IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2938 OF 2015

Jagat Alloys Private Limited and another Petitioners
versus
Union of India and others Respondents

Mr.Prabhakar K. Shetty for Petitioners.
Mr.Pradeep S. Jetly with Mr.J.B.Mishra for Respondent no.3.

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 is being entertained in rather unusual circumstances. Very few dates and events have to be referred to for our ultimate order and direction.

2. The first Petitioner claims to be engaged in the activity of manufacture of Ferro Aluminium Alloy products at its factory at Khopoli. The final product manufactured by the Petitioner no.1 is exigible to excise duty as far as raw materials or inputs are concerned. CENVAT credit of the duty paid on the said inputs was also admissible according to the Petitioner.

However, the Revenue issued a show cause notice proposing to deny such credit and that is how two orders were passed on this show cause notice on 2 January 2004 and 30 January 2006.

3. The Petitioners preferred an appeal and that appeal in terms of the applicable law lies to the Customs, Excise and Service Tax Appellate Tribunal. The jurisdictional Tribunal is the West Zonal Bench at Mumbai. That appeal was heard on 10 October 2014. The Tribunal pronounced its judgment but there was no unanimity. There was difference of opinion. The first order came to be pronounced by the Member-Judicial and he held that the Revenue could not establish and prove that availment of CENVAT credit on inputs is wrongful and illegal. However, the Member-Technical disagreed and passed a separate order.

4. There was a rectification application filed stating that there is a mistake apparent and that needs to be rectified by the Tribunal. Surprisingly, on that, the Tribunal Members who had disagreed earlier, agreed on 11 September 2015 and held that there is no mistake. The Tribunal dismissed the rectification application.

5. We find that the learned counsel for the Petitioners has rightly relied upon page 145 of the paper book. That indicates that there was a difference of opinion between

Member-Judicial and Member-Technical. Together they agreed to place the matter before the President of the Tribunal for the President to refer the question or point of disagreement to a third Member of the Tribunal.

6. However, the said difference of opinion is recorded in the following terms :

> *"DIFFERENCE OF OPINION*
>
> *In view of the difference of opinion between Member (Judicial) and Member (Technical), the matter may be placed before the President to nominate Third Member to resolve the difference of opinion on the following point :-*
>
> *The evidence produced by Revenue is not sufficient to establish fraudulent availment of credit by the appellant and consequently demand of duty should be set aside and penalties are not imposable as held by Member (Judicial)*
>
> *OR*
>
> *Whether the evidence produced by Revenue establishes wrongful availment of Cenvat credit and consequently demand of duty and imposition of penalties is sustainable as held by Member (Technical).*
>
> *(Pronounced in Court on 07-04-2015)"*

7. Upon perusal of the above with the assistance of both learned Advocates, we find that it is surprising that as a result of this way of recording the disagreement, the entire appeal may have to be heard by the third Member and that is hardly conducive to the larger interest of justice. The difference of opinion on facts noted should be referred specifically and a

question or questions arising on that difference of opinion alone should be referred to the Third Member. If the entire appeal is to be heard afresh, then, that would not be conducive for effective and proper adjudication. Ultimately there has to be an element of certainty and finality to a litigation. None should be allowed to take chances or have a rehearing of the proceedings before the sme Court.

8. Hence, we set aside the order passed initially by the Tribunal namely the final order dated 10th October 2014 where the Member-Judicial and Member-Technical disagreed with each other. We would highly appreciate that instead of the appeal going to a third Member and for being heard in its entirety, it is now reheard by the Tribunal's West Zonal Bench afresh. They should, uninfluenced by the earlier findings in the matter, pass fresh order on merits and in accordance with law after hearing both sides. We clarify that we express no opinion on the rival contentions. The writ petition is allowed accordingly with no order as to costs.

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

MST