**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**ORDINARY ORIGINAL CIVIL JURISDICTION**

**COMPANY PETITION NO. 371 OF 2014**

M/s. Savino Del Bene Frieght Forwarders (I) Pvt.Ltd. … Petitioner

Versus

Permanent Magnets Limited … Respondent

Mr. Simil Purohit a/w. Mr.Mridul Sharma i/b. Shrivastav and Company for the Petitioner.
Mr.Shankar Durgad i/b. G.N. Salunkhe for the Respondent.

**CORAM : S.J. KATHAWALLA, J.**
**DATED : 15TH APRIL, 2015**

**P.C.**

1. By the above Company Petition, the Petitioner seeks winding up of Permanent Magnets Limited (the Company). The above Company Petition is taken up for hearing and final disposal.

2. It is the case of the Petitioner that the Petitioner caused delivery and transport of the Respondent's products to various airlines and accordingly raised invoices on the Respondent for the services rendered. The Respondent made part payment to the extent of Rs.25,03,333/- on or about 3rd June 2010 leaving a balance of Rs.15,30,767/-. On or about 9th November 2010, the Respondent made further on account payment of Rs.2,35,642/- leaving a balance of Rs.12,95,305/- which amount forms the subject matter of the present Petition. The Respondent was served with

statutory notice dated 28th June 2013. However, the same was returned unserved with the remark 'Intimated'. A reminder notice was also sent on 31st July 2013 which was received and acknowledged by the Respondent (Exh. 'E' to the Petition).

3. On the Respondent's request, a copy of the statutory notice was resent on 16th September 2013. The Petitioner also by way of abundant caution issued a fresh statutory notice on 20th September 2013 which was received and replied to by the Respondent on 11th August 2013. However, as the Respondent failed to comply with the statutory notice, the present Petition came to be filed. The Petition was served on the Respondent as far back as on 8th November 2013. However, till 16th December 2014 the Respondent did not file any reply.

4. The Petition was placed on Board on 12th December 2014 when it was contended on behalf of the Respondent that since the Petitioner had retained the Export Promotion Form ("EP"), the Respondent was unable to avail the benefits i.e. DEPB and excise. Mr. Purohit, Learned Advocate for the Petitioner submitted that the Respondent has availed of the benefits. In view thereof, the Respondent's representative Mr. D.V. Parab, HRD Manager who was present in Court was specifically asked whether the Respondent had availed the benefits i.e. DEPB & Excise on the Export Promotion ("EP") copy of which was retained by the Petitioner for

nonpayment of its dues. The Respondent's representative sought time to verify the same and Mr. Purohit, learned counsel for the Petitioner, was directed to produce documents before this Court in support of his contention that the Respondent had availed of the benefits. Accordingly the matter was adjourned to 15th December 2014.

5. On 15th December 2014 in answer to the Court's query, the Respondent's representative informed the Court that he has verified the records and has confirmed that the Respondent has not availed any benefit of the EP. However, Mr. Purohit, learned counsel for the Petitioner relied upon the Hand Book on Procedure (Vol. I) in case of lost forms and orders passed by the authorities confirming that the Respondent had in fact availed the EP benefit. In order to ascertain the factual position, this Court vide its order dated 15th December 2014 directed Mr. D.G. Bokde, Freight Trade Development Officer and Mr. R.P. Patel, CHA to remain present to verify the contention of the Petitioner. Accordingly, the matter was adjourned to 18th December 2014.

6. In the meantime, the Respondent submitted its reply to the Petition. In the said reply, the Respondent changed its stand and admitted that it had in fact received the EP benefit to the extent of Rs.4,86,298/- in terms of DEPB claim. It was contended that the Respondent however could not succeed in receiving benefit in terms of the excise rebate amount

to the tune of Rs.11,12,338/- due to non-submission of EP forms in original. It was also contended that the Respondent had initially initiated proceedings to obtain the excise rebate benefit and that the claim of the Respondent was denied and an appeal there from filed by the Respondent was also dismissed. It was further contended that in absence of the original EP forms the Respondent could not avail the benefit of Rs.11,12,338/- on account of excise rebate as the excise department mandatorily required the EP forms in Original.

7. In view of the statement made by the Respondent in its reply, of having availed EP benefit, the presence of the customs officer on 18th December 2014 who were to state the actual position was rendered academic. At the request of the Petitioner, the matter was adjourned to enable the Petitioner to file its rejoinder, which was filed on 19th January 2015.

8. The above Petition was admitted by an order of this Court dated 29th January, 2015 and the same was directed to be advertised. Paragraphs 8 to 16 of the said order dated 29th January, 2015 are relevant and reproduced hereunder :

> *"8. I have considered the rival arguments and the documents relied upon by both the Petitioner and the Respondent. There is no dispute with respect to the*

*services rendered by the Petitioner and the invoices raised. Even the quantum of amount claimed by the Petitioner in the invoice is not in dispute.*

*9. The Respondent's defence is that it is not liable to pay any amount to the Petitioner save and except to the extent set out in its reply, as the Respondent had suffered loss due to non-furnishing of the original EP forms by the Petitioner.*

*10. The sequence of events shows that the defence raised by the Respondent is incorrect and false. The correspondence and the pleadings clearly show that the Respondent enjoyed the services provided by the Petitioner. The Petitioner raised its invoices and called upon the Respondent to pay the amounts due. However, the Respondent did not comply with the same resulting in the Petitioner retaining the original export documents. Further, the Petitioner vide its email dated 25th November 2010 requested the Respondent to clear the outstanding payment. The Petitioner specifically stated in the said email that it did not want to hold the*

*EP copy and would hand over the same against payment by the Respondent. However, the Respondent did not make payment of the outstanding dues of the Petitioner which resulted in the Petitioner retaining the EP copy with it. Thus it is clear that the retention of the EP copy by the Petitioner was due to the nonpayment of the dues by the Respondent. The Respondent itself having brought about the situation cannot blame the Petitioner for retaining the EP copy. Even during the course of hearing there was no explanation offered by the Respondent as to why the Respondent did not pay the amounts and obtain release of the EP copy from the Petitioner, especially when the services rendered and the quantum claimed in the invoices are not in dispute.*

*11. The Respondent in reply to the statutory notice contended that it had lost out on the DEPB and also Excise benefit due to retention of the EP forms by the Petitioner. The said stand was subsequently changed by the Respondent in its reply wherein the Respondent admitted that it had in fact received the benefit of EP* *forms in terms of DEPB certificate. This changed stand further shows that the retention of the EP copy by the Petitioner did not prevent the Respondent from claiming the benefits thereunder.*

*12. This only shows that even if the Petitioner did not furnish the original EP copy, the Respondent could have still obtained duplicate EP copy from the customs authorities. In support, the counsel for the Petitioner relied upon Chapter 4 of the Duty Exemption/Remission Scheme particularly Chapter 4.52 which lays down the procedure for issuance of DEPB and other duty credit certificates against loss of EP copy of the shipping bills, which is reproduced for the sake of convenience :*

*"4.52 Issuance of DEPB/DFRC against Lost EP copy of the Shipping Bills*

*a) In case where EP copy of the Shipping Bill has been lost, the DEPB/DFRC claim can be considered subject to submission of the following documents :-*

*I) A duplicate/certified copy of the Shipping Bill issued by the Customs authority in lieu of original;*

*ii) An application fee equivalent to 10% of the DEPB entitlement or 3% of DFRC entitlement, as the case may be, in respect of lost Shipping Bills. However, no fee shall be charged when the Shipping Bill is lost by the Government agencies and a documentary proof to this effect is submitted;*

*iii) All the other prescribed documents in original.*

*iv) An affidavit by the exporter about the loss of Shipping Bills and an undertaking to surrender it immediately to the concerned licencing authorities, in case the same is found subsequently.*

*v) An indemnity bond by the exporter to the effect that he would indemnify the Government for the financial loss if any on account of DEPB/DFRC issued against lost Shipping Bills.*

*b) The Customs authority, before allowing clearance, shall ensure that no DEPB/DFRC benefit has been availed against the same shipping bill.*

*4.52.1 The claim against the lost Shipping Bill shall be preferred within a period of six months from the date of* *release of duplicate copy of shipping bill and any application received thereafter will be rejected. However, if a provisionally assessed DEPB shipping bill is lost, the time period for filing an application for DEPB would be six months from the date of release of the finally assessed shipping bill."*

*The aforesaid procedure makes it clear that in order to claim EP benefit, a party can apply and obtain duplicate EP copy. The Respondent has availed the DEPB benefits to the extent of Rs.4, 86,298/- which makes it apparent that the Respondent has in fact applied and obtained duplicate EP copy.*

*13. In so far as the excise rebate is concerned, the Respondent has not produced any material on record to show that the excise authorities insisted for the original EP copy. Having availed DEPB benefit on the basis of duplicate EP copy, the Respondent could utilize the same to obtain excise benefit. The Respondent has relied upon the proceedings initiated by it before the excise authorities to show that its claim for excise benefit was* *refused due to non-submission of original EP copy. Mr. Purohit, learned counsel for the Petitioner relied upon Notification No. 19/2004 CE (NT) dated 6$^{th}$ September 2004 which show that to claim Excise Benefit of Exports the Exporter is not required to submit the Original EP Copy, but merely has to submit a self attested EP Copy. This notification is not disputed by the Respondent's Advocate nor any contrary notification is pointed out. Furthermore a perusal of the said order passed by the Appellate Authority of the excise department (Exhibit 'C' to the rejoinder dated 19$^{th}$ January 2015) makes it clear that the excise authorities had rejected the claim of the Respondent for excise rebate on the ground that the said claim was lodged beyond the prescribed time period and not because of non-submission of the EP copy.*

*14. Mr. Purohit, learned counsel for the Petitioner relied upon various judgements of this Court to show that if a party is in a position to prove export of merchandise, the said party would be entitled to and can claim export benefits including excise rebate in the manner* *prescribed. This position is not contested by the Respondent. In view thereof, it is clear that the Respondent could have availed excise rebate by proving the factum of export. The rejection of the claim for the excise benefit is therefore not due to the non-submission of EP copy but due to the claim not being made in time.*

*15. Even otherwise, this Court cannot lose sight of the fact that the entire situation was brought about by the Respondent due to its own conduct. The Respondent cannot on one hand refuse to pay the dues of the Petitioner whilst at the same time blame the Petitioner for not furnishing the EP copy. Even during the course of the proceedings, the Respondent's counsel, upon instructions, expressed his inability to pay/deposit the principal sum claimed by the Petitioner.*

*16. From the aforestated facts, it prima facie appears that an amount of Rs.12,95,305/is due and payable by the Respondent to the Petitioner. The defense of the Respondent is clearly an afterthought and untenable. In light of the above, the Petition deserves to be admitted* *and accordingly stands admitted. Hence, the following order ......... "*

9. Pursuant to the order dated 29th January, 2015, the admission of the above Company Petition has been advertised in two local news papers as well as in the Maharashtra Government Gazette and the Affidavit proving publication dated 16th March, 2015 is on record. The Company has not advanced any fresh / additional submissions. In view thereof, for the reasons set out in the order dated 29th January, 2015 and herein, I am satisfied that the Company is unable to pay its debts and deserves to be wound up. The above Company Petition is, therefore, allowed in terms of prayer clauses (a) and (b), which are reproduced hereunder :

*"(a) that the Respondent Company viz. Permanent Magnets Limited, be ordered and directed to be wound up by and under the orders and directions of this Hon'ble Court ;*

*(b) that the Official Liquidator, High Court, Bombay or some other fit and proper person be appointed as the Liquidator of the Respondent Company i.e. Permanent Magnets Limited, with all powers under the Companies Act, 1956".*

10. The Official Liquidator to forthwith act on an ordinary copy of this order, duly authenticated by the learned Associate of this Court without waiting for any further notification from this Court or from any other authority.

11. The above Company Petition is accordingly disposed of.

**(S.J. KATHAWALLA, J.)**