IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CUSTOM APPEAL NO.18 OF 2010

M/S. GOODRICH FAIRWELL EXPORTERS ...Appellant
Versus
1.Union of India & Ors. ...Respondents

AND
NOTICE OF MOTION NO. 1355 OF 2010
IN
CUSTOM APPEAL NO.18 OF 2010

M/S. GOODRICH FAIRWELL EXPORTERS ...Appellant
Versus
Commissioner of Customs (Import). ...Respondent

WITH

NOTICE OF MOTION NO. 755 OF 2013
IN
CUSTOM APPEAL NO. 18 OF 2010

1(a) Mr.Nazim Siraj Hamid & Ors. ...Applicants
In the matter between
M/S. GOODRICH FAIRWELL EXPORTERS ...Appellants
Versus
1.UNION OF INDIA AND 2 ORS. ...Respondents

WITH
NOTICE OF MOTION NO. 1108 OF 2014
IN
CUSTOM APPEAL NO. 18 OF 2010

1.M/S. GOODRICH FAIRWELL EXPORTERS & ORS. ...Applicants
In the matter between
M/S. GOODRICH FAIRWELL EXPORTERS ...Appellant
Versus
1.UNION OF INDIA AND 2 ORS. ...Respondents

WITH

NOTICE OF MOTION (APPEALS) NO. 1432 OF 2013
IN
CUSTOM APPEAL NO. 18 OF 2010

M/S. GOODRICH FAIRWELL EXPORTERS ...Applicant
In the matter between
M/S. GOODRICH FAIRWELL EXPORTERS & Ors. ...Appellants
Versus
1.UNION OF INDIA AND ORS. ...Respondents

Mr.R.V.Desai, Senior Counsel with Mr.Rohit Pardeshi i/b. Mr.Rakesh K.Singh, for the Appellants.

Mr.Pradeep S.Jetly with Mr.Jitendra B.Mishra, for Respondent Nos.1 to 3.

Mr.Arshad Hidayatullah, Senior Counsel i/b. M/s.Kachwala Misar & Co., for Respondent Nos.4 & 5.

CORAM : S.C. DHARMADHIKARI &
G.S.KULKARNI, JJ.

DATED : 11th APRIL, 2016

P.C.

1. At the hearing of these Notices of Motion, we had indicated to the parties that the Court would dispose of Appeal itself for it involves a very short point.

2. This appeal was admitted by this Court on 22nd March,2010 on the following two substantial questions of law:-

> “(a) Whether finding recorded by Hon'ble Tribunal in para 12 of the impugned order that Appellants already had a copy of the statements and the appellants were fully aware of the contents of the statements is perverse, particularly in the background of the finding recorded in para 5 of the impugned order that the statements were never given to the Appellant either along with show cause notice or at any time thereafter.
>
> b) Whether the Tribunal erred in its finding that there was no substance in the grievance about total non application of mind by the adjudicating authority so far as its failure to consider the IIT report on the ground that there was no evidence that the appellant had submitted IIT report to the Ld. Commissioner though the Ld. Commissioner refers to the IIT report in his order.”

3. We are not concerned with the compliance of the terms and conditions on which the interim stay has been granted and, therefore, no separate orders are necessary on the Notices of Motion.

4. With the consent of both sides, the appeal itself is heard finally. The appeal itself is now prosecuted by the heirs and legal

representatives of the sole proprietor Siraj J.Hamid (since deceased). Some of these heirs are impleaded as original Appellants while others are impleaded as Respondent nos.4 and 5.

5. We have heard the learned Senior Counsel appearing for these parties and Mr.Jetly, learned Counsel appearing for the Revenue.

6. The brief facts are that the deceased had imported 3500 metric tons of goods described more particularly in paragraph (3) of the Memo of Appeal. It is his claim that the consignments were examined by proper Officers of the Customs and cleared on payment of appropriate Customs duty. However, the Special Investigation and Intelligent Branch of the Customs Commissionerate at Jawaharlala Nehru Customs house, Nhava Sheva, District Raigad made inquiry on intelligence that the deceased was resorting to undervaluation in the import, obtained an opinion of the Research Scientist attached to Institute of Chemical Technology, Mumbai. He conducted various tests and submitted his report. It is the claim of the Assessee that the Revenue had forwarded a sample from the imported consignment to Indian Institute of Technology, Powai, Mumbai. The representative samples were drawn and forwarded to the Chemical Examiner, and the investigation, then, resulted in the

statement of the deceased being recorded. Though the consignment was cleared under a Bill of Entry dated 22nd March,2005, a notice to show cause was issued by the Deputy Commissioner of Customs attached to Special Investigation and Intelligent Branch dated 2nd June,2006. The Appellants through the Advocate replied to this notice and sought copies of the documents, more particularly, mentioned therein. He also sought permission to cross examine the expert whose report was relied upon by the Revenue. Thereafter, an interim reply was forwarded. However, the grievance is that the demand raised in the Show Cause Notice was confirmed without sufficient opportunity being given and afforded to the Appellant's predecessor in title.

7. That is how the order passed by the Adjudicating Authority dated 13th December,2008 was impugned in the appeal before the Customs, Excise & Service Tax Appellate Tribunal.

8. Two grounds were urged and one of which was non compliance with principles of natural justice.

9. These grounds having not been accepted that the Tribunal's order dated 11th June,2009 is impugned in this appeal.

10. Both the learned Senior Counsel Mr.R.V.Desai and Mr.Arshad Hidayatullah urged that the Tribunal failed to apply its mind to a very important issue and which was squarely raised. The Tribunal referred to these grounds in paragraph (2) and eventually concluded that the copy of the statement recorded was not given to the Appellant's predecessor-in-title alongwith the show cause notice or at any time thereafter. However, the Tribunal proceeded on the footing that the Appellant's predecessor-in-title had full knowledge of the contents of such statement even at the time of filing of reply. The Tribunal, then, refers to retraction of predecessor-in-title of the statement made under Section 108 of the Customs Act by him. In paragraph (6) of its order, the retraction is also referred. Yet, the Tribunal finds that there is no necessity of supplying copy of such statement nor has it resulted in miscarriage of justice. That reasoning and by attributing the knowledge of the contents of the statement to the Appellant's predecessor-in-title that the first ground was rejected.

11. Then comes the next and more important ground based on which the Appellants submitted that if there was a report of IIT and which was indeed on file, then, at least that should have been made

available. The Tribunal in paragraph 17 and after its detailed discussion on the first ground finds that failure to consider the report of the IIT, a copy of which was supplied by the Appellant alongwith the reply to show cause notice vitally affects and rather completely falsifies the conclusion reached by the Adjudicating Authority.

12. The Appellants had contended that they furnished copy of the report. A reference in that regard was made to letter dated 3rd July,2008. Alongwtih that, the report was filed and which report discloses that the goods imported by the Appellant's predecessor were 'industrial soap flakes Grade II' and not 'soap noodles'. Paragraph 18 of the Tribunal's order refers to the contents of the letter dated 3rd July,2008 and the report of the IIT.

13. However, the Tribunal, then, refers to letter dated 31st March,2007 as well to conclude that the records nowhere disclose any copy of such report having been furnished alongwith the reply to the Adjudicating Authority. It is on that basis and by then considering all the documents which were supplied that the Tribunal concluded that they did not include any certificate or report from IIT. The Tribunal, then, concluded that the Appellants or their predecessor have not placed

before them any other document which would reveal that any test report from IIT was ever submitted alongwith the reply to show cause notice. If that report or its copy was never supplied, then, non consideration thereof can never be fatal in the opinion of the Tribunal.

14. This Court admitted the appeal after a prima facie view and taken from the contents of the Memo of Appeal. At the hearing of this appeal, we indicated to both sides that calling and summoning the original records would take care of the whole issue and controversy. If the original records and from the file of the Tribunal as also the Adjudicating Authority are summoned, they would indicate whether the Appellants at all had supplied any copy of the report of IIT to the Adjudicating Authority. That is how the original records were called for by our earlier order and the parties through their Counsel were permitted to inspect them. The matter was placed before us for further hearing after the inspection of the records was completed.

15. After the records were inspected, the Senior Counsel appearing for the Appellants and the supporting Respondents submitted that alongwith the letter referred by the Tribunal and by us as above, there was indeed a copy of the report of IIT supplied to the Adjudicating

Authority.

16. This submission is countered by Mr.Jetly, learned Counsel appearing for the Revenue and submitting that though a letter was issued addressed to the Adjudicating Authority, the report stated to be accompanying it, was not in his file but with another section in the Customs Department.

17. We are not impressed by this submission of the Revenue. We have perused the file and the original records, we find that the Department of Chemical Engineering, Indian Institute of Technology, Bombay, had indeed forwarded its Test Report dated 21st August,2006 and which is duly signed by one Mr.H.Nanavati. On 1st June,2010 the Assistant Commissioner/Deputy Commissioner (Customs), Group-IIA Jawaharlal Nehru Customs House, Sheva was informed by the Central Public Information Officer, Import Commissionerate and with reference to letter dated 21st May,2010 that the sample has been drawn and sent to IIT, Mumbai for test. However, it is requested to obtain and forward a copy of the test report to the same in compliance with the order in appeal.

18. We do not see why the Revenue sought such an information.

19. Apart from the fact that on 8th June,2010 the predecessor-in-title of the Appellants also sought this information and particularly with regard to the test report from IIT and was informed that no record of the Test Report of IIT is available in the adjudicating file, it is evident that this report was in the same Commissionerate but with a different Section.

20. To our mind in such state of affairs, the Tribunal should have considered the request of the Appellant's predecessor to read this document in evidence and allow the Assessee to rely on it. There was no ground and sufficient for the Tribunal to deny this request. This would have obviated further proceedings including filing of appeal in this Court. We have seen that lot of correspondence has gone by on this point and between the parties. We are not concerned with the correctness of the replies that were given to the applications under the Right to Information Act,2005. Once it is not seriously disputed that such a report is in existence and duly forwarded to one Section in the Commissionerate, then, larger interest of justice demands that the Tribunal should have allowed the parties to refer to it and if the Assessee

desires to rely on it, allow it to so rely.

21. What would be the consequence flowing from such reliance is a different matter and need not bother us. The order of Adjudication thus prima facie suffers from non compliance with principles of natural justice and the second ground in the Memo of Appeal before the Tribunal, at least should have been accepted by the Tribunal.

22. That it would have been advisable at that stage itself to look into that document and consider it, but possibly the Tribunal thought that it would necessitate a remand, that it dealt with the matter on the available material. To our mind, when the report relied upon by the Revenue and the one produced by the Assessee contain different conclusions and observations and there is divergence of opinion between the experts in the field, then, all the more the prejudice is established and proved.

23. We are of the firm opinion that the Tribunal's order is, therefore, vitiated for want of consideration of a vital and valid ground of appeal referred by us above. That ground was squarely raised in the Memo and pressed during the oral arguments. The Appellants should

have been given complete opportunity to press that ground on merits and non furnishing of such an opportunity, therefore, results in Tribunal's order being ex-facie illegal. It is vitiated by an error apparent on the face of the record.

24. We proceed to quash and set aside the impugned order of the Tribunal.

25. We do not think that the matter should be, and in the given facts and circumstances, remanded and sent back to the Adjudicating Authority, rather restoration of the appeal to the file of the Tribunal and for consideration afresh on merits and in accordance with law would serve the interest of justice. We, therefore, quash and set aside the order of the Tribunal and restore the appeal of the Assessee to its file for fresh consideration. While fresh consideration thereof, the Tribunal should allow the Appellants to raise the ground particularly of non-compliance with principles of natural justice by the Adjudicating Authority and a patent error in not reading into evidence the opinion of Indian Institute of Technology though a copy of its report was on its file. Once the Tribunal allows raising of such ground, then, it is but natural that it must record a conclusive opinion thereon after hearing both sides. While

rendering its opinion, the Tribunal must also consider the impact of findings in the report and whether indeed the Appellants or their predecessor-in-title can be held guilty of undervaluation as alleged in the show cause notice. Thus, all contentions with regard to the submission of the copy of the report and its contents, of both sides are kept open. We clarify that we have expressed no opinion on the rival contentions. We have highlighted them only to impress upon the Tribunal that it has not completed its job fully and failed to function properly and in accordance with law as a last fact finding Court. Now we expect it to perform the same expeditiously.

26. The Appeal is allowed in the aforesaid terms.

27. Since the matter is fairly old and it is the heirs and legal representatives who are raising the pleas before us of the same being concluded expeditiously, we direct the Tribunal to decide the appeal as expeditiously as possible and within a period of three months from the receipt of copy of this order.

28. The records be sent down immediately.

29. As the Notices of Motion do not survive, once the appeal is disposed of as above, the Notices of Motion are also disposed of.

[G.S. KULKARNI, J.] **[S.C. DHARMADHIKARI,J.]**