Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2099 OF 2016

Larsen and Toubro Limited …Petitioners
Versus
The Union of India & Ors. …Respondents

Mr. Prakash Shah, *a/w Mr. Jas Sanghavi, for the Petitioners.*
Mr. Pradeep S. Jetly, *a/w Mr. Jitendra B. Mishra, for the Respondents.*

CORAM: S.C. DHARMADHIKARI & G.S. PATEL, JJ.
DATED: 22nd February 2016

PC:-

1. The Petitioner before this Court M/s. Larsen & Toubro have approached this Court with a request that the order passed on 19th January 2016 by the Assistant Commissioner, Central Excise, Powai Division, Mumbai II to the extent that it purports to appropriate part of the rebate against the demand which is stayed by the Appellate Tribunal be set aside.

2. Very few facts are necessary to appreciate the arguments of the Petitioners' counsel. The Petitioners, *inter alia*, export various engineering equipments and machinery. They cleared excisable goods for export on payment of duty of Rs. 1,58,20,843/- on 13th

February 2015 and then claimed the rebate. An order-in-original was passed on 25th May 2012 denying the credit of service tax paid on input service to the extent of Rs. 2,38,57,646/- which, according to the Petitioners, is used in providing taxable service.

3. Being aggrieved and dissatisfied with this order-in-original, they filed an Appeal in the Customs, Excise and Service Tax Appellate Tribunal ("**Tribunal**") and sought waiver of the condition of pre-deposit to the extent of the Cenvat credit denied, namely, Rs. 2,38,57,646/-.

4. The Tribunal has passed an order on this stay application.

5. In the initial order passed on 22nd October 2012, which is at page 30, the Tribunal waived the condition of pre-deposit and stayed the recovery of taxes during the pendency of the Appeal. That was done in the exercise of inherent powers of the Tribunal and later on that order came to be confirmed.

6. What we have found thereafter is that the 3rd Respondent on 17th September 2015 sanctioned the claim of rebate of duty which was paid by the Petitioners on the goods exported as above to the extent of Rs. 1,49,43,056/- in cash and Rs. 8,77,787/- by way of credit that is available in the Cenvat Register maintained by the Respondents. However, he appropriated an amount of Rs. 1,49,43,056/- sanctioned by him by way of rebate in purported exercise of his power, according to the Petitioners, under Section 11 of the Central Excise Act, 1944. That is now he sought to recover the entire sum which was involved in the Appeal.

7. The Petitioners filed a Writ Petition in this Court and later on by an order passed on 19th November 2015, the order of Respondent No. 3 was set aside by this Court and the Respondent No. 3 was directed to comply with the Rule of law, namely, issue a notice and hear the Petitioners at a personal hearing.

8. Subsequent thereto and in compliance of this Court's order, the Respondent No. 3 made the impugned order dated 19th January 2016.

9. Mr. Shah appearing on behalf of the Petitioners would submit that the impugned order is *ex facie* without jurisdiction, arbitrary and untenable in law.

10. The Assistant Commissioner, viz., Respondent No. 3 may not have been prevented from considering any request for rebate and sanctioning it but he was certainly not empowered to adjust the sum under dispute and by this indirect process. This would mean that a pending Appeal before the Tribunal and a stay order passed therein is rendered infructuous. After the initial order was passed, viz., order-in-original was challenged in Appeal before the Tribunal and which Appeal is pending. Having been aware of that Respondent No. 3 could not have been given effect to the order in original in an indirect manner. Now, the very order which was passed earlier and which is under challenge is enforced by a back door or indirect method. In such circumstances, all the legal rights of the Petitioners now are in jeopardy.

11. After such a complaint was made by Mr. Shah for the Petitioners and a compilation was handed over, what Mr. Jetly initially sought was an adjournment to take instructions, but he stated that he would be able to obtain instructions today itself.

12. At the request of Mr. Jetly, we posted this matter after recess. Post-recess Mr. Jetly would submit that the Respondent No. 3 has relied on a judgment of this Court in *India Steel Works v. Union of India*[1] in passing the impugned order.

13. While doing so, Mr. Jetly submits that the Respondent No. 3 has referred to all the arguments of the Petitioners and their primary objection. Mr. Jetly would submit that appropriation is not a recovery. What the Revenue is seeking to exercise is its power of adjusting the amount which is due, viz., rebate claim of the assessee against the amount payable to the Revenue by the assessee and this was a permissible exercise.

14. Mr. Jetly would submit, therefore, that the Petition be dismissed.

15. After giving our anxious consideration to the contentions of both sides and perusing the Petition, the annexures thereto and the judgment of this Court rendered in the above matter, we are not in agreement with Mr. Jetly.

16. *India Steel* (supra) was a case where a Division Bench of this Court was approached in a Writ Petition under Article 226 of the

1 2014 (306) E.L.T. 296 Bom.

Constitution of India. The Petitioners before that Court faced certain investigation proceedings for alleged refund of central excise duty. In the course of investigation, the Petitioners deposited Rs. 20,00,000/-. Thereafter, a show-cause notice was issued and that was adjudicated. The Central Excise Commissioner confirmed the duty demand of Rs. 53,53,452/-. That is how the Petitioner/ assessee approached the Tribunal and they filed applications for dispensation of the condition of pre-deposit and stay. The Tribunal disposed of those applications and passed an order of dispensation.

17. An extension of the stay continued but by three orders the Assistant Commissioner sanctioned the claim of refund. While sanctioning the rebate claim of the Petitioners before this Court, the Assistant Commissioner directed appropriation against confirmed dues recoverable in pursuance of the order-in-original. The Superintendent of Central Excise was calling upon the Petitioners to pay the sums and that is how the matter was brought before this Court.

18. In the backdrop of the admitted facts, in paragraph 6 this Court observed that the Revenue is not seeking to initiate recovery proceedings on the expiry of a stay. The Revenue is seeking to exercise its powers under Section 11 and by making an adjustment. Paragraph 6 of this decision reads as under:-

> "6. In the present case, the revenue is not seeking to initiate recovery proceeding on the expiry of a stay. In this case, the revenue is seeking to exercise its power under Section 11 of the Act by adjusting the amount

which is due (rebate claim) to the petitioner from the revenue against the amount payable by the petitioner to revenue as a consequence of the order dated 31 July, 2006. It is to be noted that the so called stay which was granted to the petitioner on 15 December, 2006 by the Tribunal was not in exercise of its inherent powers but was in exercise of powers under Section 35F of the Act which only dispenses with the requirement of pre-deposit of duty and penalty for entertaining the appeal on merits. The dispensing with the requirement of pre-deposit of duty and penalty under the proviso to Section 35F of the Act for the purposes of hearing the appeal could at the highest be said to restrain the revenue from taking any coercive action for recovery but would not estop the revenue from adjusting amounts which become subsequently due to the petitioner towards the amount payable by the petitioner to the department. Besides, introduction of the third proviso to sub-section (2A) of Section 35C of the Act introduced in 2013 would appear to dilute the applicability of the decision relied upon by the petitioner. However, it must be pointed out that a Division Bench of this Court in *CIT v. Ronuk Industries Ltd.* - (2011) 333 ITR 99 while dealing with an identical provision to the third proviso to Section 35C(2A) of the Act as found in the third proviso to Section

> 254(2A) of the Income Tax Act dismissed the revenue's appeal before it by upholding the view of the ITAT that even after the introduction of the above third proviso, the ITAT can extend the stay."

19. We are unable to see how this principle and which is evolved in this case by the Division Bench has a universal application or dehors the factual conspectus. It would all depend on the facts and circumstances of each case and the nature of the power exercised by the Revenue.

20. Before us the Revenue had passed an original order. That confirmed a certain demand. That order was challenged in Appeal before the Tribunal and to the extent the Petitioner disputed the demand, there was a stay in favour of the Petitioner before us, as also the condition of pre-deposit was waived. Such an order passed in the presence of both sides including the Revenue could have been assailed by the Revenue by appropriate legal proceedings. However, the Revenue could not have got over a binding stay order and by indirect or oblique process seek to recover the very sum and amount which it could not recover because of the prohibitory order of the Tribunal. Once no recovery of taxes pending Appeal was permissible and there was a stay to that extent, then, the Revenue could not have ignored this binding order of the Tribunal. This is a novel way of taking over the adjudication and recommencing it when the earlier exercise ended completely in an order favourable to the Revenue but subject matter of Appeal. This is a clear case where the principle of matter being sub-judice would apply. The judgment and order in the *India Steel* is of no assistance, therefore, to Mr. Jetly.

21. Beyond that we do not find any reasoning in the impugned order. There is only a reproduction of the observations, particularly in paragraph 6 of the judgment in *India Steel.* The power and to make adjustment which is exercised in the present case is unavailable on that reasoning, once *India Steel* was wholly distinguishable on facts. In the process of a power which is assumed by the Assistant Commissioner and erroneously has resulted in acting beyond the jurisdiction vested in the Assistant Commissioner by law, therefore, we cannot sustain such an order and consider it our duty to correct it in exercise of our writ jurisdiction.

22. The impugned order, passed in the present Petition and the observations in paragraph 10 cannot be utilized and to nullify, therefore, an order of stay which binds the Revenue. The powers if at all available could not have been exercised in this case and to subvert the order of stay and the Appeal which is pending,as a whole. This novel way of adjudication and mid-way during the pendency of legal proceedings before higher forum enables us to interfere in our writ jurisdiction.

23. As a result of the above discussion, the Writ Petition succeeds. The impugned order is quashed and set aside. However, none of the conclusions recorded by us shall influence the Tribunal while deciding the Appeal. The Tribunal should decide the Appeal on its own merits in accordance with law uninfluenced by the order of the Assistant Commissioner and which we have set aside and equally our observations. All contentions of both sides on merits of the Appeal pending before the Tribunal are kept open.

(G. S. PATEL, J.) **(S. C. DHARMADHIKARI, J.)**