

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

Writ Petition No.38839 of 2015

ORDER: (per Hon'ble Sri Justice Ramesh Ranganathan)

The proceedings, under challenge in this writ petition, is a notice of demand to the defaulter dated 27.10.2015 informing the petitioner that the certificate dated 01.07.2015 had been forwarded by the Assistant Commissioner of Customs to the Principal Commissioner of Customs, Hyderabad for recovery of an amount of Rs.1,30,92,135/-; the Commissioner had sent the certificate to the Assistant Commissioner who was authorised by the Commissioner under Section 142(1)(c)(ii) of the Customs Act, 1962, read with Rule 4 of the Customs (Attachment of Property of Defaulters for Recovery of Customs Dues) Rules 1995, specifying that an amount of Rs.1,30,92,135/- is to be recovered from them. The petitioner was called upon to pay the said amount within seven days failing which steps would be taken to recover the amount in accordance with the provisions of the said Rules. The petitioner was also informed that, in addition thereto, they were liable to pay interest in accordance with Section 11AA of the Central Excise Act, 1944 (for short "the Act") and all costs, charges and expenses incurred in respect of the notice.

Sri Unnam Muralidhar Rao, learned counsel appearing on behalf of the petitioner, would question the order on the following grounds ie. (i) mere dismissal of the appeal, preferred against the order of the CESTAT, Chennai, would not attract the doctrine of merger; (ii) in view of the subsequent ruling by the CESTAT, Bangalore, in ***Commissioner of Customs, Bangalore vs. Ni Micro Technologies Pvt. Ltd.***, the petitioner is not liable to pay customs duty, and the respondents could not have imposed duty on batteries which form part of the cellular phone; (iii) Corporate Debt Restructuring, of the debts due from the petitioner-company was undertaken by the Axis Bank, UCO Bank, State Bank of Hyderabad and Andhra Bank, and the debt due from the petitioner was restructured; as the debts due to these banks and financial institutions are secured debts, they have preference over crown debt in the discharge of liabilities; and (iv) even otherwise, the Circular issued by the Central Board of Excise and Customs dated 28.02.2015 confers a discretion on the Commissioner to grant sanction to pay arrears in instalments upto a

maximum of 24 monthly instalments, and on the Chief Commissioner to grant sanction to pay the arrears in monthly instalments greater than 24 and upto a maximum of 36 months; and as the petitioner has submitted a representation dated 03.12.2015, the Chief Commissioner should be directed to grant the petitioner 36 monthly instalments for payment of the arrears.

Aggrieved by the order passed by the adjudicating authority under the Customs Act, the petitioner herein carried the matter in appeal to the CESTAT, Chennai in Appeal Nos.989 to 991 of 2010. Following the judgment of the Supreme Court in ***Twenty First Century Builders vs. CC, New Delhi***, the CESTAT, Chennai dismissed the appeals except to the limited extent that fine and penalty were reduced. The CESTAT held that the adjudicating Commissioner had rightly held that the appellants had mis-declared that batteries were parts of IFW telephones with a view to avail the claimed exemption, instead of declaring the same as lead-acid batteries as indicated in the country of origin certificate; the orders of confiscation, and the orders imposing redemption on fines and penalties, passed by the adjudicating Commissioner, were also required to be upheld; and, considering the amounts of duty benefit sought to be availed, penalty and fine was being reduced to Rs.13 lacs and Rs.6 lacs respectively. Aggrieved thereby, the petitioner carried the matter in appeal to the Supreme Court under Section 35L of the Act and the Supreme Court, by its order in Civil Appeal No.10707 of 2010 dated 24.01.2011, condoned the delay and dismissed the appeal.

Section 35L(b) of the Act provides for an appeal to the Supreme Court against any order passed by the Appellate Tribunal relating to the determination of any question having a relation to the rate of duty or to the value of goods for the purposes of assessment. As the petitioner has preferred an appeal to the Supreme Court, against the order of the CESTAT under Section 35L(b) of the Act, dismissal of the said appeal would attract the doctrine of merger rendering the judgment of the Supreme Court binding inter parties. The mere fact that a different view from that of the CESTAT, Chennai, is said to have been taken later by the CESTAT, Bangalore in ***Ni Micro Technologies Pvt. Ltd.***¹ is of no consequence. The petitioner cannot now seek to reopen the entire matter on the basis of a subsequent order of the CESTAT, Bangalore, as the *lis* has attained finality on the appeal, preferred by the petitioner, being dismissed by the Supreme Court. We see no reason, therefore, to reopen the matter or to re-examine whether the order of the CESTAT, Chennai accords with law or not.

On the question of priority of secured debts over crown debts, reliance is placed by Sri Unnam Muralidhar Rao, learned counsel for

the petitioner, on ***Rana Girders Ltd. vs. Union of India***. In ***Rana Girders Ltd.***³, M/s. P.J.Steels (P) Limited, had taken loans/financial accommodation from the Uttar Pradesh Financial Corporation (UPFC); and, on their defaulting in repayment, the UPFC took possession of the lands and buildings, and initiated proceedings under Section 29 of the State Financial Corporations Act. The subject properties were put to sale and the appellant was found to be highest bidder. Consequently, a sale deed was executed in his favour qua the land and building of the defaulting borrower. The borrower had also failed to discharge their excise duty liability. With a view to recover the said amount, the Commissioner of Central Excise called upon the appellant (***Rana Girders Ltd.***³) to discharge the said liability, as the purchaser and successor in interest of the land and building, including the plant and machinery of the borrower. The appellant resisted the demand contending that they had purchased the subject properties free from all encumbrances and they were, therefore, not liable to make payment of the central excise dues of the defaulting borrower. It is in this context that the Supreme Court held that the Crown's preferential right for recovery of debts over other credits is confined to ordinary or unsecured creditors; and that the Crown debt did not have any preferential right of recovery over a mortgage or a pledge of goods to a secured creditor. Whether or not the central excise dues should be accorded preference over the secured debt of the secured creditors i.e., banks may call for examination if, and when, the secured creditor invokes the jurisdiction of this court. A defaulter, who has failed to discharge his customs duty liability, cannot be heard to contend that, since the secured creditor has a preferential repayment of dues over the crown debt, the defaulter need not pay customs duty on the specious plea that he still owes money to the secured creditors. This contention, urged on behalf of the petitioner, also necessitates rejection.

The Central Board of Excise and Customs, by Circular dated 28.02.2015, decided to allow recovery of arrears of taxes, interest and penalty in instalments. The power to allow such payment in monthly instalments was to be exercised by the Commissioner in his discretion for granting sanction to pay arrears in instalments upto a maximum of 24 monthly instalments, and by the Chief Commissioners for granting sanction to pay arrears in monthly instalments greater than 24 and upto a maximum of 36 monthly instalments.

Sri Unnam Muralidhar Rao, learned counsel for the petitioner, would submit that a representation in this regard was made by the petitioner to the Chief Commissioner on 03.12.2015 by Registered Post, and a copy thereof has also been handed over across the Bar to Sri Jalakam Satyaram, learned Standing counsel for Central Excise. As

the Circular issued by the Central Board of Excise and Customs dated 28.02.2015 confers a discretion on the Chief Commissioner to grant sanction to pay arrears in instalments, such discretion can only be exercised by the Chief Commissioner and not by this Court in proceedings under Article 226 of the constitution of India. As the petitioner has submitted a representation to the Chief Commissioner on 03.12.2015, ends of justice would be met if the Chief Commissioner is directed to dispose of the representation with utmost expedition, and in accordance with law.

The Writ Petition is, accordingly, disposed of. The miscellaneous petitions pending, if any, shall also stand disposed of. There shall be no order as to costs.

RAMESH RANGANATHAN, J

M. SATYANARAYANA MURTHY, J

Date: 09.12.2015

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