

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL WRIT PETITION NO.279 OF 2015

Sunbel Alloys Co. of India Ltd.	..Petitioner
Versus	
The Union of India & Ors.	..Respondents

WITH

CENTRAL EXCISE APPEAL NO.179 OF 2014
[Original Side]

Sunbel Alloys Co. of India Ltd.	..Appellant
Versus	
The Commissioner of Central Excise, Belapur, Navi Mumbai	..Respondent

Mr. V. Sreedharan, Senior Counsel a/w. Mr. Prakash Shah and Akhilesh Rangasia i/b. PDS Legal, for the Petitioner/Appellant.

Mr. Y.S. Bhate i/b. Mr. Kirankumar Phakade, for the Respondent.

**CORAM : S.C. DHARMADHIKARI &
SUNIL P. DESHMUKH, JJ.**

DATE : JANUARY 20, 2015

ORAL JUDGMENT : [PER S.C. DHARMADHIKARI,J.]

1. These two matters can be disposed of by a common order.
2. We take up first Central Excise Appeal No.179 of 2014.
Having heard both sides and perusing the order of the Tribunal we proceed to admit this appeal on the following substantial questions of law :

[i] Whether, under the facts and circumstances of the case, the Appellate Tribunal erred in committing yet another instance of judicial indiscipline by not following binding precedent in case of S.D. Fine Chemicals affirmed by the Hon'ble Supreme Court which was followed in the decision of the Appellate Tribunal in case of E. Merck under identical facts for the past period, which had attained finality since no appeal was filed against that decision ?

[ii] Whether, under the facts and circumstances of the case, the Appellate Tribunal is correct in allowing the Respondent to argue & lead evidence as regards percentage of value addition achieved in the processes undertaken, at the final hearing stage, especially when such an allegation was never raised either in show

cause notice or in the appeal filed before it and no evidence was led at any earlier stage ?

[iii] Whether, under the facts and circumstances of the case, the Appellate Tribunal is justified in holding that activity of purification undertaken by the Appellants amounts to manufacture in terms of Section 2(f) of Central Excise Act, 1944 and accordingly, clearances of purified goods attracts payment of Central Excise duty ?

3. With the consent of both sides, we dispose of this Central Excise Appeal finally. In the light of the order passed in the Central Excise Appeal, the controversy in the Writ Petition would be academic.

4. The appellants have pointed out that they are engaged in the activity of purification of excise duty paid Hexane and Petroleum Ether, which are supplied to them on free of costs basis by M/s. Merck Specialties Private Limited (for short, "M/s.Merck"). The appellants carry out purification, if required, on job work basis. During the relevant period, M/s. Merck purchased the above goods, namely, Hexane and Petroleum Ether from various suppliers and directed the suppliers to transport the said goods to the appellants. In addition M/s. Merck also

supplied purified Hexane and Petroleum Ether to the appellants for laboratory testing and repacking purposes. The appellants have stated as to how the job work assigned to them has been carried out and they claimed that the process of purification of Hexane and Petroleum Ether as well as that of repacking from bulk to smaller/retail packs does not amount to “manufacture” within the meaning of Section 2(f) of the Central Excise Act, 1944. The appellants claimed that these purified Hexane and Petroleum Ether obtained from duty paid Hexane and Petroleum Ether are cleared from the factory of the appellants in the name of grades such as Guaranteed Reagent Hexane for Chromatography Lichrosolv grades.

5. The appellants have described the entire process and which they claim as job work on and of M/s. Merck. We need not advert to those details and which are set out till page-9 of the appeal paper book (para- 6.5).

6. The appellants pointed out that in the past the Revenue had sought recovery of duty on the reprocessed and repacked Hexane and Petroleum Ether relying upon the erstwhile Central Excise Rules, 1944

and the Central Excise Rules, 2002 prevalent at present. The appellants have been registered with the Department in terms of both the earlier and the prevalent Rules, namely, Central Excise Rules, 2002. The appellants pointed out that M/s. Merck had obtained loan license as a manufacturer in the premises of the appellants. Besides Hexane and Petroleum Ether, the appellants were also receiving some other chemicals for purification in respect of which there is no dispute. M/s. Merck filed declaration under Rule 173C of the erstwhile Central Excise Rules, 1944 in the capacity of a principal manufacturer in the unit of the appellants. In the said declaration, the details of activity undertaken by the appellants on the duty paid Hexane and Petroleum Ether were furnished to the Department. The Revenue had relied upon the visit which was paid by the Superintendent of Central Excise, Range-IV, Belapur I Division. There was a communication dated 27th February, 2001 issued by the said Superintendent. The appellants point out that the above products were classified under Sub-Heading 27.10 of the Central Excise Tariff. The purified Hexane and Petroleum Benzine 60-80 which were cleared by the appellants after repacking to M/s. Merck were also classified under this chapter of Central Excise Tariff. The

appellants claimed to have replied to the letter of the Superintendent and made him known this entire process. They were of the view that the Department is satisfied with the explanation and no show cause notice was issued. However, despite such extensive correspondence carried out with the Revenue, the appellants were called upon to pay the duty on the ground that the processing activity carried out by using boiler, reactor etc. amounts to manufacture on account of which the duty demand was raised. This correspondence from March to May 2006 is relied upon. Equally this continued in the year 2007 as well. However, a show cause notice was issued and which resulted in an order of adjudication passed by the Commissioner of Central Excise, Belapur dated 29th October, 2007. He held that the activity of purification of Hexane and Petroleum Ether carried out by M/s. Bharat Dye Chem amounts to manufacture and thereby purified grades of Hexane and Petroleum Ether are required to pay duty. The case of that entity, namely, M/s. Bharat Dye Chem was relied upon to seek clarifications from the appellants and pursuant to the alleged non-satisfaction of the Revenue even the appellants proceeded to receive a show cause notice dated 8th February, 2008. That show cause notice proposed to demand

Central Excise duty in the sum of Rs.2,34,81,983/- under Section 11A(1) of the Central Excise Act, 1944. This was on the clearance of the purified Hexane and Petroleum Ether from January, 2003 to November, 2007. Even interest was also claimed and the notice also proposed to impose penalty.

7. We do not wish to go into the contents of the show cause notice and equally the response of the appellants thereto which is contained in the letter dated 27th July, 2008. Pertinently an adjudication order was passed rather which could be said to be an order discharging or dropping the proceedings. That order dated 31st March, 2009 was subject to some scrutiny by the committee of the Chief Commissioner of Central Excise and had decided to prefer an appeal against the said order. That appeal came to be preferred before the Appellate Tribunal. The Appellate Tribunal passed an order and proceeded to uphold the claim of the Revenue. That order dated 28th March, 2014 is impugned in the Central Excise Appeal.

8. In the Writ Petition what has been impugned is the order dated 12th September, 2014 on an application which is preferred by the

appellants seeking rectification of the order passed on 28th March, 2014 by the Tribunal.

9. Mr. Sreedharan, learned Senior Counsel appearing on behalf of the appellants submits that the the above framed substantial questions of law arise on the adjudication by the Department/Revenue. Mr. Sreedharan points out as to how the process undertaken by the appellants was explained in details before the Commissioner while he passed the Order-in-Original and also before the Tribunal.

10. Mr.Sreedharan submits that similar proceedings were initiated against M/s. E. Merk (i) Ltd.. There is an order passed in the case of M/s. E. Merk (i) Ltd., namely, final order No.995/98-C dated 12th October, 1998. He submits that now what is done by the appellants is identical inasmuch as what M/s. E. Merk did earlier has now been assigned as job work to the appellants. M/s. Merck Specialties Pvt. Ltd. are same as M/s. E. Merk (i) Ltd.. M/s. E. Merk (i) Ltd. had undertaken similar process and identical activity at its Taloja Unit. The show cause notices were issued to M/s. E. Merk and alleging that the activity of purification carried out by said M/s. E. Merk amounts to manufacture.

The allegation is that the process undertaken by said M/s. E. Merk cannot be said to be not bringing out any new commodity or article. Yet the Department / Revenue persisted with its stand and a show cause notice was issued to M/s. E. Merk (i) Ltd. On that, an order was passed on 8th August, 1992 (Annexure-E). Relying upon the findings in that order Mr. Sreedharan submits that this order was upheld by the Commissioner of Central Excise (Appeals) by his order dated 26th September, 1994. The Tribunal also did not deem it fit to interfere with these orders and confirmed them by final order dated 12th October, 1998.

11. The Tribunal's final order was accepted by the Department / Revenue. It is in these circumstances that Mr. Sreedharan submits that the finding in the final order dated 12th October, 1998 binds the Revenue. These findings were specifically brought to the notice of the Appellate Tribunal when it passed the impugned order. During the course of hearing before the Tribunal, the Tribunal's attention was extensively invited to these orders. The Tribunal has not adverted to these orders and neither expresses its disagreement nor concurrence therewith. In that regard our attention is invited to Tribunal's impugned

order dated 28th March, 2014 and para-5 thereof. The Tribunal in the further paragraphs has not commented about the correctness of the conclusion recorded earlier. Mr. Sreedharan, therefore, has essentially based his arguments on the principle of finality of judgment and rule of precedents. He submits that if the Tribunal is shown an earlier order passed by it taking a particular view on the same issue or question, then, it is the bounden duty of the Tribunal to refer to its own findings and then conclude as to whether they bind it in the successive or second round or is there is reason to hold that these findings have lost their binding nature. However, this cannot be a mere *ipse dixit* or a bare conclusion but reasons would have to be assigned which must stand the scrutiny by a higher Court. Mr. Sreedharan would submit that the earlier order if brought to the notice of the Tribunal and relied upon so as to support the argument that it is identical on facts and in law, then, the Tribunal must advert to it in details. It must advert to the legal principles referred above. It must then conclude whether on account of any changes in law or because the facts and circumstances are not identical and similar, that a departure can be made from the earlier view and conclusion. Meaning thereby, the Tribunal must hold that its earlier

order is no longer a good law or is distinguishable on facts. In the instant case the Tribunal has without adverting to any of these principles, proceeded to allow the appeal of the Revenue and directed remand of the matter to the adjudicating authority for re-computation of the duty demand within the normal period and also for allowing Cenvat Credit of the duty paid on the raw materials, subject to submission of documentary evidence. However, all this will have to be done bearing in mind the conclusions recorded by the Tribunal in para-6.1 and 6.2 of the impugned order.

12. Mr. Sreedharan submits that ordinarily none would complain if the remand is necessitated so as to render justice to both sides or to decide an issue which has been left out of consideration. If the remand is in the interest of justice and sub-serves the larger purpose, then, ordinarily a higher Appellate Court would not interfere with such an order. However, the Revenue insisted that the appeal be allowed in its entirety, whereas the appellant before us insisted that it should be dismissed in the light of the earlier round of litigation with M/s. E. Merk. The Tribunal does not adopt the course of giving a finality to the issue but rendering some tentative opinion and thereafter remanding the case.

That serves no purpose, according to Mr.Sreedharan. In such circumstances, he would submit relying upon a judgment of the Division Bench of this Court in the case of *Mercedes Benz India Pvt. Ltd. Vs. Union of India* in Writ Petition No.1614/2010 decided on 17th March, 2010 reported in **2010 (252) E.L.T. 168**, that this Central Excise Appeal be allowed.

13. On the other hand Mr. Bhate appearing on behalf of the Revenue would submit that neither the Central Excise Appeal deserves to be admitted or allowed nor the Writ Petition. Pure findings of fact are being sought to be reappreciated and reappraised. This is not permissible in an appellate jurisdiction. He would submit that the Tribunal has assigned reasons as to why it takes a view that the activities undertaken would amount to manufacture. He relies upon para-6.1 of the Tribunal's order. He would submit that the entire process has been considered and it is clearly amounting to manufacture. The Tribunal has assigned reasons for its factual conclusion that a new product has merged having a distinct character, name and use after various processes undertaken by the appellants. That would attract Section 2(f) of the Central Excise Act, 1944. Mr. Bhate would rely on the conclusion

reached by the Tribunal and the decisions of the Hon'ble Supreme Court in the case of *Pio Food Packers* reported in [1980 (6) ELT 343 (SC) and in the case of *Empire Industries Ltd.* reported in 1985(20) ELT 179 (SC) to support the Tribunal's order. Mr. Bhate specifically relied upon the factual conclusion of the Tribunal that the value addition which the appellant has achieved on account of these processes is of 200% which is substantial and which is not achievable in mere repacking. In such circumstances, he would submit that both the proceedings deserve to be dismissed.

14. We have with the assistance of learned Counsel appearing for the parties perused the appeal paper book and which we find is sufficient for a decision in the present proceedings. Our conclusion rendered in this Central Excise Appeal would not require us to pass a separate order in the Writ Petition. The Writ Petition strictly would then not survive. However, we clarify that in the light of our answer and conclusion on question No.(i), it is not necessary to render any findings on the questions (ii) & (iii). They will have to be considered by the Tribunal.

15. It is apparent that show cause notice is dated 8th February,

2008 and which was the subject matter of the proceedings pertaining a demand for the period January, 2003 to November, 2007. There is a second show cause notice dated 16th December, 2008 which is also referred to by the Tribunal. We find from the factual narration in the Tribunal's order that the Tribunal was concerned with the validity and legality of these two show cause notices whereunder a demand was raised for the period January, 2003 to November, 2007 and from December, 2007 to September, 2008. The ground alleged in the show cause notice is that the activity of repacking / relabeling / refining of laboratory chemicals undertaken by the appellants in respect of Petroleum Benzine and Hexane for Chromatography Lichrosolv would amount to "manufacture" and, therefore, it was required to discharge excise duty liability. The adjudicating authority came to the conclusion that these activities did not result into manufacture of a new product and held that the said process undertaken by the appellant does not amount to "manufacture".

16. In the memo of Appeal as also in the oral arguments before the Tribunal, the Revenue contended that the standards laid down for Food Grade Hexane and the product manufactured by the appellants

would demonstrate that the product of the appellants conforms to these specifications. There is an order passed in the case of *Alok Enterprises Vs. CCE, Mumbai-II* reported in *2004 (178) ELT* 550. The Revenue also relied upon a judgment of this Court which upheld the view taken in *M/s.Alok Enterprises (supra)*. Then another judgment of the Hon'ble Supreme Court was relied upon to demonstrate as to how the process undertaken by the appellants amounts to “manufacture”. The Additional Commissioner appearing for the Revenue before the Tribunal pointed out that there is a substantial value addition achieved in the process and the value addition is more than 200%.

17. The learned Counsel appearing for the appellants pointed out that this is nothing but only a repacking of the goods and no purification process was undertaken and mere repacking from bulk to smaller/retail packs would not amount to “manufacture”. The reliance was placed on the appellants own case where the duty was demanded but the proceedings were discharged / dropped by an order in Appeal, dated 26th September, 1994 and which was upheld by the Tribunal's final order dated 12th October, 1998. Thus, this is a case which is identical to *M/s. E. Merk (i) Ltd.*, was the essential argument before the Tribunal. There

was an alternative argument and which has been noted in para-5 of the Tribunal's order.

18. However, we have extensively referred to para-6.1 of the Tribunal's order passed on 28th March, 2014 and impugned in this appeal only to highlight that we find no reference therein being made to the facts emerging from the record in the case of M/s. E. Merk (i) Ltd., order dated 26th September, 1994 relied upon and equally the Tribunal's earlier order dated 12th October, 1998. We do not find that the Tribunal has distinguished its earlier order in the case of M/s. E. Merk (i) Ltd. heavily relied upon by the appellants for the reason that it is not identical to the present facts and circumstances. We also do not find that the Tribunal has extensively referred to the reasoning in the order dated 12th October, 1998 and found it to be either incorrect or not being in conformity with law. We also do not find any conclusion being rendered that in the light of subsequent changes or subsequent rulings including of the Hon'ble Supreme Court earlier order is no longer a good law. We find substance in the argument that judicial discipline requires all this to be done and carefully and meticulously. There is a larger purpose being served by certainty and finality of judgments. We do not see as to how

after decades of the enactments, such as, Code of Civil Procedure, 1908 and particularly Section 11 thereof that it has to repeatedly emphasized that judicial Tribunals and Courts of law have to follow the rule of consistency and certainty so also finality of judgments. There is a definite purpose being served because of all this and namely parties before the Court of law or a Tribunal and litigants and citizens can then proceed on the assumption that the judgments and decisions rendered earlier in their own at least cases on facts would have a binding effect. If certain issues and questions have been dealt with earlier then such orders may also govern cases of other litigants if they involve identical facts and circumstances. Thus public interest is sub-served when a Court of law or judicial Tribunal follows such principles. This is embodied in the explanation to Section 11 of the Code of Civil Procedure. That is pertaining to finality of judgments. There is a rule, namely, *res judicata* and *constructive res judicata*. These rules may not apply strictly in proceedings under a taxing statute, but there is another principle which equally applies and with full force and that is impressed upon the Tribunals such as CESTAT in the case of Mercedes Benz (*supra*). This Court was faced with a similar situation and in para-16 of the order

passed in the case of Mercedes Benz (Supra) this Court noted the argument that a decision of the coordinate bench has been disregarded by the Tribunal in the case of Mercedes Benz, rather it was completely ignored. This Court concluded that the grievance is not wholly unjustified. In paras-17 and 18 of the order this Court held as under :

“17. We are not happy to observe but constrained to say that one must remember that pursuit of the law, however glamorous it is, has its own limitation on the Bench. In a multi-judge court, the Judges are bound by precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority. The judicial decorum and legal propriety demand that where a learned single Judge or a Division Bench does not agree with the decision of a Bench of co-ordinate jurisdiction, the matter should be referred to a larger Bench. It is a subversion of judicial process not to follow this procedure. In our system of judicial review which is a part of our Constitutional scheme, we hold it to be the duty of the judges of the courts and members of the tribunals to make the law more predictable. The question of law directly arising in the case should not be dealt with apologetic approaches. The law must be made more effective as a guide to behavior. It must be determined with reasons which carry convictions within the Courts, profession and public. Otherwise, the lawyers would be in a predicament and would not know how to advise their clients. Subordinate courts would find themselves in an embarrassing position to choose between the conflicting opinions. The general public would be in dilemma to obey or not to obey such law and it, ultimately, falls into disrepute. These are the observations made by the Apex Court

in *Sundarjas Kanyalal Bhathija v. Collector, Thane*, AIR 1990 SC 261.

18. The Apex Court also had an occasion to notice similar impropriety in the case of *Lala Shri Bhagwan v. Ram Chand*, AIR 1965 SC 1767; wherein it was observed as under:

“It is hardly necessary to emphasize that considerations of judicial propriety and decorum require that if a learned single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a single Judge, need to be reconsidered, he should not embark upon that enquiry sitting as a single Judge, but should refer the matter to a Division bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety. It is to be regretted that the learned single Judge departed from this traditional way in the present case and chose to examine the question himself.”

The similar expressions are to be found in the case of *Mahadeolal Kanodia v. The Administrator General of West Bengal*, AIR 1960 SC 936 (at p.941); wherein it is observed:

“We have noticed with some regret that when the earlier decision of two Judges of the same High Court in *Deorajin's* case, 58 Cal.WN 64 AIR 1954 Cal 119 was cited before the learned Judges who heard the present appeal they took on themselves to say that the previous decision was wrong, instead of

following the usual procedure in case of difference of opinion with an earlier decision, of referring no less than legal propriety form the basis of judicial procedure. If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if Judges of co-ordinate jurisdiction in a High Court start overruling one another s decision.”

19. In the present case, there is a far more serious legal infirmity. The appellants claim to be carrying on job work for E.Merck Specialties (P) Ltd.. The principals of the appellants (E.Merk) faced identical allegations and were proceeded against for having carried on manufacturing activity in their premises. The product or goods in relation to which the allegations are made are identical. The Tribunal upheld the arguments of E.Merck and allowed its Appeal. That order was relied upon by the appellants in the proceedings against them. They succeeded before the Commissioner. The Tribunal does not make any reference to all this and does not deem it necessary to consider the arguments based on its earlier orders. These orders were stated to be final. Yet, the Tribunal omits to consider them. We are not impressed by the argument of Mr. Bhate that though the assessee cited before the Tribunal the decision in its own case or rather in the case of M/s. Merk Specialities Pvt. Ltd. or M/s. E. Merk (i) Ltd., the judgment of this Court in the case of Mercedes Benz (supra) was not brought to the notice of the Tribunal. It is surprising that the Tribunal has to be shown on this elementary or basic point any judgment as

it is its bounden duty in law to have adverted to an order passed by it or its coordinate bench on the same point, may be in earlier round of litigation. If it is relevant to the adjudication in the present appeal, then, it is the further bounden duty to deal with it in details. If the judgment is distinguishable on facts a definite conclusion on that count has to be reached. If the judgment is not correct then equally reasons have to be assigned for such a crucial conclusion. This is the rule which has been emphasized. Rule of judicial discipline requires reference being made to a larger bench in case of differences of opinions or views between the benches of the Tribunal on identical facts. A healthy way of deciding matters and to maintain purity and sanctity of the judicial process is emphasized by this Court in Mercedes Benz (supra) and relying upon the judgment of the Hon'ble Supreme Court of India. This binds the Tribunal. We have also cautioned the Tribunal in number of cases that the process of adjudication and in Revenue matters requires an early finality to vexed issues. If the issues are raised repeatedly then all more there ought to be certainty and end to the litigation. In Revenue matters none is benefited by delays. If the delays are caused by repeated remand of proceedings then that has to be avoided. If its earlier orders have been brought to the notice of the Tribunal, then, the least that is expected is that they are dealt with and considered seriously and a conclusion is reached about their applicability to the facts and circumstances of a given case. The Tribunal which is manned by

experienced members drawn from the Revenue or Technical Services and Judiciary are expected to perform this task efficiently. They are selected and appointed on account of their merit and not just their experience. They may not have dealt with matters which required them delivering judgments and passing binding orders after hearing both sides and on questions of law, but, their learning knowledge and experience as Members of the Tribunal would improve their performance by passage of time. This minimal expectation is not fulfilled now-a-days and cryptic orders lacking in reasoning and precision are passed day in and day out. We do not know where the fault lies. It is either in the process of selection and appointment or because there is no review and appraisal of the performance of the Tribunal Members from time to time. Whatever may be the cause, the outcome is rendering decisions which leave everything incomplete. Such unsatisfactory state of affairs need to be now brought to the notice of all concerned including the appointing authorities.

20. In the light of the above, we are required to quash and set aside both orders of the Tribunal. The Appeal succeeds. The order passed by the Tribunal on 28th March, 2014 and 12th September, 2014 both are quashed and set aside. The Revenue's appeal now shall be reheard by the Tribunal on merits and in accordance with law uninfluenced by its earlier conclusions.

21. The Tribunal must render a decision after dealing with all the

contentions which have been raised by the parties. It should permit the appellants to rely upon the earlier adjudication and also bring to its notice the factual matrix involved therein. It must also allow the assessee an opportunity to rely upon the legal provisions and the judgments relevant to the same. Equally, such an opportunity must be given to the Revenue and if it desires distinguishing the earlier adjudication in the case of M/s. E. Merk (i) Ltd. on facts or on law, the requisite material in that behalf will have to be produced and relied upon by the Revenue. The Revenue is also free to urge before the Tribunal that even if in the earlier round the Tribunal has considered somewhat identical facts and circumstances its earlier conclusion requires reconsideration. When all such contentions are allowed to be raised, we expect the Tribunal to give them serious consideration and render a fresh decision assigning cogent, satisfactory and complete reasons. With these observations and by clarifying that this Court has not expressed any opinion on the rival contentions, either on merits of the show cause notices, the facts or on the questions of law, we dispose of the Appeal and the Writ Petition. No costs.

(SUNIL P. DESHMUKH, J.)

(S.C. DHARMADHIKARI, J.)