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

**CRIMINAL APPLICATION NO. 561 OF 2016**

1] M/s S.R.J. Peety Steel Pvt. Ltd.,
D-51, Additional MIDC, Jalna
A Company duly established under the provisions of Companies Act, 1956

2] Surendra Shantilal Peety,
Age 44 years, Occu : Business,
R/o Jalna,

Managing Director of M/s SRJ Peety Steels Pvt. Ltd. D-51, Additional MIDC Area, Jalna, District Jalna

3] Ravindra Shantilal Peety,
Age 40 years, Occu. : Business,
R/o Jalna, Dist. Jalna,
Director of M/s SRJ Peety Steels Pvt. Ltd., D-51, Additional MIDC Area, Jalna, District Jalna .. Applicants
(Orig. Accused)

**Vs.**

The Assistant Commissioner,
Central Excise & Customs,
Nanded Division, Nanded,
District Nanded .. Respondent
(Orig. Complainant)

----

Mr. S.M. Godsay, Advocate for the applicants
Mr. D.S. Ladda, Sr. Standing Counsel for the respondent

----

**CORAM : N.W. SAMBRE, J.**
**DATE : 19/09/2016**

**ORAL ORDER :**

Heard finally with the consent of the parties.

2. The present applicants are running an unit for manufacturing M.S. ingots/billets.

. It is alleged that the applicants have indulged in suppression of production and clearing clandestinely without payment of central excise duty for a period from May, 2003 to December, 2007 and as such notice to show cause dated 9th May, 2008, calling upon the applicants as to why -

(i) Central Excise amounting to Rs.32,53,27,398/- and Education Cess amounting to Rs.55,21,868/-, Higher Education Cess Rs.6,52,115/- (Totally amounting to Rs.33,15,01,382/-) (Rupees Thirty Three Crores, Fifteen Lakhs One Thousand Three Hundred Eighty Two Only) (as detailed in Annexure-A enclosed) leviable on a total quantity of 122946 MT of Billets / M.S. Ingots clandestinely manufactured and cleared by them without payment of duty during the financial year May 2003 to December 2007 should not be demanded and recovered from them under the provision of first proviso to Section 11A(1) of the Central Excise Act, 1944;

(ii) Penalty should not be imposed upon them under Section 11AC of the Central Excise Act, 1944 and Rule 25 of Central Excise Rules, 2002.

(iii) Interest should not be recovered from them under Section 11AB of the Central Excise Act, 1944.

(iv) Mr. S.S. Peety, Director of the unit is the key person who was actively involved in the manufacture of Billets / M.S. Ingots which were not accounted for in the Daily stock account register and were cleared without discharging duty involved. He was concerned with the production, clearance, removal and sale of goods. He dealt with the goods which he has reason to believe that the goods were liable for confiscation and he was the person who has concealed the information regarding actual production, clearance and fabrication of the records. The authorized signatory have acted in the manner which resulted in to undue benefit to

M/s SRJ Peety Steel Pvt. Ltd., D-51, Additional MIDC, Jalna, and same was done with an intention to have pecuniary gains for themselves. Therefore, it is clear that he had abetted such activities and had strived hard to conceal the correct information. By doing so, he appears to have rendered himself liable for penal action under the provisions of Rule 26 of Central Excise Rules, 2002 and Addendum dated 2.4.2009.

. As such, the proceedings were initiated against the present applicants by the Commissioner, Central Excise, Aurangabad for the assessment of the excise duty, penalty, fine, cess etc. which was liable to be paid by the present applicants. As a consequence of such proceedings, the Commissioner passed an order in original on 28/8/2009 raising duty of Rs.33,07,22,069/- under the provisions of proviso to section 11A(1) of the Central Excise Act, 1944 with interest under section 11AB of the said Act with the penalty of equal amount under section 11AC of the said Act.

3. Against the order of assessment qua the evasion of excise duty, an appeal being Appeal no. E/1319/09/MUM was carried before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT). The appeal came to be heard by the Division Bench and in view of the difference of opinion between the Vice President and Member Technical, the matter was placed before President for reference to the Third Member. The Member (Judicial) vide order dated 17th July, 2014 based on the judgment of R.A. Casting concurred with the finding recorded by Hon'ble Vice President. As a consequences, the Bench allowed the appeal of the applicants based on majority view of the CESTAT. As the appeal preferred by the present applicant/assessee came to be allowed and the assessment and the demand of penalty, as ordered referred supra, came to be set aside, against which it is informed that the department has preferred an appeal under section 354 of the Central Excise Act, 1944 before this Court and the said appeal is already admitted.

. In the meantime, the respondent herein initiated RCC No. 676/2013 before the Judicial

Magistrate First Class at Jalna against the petitioner alleging that as the applicants herein has willfully suppressed the production for a period from April, 2004 to December, 2007 and order in original was passed against the applicant was not complied with hence they are liable to be charged for violation of provisions of Act and Rules framed thereunder and the process against accused no.1 to 3 be issued under section-9(1)(b),(bb), (bbb) and 9(1)(c) and 9(1)(d) of Central Excise Act-1944 and Rules made thereunder and they be punished deterrently as per the provisions of law.

4. Shri Godsay, learned counsel for the applicants while trying to make out case for quashing the complaint, would urge that criminal complaint initiated against the present applicants pursuant to the provisions of section 9 of the Central Excise Act, 1944 is not maintainable. He would then urge that as on date, there is no order governing the field so as to infer the commission of alleged offence of non payment of outstanding dues of the excise duty or any evasion thereof. According to him, the duty, as was imposed qua

taking into account case of evasion, no more holds the filed particularly, when the CESTAT has already allowed the appeal preferred by the assessee i.e. applicants. According to him, even if the appeal of the Revenue is admitted by Division Bench of this Court, the same would not operate as stay to the order of CESTAT against the present applicants, as on this date, there is no outstanding excise duty or any evasion thereof. He would then urge that in case if the appeal preferred by the department before this Court is allowed, the department will be at liberty to initiate fresh proceedings pursuant to the provisions of section 9 of the Central Excise Act, 1944.

5. While opposing the claim, learned standing counsel for the respondent department - Shri Ladda would urge that the pendency of the appeal before this Court would operate as bar in entertaining the present proceedings at the behest of the applicants. According to him, once the appeal of the department is admitted for final adjudication, which is considered to be a continuation of the original proceedings, this Court should refrain itself from quashing the complaint.

According to him, the applicants have alternate remedy of praying discharge before the Court below and as such application herein be rejected.

6. Having considered the rival submissions of the parties, it is required to be noted that the assessment order was passed under the provisions of the Central Excise Act, 1944, particularly, keeping in mind the power consumption of the present applicants, was held to be bad in law by the appellate tribunal. As such, the fact remains that as on date, there is no evasion of duty in law by the present applicants. Though, the appeal of the department is pending before the Division Bench of this Court against the order of the appellate tribunal, however, there is no interim relief operating as against the present applicants in favour of the department. The pendency of appeal against the order of CESTAT before this Court will not operate as automatic stay in favour of Revenue.

. Apart from above, it is required to be noted that the Apex Court in the matter of ***Pepsi Foods Ltd. and another vs. Special Judicial Magistrate and others,*** *reported in* ***(1998) 5 SCC 749),*** has already observed that criminal law as against an innocent individual cannot be set into motion merely for asking. Relevant considerations and the observations made by the Apex Court reads as under :-

> "*Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The magistrate has to carefully scrutinize the evidence*

> *brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused*."

7. Having considered the above referred law in the factual background narrated hereinabove, in my opinion, the contention of Shri Godsay, learned counsel for the applicants, needs to be accepted. Merely because, the appeal of the department is pending before the Division Bench of this Court and is admitted for final hearing, that does not mean that the department has every right to continue the criminal proceedings in absence of any basis as contemplated under section 9 of the Central Excise Act, 1944.

8. The submissions of Shri Godsay, learned counsel for the applicants, in all fairness, are required to be accepted, particularly when the department has every right to initiate fresh criminal proceedings against the present applicants, in case the appeal of the department is allowed by this Court.

9. In view thereof, in my opinion, the present Application needs to be allowed. The complaint R.C.C. No.676 of 2013 initiated by the respondent pending on the file of Chief Judicial Magistrate, Jalna is hereby quashed and set aside with liberty to the respondent-department to initiate fresh proceedings pursuant to the provisions of section 9 of the Central Excise Act, 1944 in case the appeal being Central Excise Appeal no.31 of 2015 is allowed, as against the present applicants.

10. With above observations, the Application stands allowed.

Sd/-
**[N.W. SAMBRE]**
**JUDGE**

arp/