IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5297 OF 2015

Sika India Private Limited ... Petitioner
versus
The Union of India and others ... Respondents

Mr.V.Sridharan, Senior Advocate with Mr.Prakash Shah and Mr.Jas Sanghavi i/by PDS Legal for Petitioner.

Mr.Pradeep S. Jetly with Mr.J.B.Mishra for Respondents.

CORAM : S.C.DHARMADHIKARI AND
G.S.PATEL, JJ.

DATE : 01 February 2016

PC :

1. This petition under Article 226 of the Constitution of India challenges the order passed on 22 October 2014. That order was passed by Respondent no.3 namely the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench (`Tribunal').

2. The grievance of the Petitioner's counsel is that by this order, the Tribunal has, while disagreeing with the Petitioner, remanded the case to the adjudicating authority to recompute the duty liability. That is to be determined

considering the selling price as cum duty price. Though the penalty is set aside, according to the Petitioner's counsel, the remanding back of the matter to the adjudicating authority even on a limited aspect was most uncalled for.

3. The Respondents have raised a preliminary objection to the maintainability of the petition on the ground that Petitioner ought to have availed of a remedy of statutory appeal. Therefore, it is contended that there is alternate and efficacious remedy available to the Petitioner. Hence, the writ petition be not entertained.

4. Alternatively and without prejudice, it is submitted that a factual finding has been rendered against the Petitioner on the main issue and it is consistent with all the materials placed on record. There is no error of law apparent on the face of the record or perversity warranting our interference in the writ jurisdiction.

5. We have heard both sides. With their assistance we have perused the entire petition and all annexures thereto. We find that no merit in the preliminary objection as regards maintainability simply because the statutory appeal would also lie and have to be filed in this Court. Secondly, we are applying the same parameters as would be applied for entertaining a statutory appeal. Meaning thereby, we would find out if there is

indeed an error apparent on the face of the record or perversity on the part of Tribunal raising a substantial question of law.

6. In that regard, we find that the appeal of the Appellant-Petitioner before us was filed aggrieved and dissatisfied with the order of the adjudicating authority and that of the first appellate authority. The controversy is fairly old. The Petitioner, inter alia, manufactured goods falling under Chapters-32, 35 and 38 of the Central Excise Tariff Act, 1985 (`Tariff Act'). The Petitioner purchased duty paid Styrene Butadiene Latex falling under Chapter heading 40.02 of the Tariff Act, which were bought under the names "Styrofan D 623 AP" and "Apcotex TSN 100" from M/s.BASF Limited and M/s.Apcotex Industries Limited. After referring to the product material, what has been urged is that the process carried out by the Petitioner does not bring about any product or goods known to the commercial world as a distinct product. The Petitioner filed a declaration and with the Superintendent of Central Excise, Goa. It is mentioned that the process of diluting duty paid Styrene Butadiene Latex would not amount to manufacture of a new product under section 2(f) of the Central Excise Act, 1944 and therefore, they are not availing CENVAT credit of inputs used for making their end product. The end product is a product utilized in the construction industry. However, after the analysis of the samples, Revenue disagreed with the Petitioner-assessee and the Petitioner was served with a show cause notice

after statement of their Deputy Manager was recorded. This show cause notice dated 20 December 2005 and another show cause notice dated 6 December 2006 were adjudicated after replies thereto were filed. The entire demand came to be confirmed with interest and penalty. Against this order passed on 19 March 2007, an appeal was preferred before the first appellate authority namely Commissioner of Customs (Appeals), Goa. He passed an order against the Petitioner. Aggrieved by that order dated 22 August 2007, the Tribunal was approached. We find that before the Tribunal several contentions were raised but without adverting to the entire material including some of the relevant provisions of Central Excise Act, 1944, the judgment and order of remand came to be passed.

7. Mr.Shah has rightly relied upon the definitions of the term "Excisable Goods" appearing in Sections 2(o) and "Manufacturer" appearing in section 2(f). The submission is that a combined reading of these definitions would indicate that every process which is undertaken must result in an article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable. Reliance is placed upon several judgments of the Hon'ble Supreme Court. It is contended that the tests which have been evolved in the case of **Indian Aluminium Co. Ltd. and another Vs. A.K.Bandyopadhyay and others**[1] by a learned

1 1980(6)-E.L.T.-146 (Bom.)

Single Judge of this court have been accepted and in that regard reliance is placed on the judgment of Supreme Court in the case of **Grasim Industries Limited Vs. Union of India**[2]. The learned counsel also relied on a judgment of a Division Bench of this Court in **Hindalco Industries Limited Vs. Union of India**[3], to which one of us (S.C.Dharmadhikari, J.) was a party. Mr.Shah states that the judgment of the learned Single Judge of this Court in Indian Aluminium Co. Ltd. (supra) has been specifically upheld by the Apex Court in *Union of India Vs. Indian Aluminium Co. Ltd. - 1995(77)-ELT-268 (SC)*.

8. The Tribunal in paragraph 4.8 has agreed with the contention of the advocates for the Petitioner-Appellant that the Petitioner continues with the maintenance of elaborate records and conducts all the quality tests. The Tribunal has observed that if the Petitioner undertakes the process of dilution, then there is no need to keep such elaborate records and there will be no need to conduct quality test for each batch. We do not understand how such an approach would be in consonance with the requirement of the law. In the prior paragraph, the Tribunal says that the activity amounts to manufacture. However, the Petitioner finds it unnecessary to refer to the tariff entry. The number of judgments that have been cited by the Petitioner-Appellant have not been referred at all. The Tribunal rests with a reference to the judgment of the Supreme Court in the case of

2 2011(273)-E.L.T.-10 (SC)
3 2015(315)-E.L.T.-10 (Bom.)

Union of India Vs. Delhi Cloth and General Mills - 1977(1)-ELT-199 (SC).

9. Pertinently, each of the judgment which is rendered by the Supreme Court including that in the case of Union of India Vs. Delhi Cloth and General Mills (supra) are referred in the latest judgment in the case of *Grasim Industries Limited (supra)* and the prior judgments rendered were followed in *Grasim Industries Limited (supra)*.

10. An order of remand, therefore, was unnecessary if the principles are so very settled. We find that a perfunctory and superficial approach by referring only to some aspects and not considering as to whether the tests evolved are satisfied or not, cannot be justified and upheld by us. If the Petitioner's case is that its activities include a dilution process to manufacture the end product and such process does not bring into existence a new product having a distinctive name, character and use, then, that argument should have been dealt with by the Tribunal itself completely and either upheld or rejected it. There was no need to render a finding in the manner which we have referred extensively. The manner in which the Tribunal arrived at a factual finding that the process indeed amounts to manufacture, is without reference to the relevant material and particularly the applicable legal principles. In such circumstances and when the Tribunal is coming to a conclusion

that the product having distinct name, character and use comes into existence from inputs and the final product is water resistance bonding agent, while the inputs are referred as Aqueous Polymer Dispersion used in the modification of hydraulic setting system, that necessarily means manufacture. How that alone is adequate and sufficient is not explained at all. Whether the activity termed as manufacture brings into existence an article known to the commercial world, then its identity and marketability ought to be discussed with reference to the applicable legal principles which is lacking in the Tribunal's opinion and findings. We do not see what the Tribunal was driving at or concluding. Mid way, we find that the Tribunal misdirects itself and the point is whether the controversy is indeed related to determination that a final product as manufactured is known to the market or whether a process by which that product comes into existence amounts to manufacture or not. In such circumstances, the conclusion is vitiated found from the paragraphs which we have referred extensively above.

11. As a result of the above discussion, we are of the view that the unsatisfactory manner of dealing with a statutory appeal by a last fact finding Court, requires us to interfere in our extraordinary, equitable and discretionary jurisdiction under Article 226 of the Constitution of India. The impugned order is vitiated by non application of mind and equally by error of law

apparent on the face of the record. The Tribunal in an old controversy and matter was not justified in abruptly concluding it. That would never serve the ends of justice.

12. We, therefore, quash and set aside the impugned order. We restore the appeal to the file of the Tribunal. That appeal should be decided on its merits and in accordance with law uninfluenced by any earlier findings on facts. Equally, the Tribunal should note that beyond referring to the rival contentions and underlining the essential controversy, we have not expressed any opinion either way. All contentions are kept open. The writ petition is allowed accordingly. No order as to costs.

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

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