the Respondent was pertaining to the duty payable on Polyester Sewing thread and Art Silk Embroidery thread cleared during 1995-96 and, as such, the period in question was from 01.04.1995 to 31.03.1996. With regard to the claim of the Appellant that there was clandestine removal of the goods for the said year ending on 31.03.1996, the Tribunal noted that the allegations is that the Appellant clandestinely sold 14.54 MTs of Art Silk Embroidery thread when the total production calculated is 167.73 MTs as shown in the schedule of the balance sheet. The learned Tribunal further noted that such balance sheet was not considered by the adjudicating authority whilst making a demand. The Tribunal as such found that the revenue has not produced any evidence as to indicate that the said closing balance of 24.16 MTs as shown in the balance sheet did not include 14.54 MTs for which demand of duty has been confirmed. The learned Tribunal as such set aside the demand of revenue filed by the Respondents.

7. The dispute in the present case is with regard to the claim of duty in respect of two types of goods, one is the claim in respect of polyester and the other is Viscose Yarn. With regard to the claim of Polyester Yarn, the CESTAT by an Order dated 19.07.2004, has come to the conclusion that the demand of duty on

polyester yarn cannot be accepted as it does not amount to manufacture. Whilst remanding the matter with regard to Viscose Yarn, the Tribunal found that the Commissioner whilst making the demand of duty for both Polyester Yarn and Viscose Yarn had not indicated the duty separately on each of these products and, as such, as no duty was payable with regard to the Polyester Yarn, the demand with regard to the Viscose Yarn had to be re-visited on the basis of goods manufactured by the Respondent during the period in question. The said Order clearly shows that the claim of duty with regard to Viscose Yarn was ordered to be re-examined by the authorities. In such circumstances, the contention of the Appellants that there was no question of re-examining the said issue cannot be accepted on reading the said Order dated 19.07.2004. Hence, the first and second substantial questions of law are answered against the Appellant.

8. With regard to the claim of the Appellant that there was clandestine removal of Viscose Yarn, the Tribunal has noted that the amount claimed by the Appellant was in respect of 14.54 MTs. While determining the said figure, the Appellant had failed to note that closing balance was 24.16 MTs. Taking note of the said closing balance which has not at all been considered by the Adjudicating Authority whilst holding that there was clandestine removal of 14.54 MTs, we find that the conclusion arrived at by the Tribunal cannot be faulted. The fact that the figures on the balance sheet have to be accepted has not been disputed by the Appellant. In fact the Tribunal has noted that there is no material on record produced by the Appellant to dispute the correctness of the figures shown on the balance sheet. These findings of fact by the authorities below cannot be re-appreciated by this Court in the present Appeal. Thus, the Tribunal on the basis of

the material on record rightly rejected the claim of Appellant that there was clandestine removal of the goods.

9. In such circumstances, we find that there is no case made out for any interference in the Order passed by the Tribunal. The third substantial question of law is answered against the Appellant.

10. In view of the above, we find no merit in the above Appeal which stands accordingly dismissed.

M. S. SANKLECHA, J.

F. M. REIS, J.

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