IN THE HIGH COURT OF JUDICATURE OF MADRAS

DATED: 09.06.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

Writ Appeal No.539 of 2016
and CMP No.7270 of 2016

M/s.SDS Ramcides Crop Science Pvt Ltd.,
(Formerly Sree Ramcides Chemicals Pvt. Ltd.)
Rep. by its Managing Director,
Mr.R.Gopal. ... Appellant/Petitioner

-vs-

The Commissioner of Central Excise,
Chennai II Commissionerate,
692, Anna Salai, M.H.U. Complex,
Nandanam, Chennai - 600 035 ... Respondent/Respondent

Writ Appeal filed against the order dated 15.03.2016 in W.P.No.30771 of 2015 Writ Petition filed udner Article 226 of the Constitution of India praying this court to issue a Writ of certiorarified Mandamus to call for the records pertaining to the impugned order No.19/2015 dated 01.09.2015 issued in C.No.V/15/104/2014-CX.Adjn.by the respondent and quash the same and further direct the respondent to permit the petitioner to cross-emamine the chemical examiner. Whose report has been relied upon in the impugned order dated 01.09.2015.

For Appellant : Mr.Hari Radhakrishnan
For Respondent : Mr.A.P.Srinivas
Sr. Standing counsel
for Customs and Central Excise

JUDGMENT

[Judgment of the Court was made by S.MANIKUMAR, J.]

Challenge in this appeal is to an order made in W.P.No.30771 of 2015 dated 15.03.2016, by which the Writ Court has directed the appellant/petitioner to file an appeal before the appellate authority against the order in original dated 01.09.2015, passed by the Commissioner of Central Excise, Chennai II Commissionerate, Chennai. The Writ Court has further directed the appellate authority to entertain the appeal without insisting on the question of limitation for the reason that the appellant/petitioner had approached this Court as early as on 20.09.2015 itself.

2. Prayer in the writ petition is to issue a writ of certiorarified mandamus, to quash the order in original dated 01.09.2015, passed by the Commissioner of Central Excise, Chennai II Commissionerate, Chennai and consequently, to direct the respondent to permit the appellant/petitioner to cross examine the Chemical Examiner, whose report has been relied on in the order dated 01.09.2015.

3. Before the writ Court, submission has been made that the respondent ought to have given an opportunity to cross examine the Chemical Examiner, who had given the report stating that the subject product is not fertilizer. Reliance has been made to the decision reported in 2013 (295) ELT 195 (Mad.). According to the appellant, denying the opportunity of cross examination, is violation of the principles of natural justice.

4. Before the writ Court, responding to the above, Mr.A.P.Srinivas, learned Senior Standing counsel appearing for the respondent had submitted that the Chemical Examiner's report was taken into consideration only at the instance of the appellant/petitioner and that even without the said report, on the material available on record the respondent had come to a definite conclusion that the product is not fertilizer. Learned counsel for the respondent also submitted that even if the Chemical examiner's report is eschewed or ignored, the order in original dated 01.09.2015, passed by Commissioner of Central Excise, Chennai II Commissionerate, Chennai, could be sustained. Submission has also been made that the writ petition has been filed without availing the alternate statutory remedy of appeal.

5. Adverting to the abovesaid rival submissions, at paragraph No.6 in W.P.No.30771 of 2015 dated 15.03.2016, the writ Court has ordered as hereunder

> "6.Accordingly, I give liberty to the petitioner to file an appeal as against the impugned order dated 01.09.2015 and also direct the appellate authority to decide the appeal, on merits and in accordance with law, without relying upon the Chemical Examiner's report. The petitioner shall file the appeal within ten days from the date of receipt of copy of this order. The appellate authority shall entertain the appeal, without insisting on the question of limitation for the reason that the petitioner had filed the writ

petition before this Court on 20.09.2015 itself. With the above observation, the writ petition is disposed of. No costs. Consequently, connected MP is closed."

6. Though, Mr.Hari Radhakrishnan, learned counsel for the appellant/petitioner contended inter alia that the writ Court ought to have setaside the order in original dated 01.09.2015, this Court is not inclined to accept the said contentions, for the reason that the main grievance of the appellant/petitioner was that without providing an opportunity to cross examine the Chemical Examiner, whose report has been relied on, an adverse order dated 01.09.2015, has been passed. However, it could be seen from the impugned order in the Writ Appeal that while directing the appellant/petitioner to file an appeal, as per the statute, the learned Judge has observed that the appellate authority would entertain the appeal without insisting the question of limitation, as writ petition has been filed before this Court on 20.09.2015, and also granted relief to the appellant/petitioner by stating that while adjudicating the issues raised in the appeal, the appellate authority, need not rest on the Chemical Examiner's report, taken note of, for arriving at the conclusion, as to whether the subject product is fertilizer or not. In short, the Writ Court had directed the appellate authority not to rely on the Chemical Examiner's report.

7. When there is an exclusion of the Chemical Examiner's report, by an order, which was one of the factors taken into consideration for arriving at the conclusion as to whether the subject product is fertilizer or not, in normal circumstances, one would have expected the department to challenge the order made in W.P.No.30771 of 2015 dated 15.03.2016. To ascertain as to whether the department would be seriously prejudiced over the exclusion of the Chemical Examiner's report in the matter of adjudication by the appellate authority, Mr.A.P.Srinivas, learned senior standing counsel appearing for the respondent reiterated that the impugned order in original dated 01.09.2015, passed by the Commissioner of Central Excise, Chennai II Commissionerate, Chennai, could still be sustained, without relying on the Chemical Examiner's report.

8. Such being the position, we are of the view that the appellant/petitioner has not made out a case for interference. Statute provides for an appeal remedy. As per Section 35-B of the Central Excise Act, a statutory appeal ought to have been filed within three months from the date on which the order sought to be appealed against is communicated to the Commissioner of Central Excise , or, as the case may be, the other party preferring the appeal.

9. In as much as the petitioner had approached this Court on 20.09.2015, the writ court has granted a concession to the appellant/petitioner to prefer the statutory appeal and further directed the appellate authority to entertain the appeal, without insisting on the question of limitation. Thus, perusal of the order impugned before us shows that the writ Court had not only eschewed the Chemical examiner's report from the consideration of the appellate authority, but also granted time for filing the statutory appeal. For the reasons stated supra, we are not inclined to interfere with the order impugned in the instant appeal and the Writ Appeal is dismissed. No Costs. Consequently, the connected Miscellaneous Petition is closed.

10. Mr.Hari Radhakrishnan, learned counsel for the appellant/petitioner seeks time to file statutory appeal before the appellate authority viz., CESTAT, Madras.

11. Having regard to the request, two weeks' time is granted to the appellant/petitioner to file the appeal, as per Law and the appellate authority, shall entertain the same and dispose of the appeal in the light of the observations made in W.P.No.30771 of 2015 dated 15.03.2016. Order impugned in the Writ Petition is directed to be returned, after getting an attested copy, for record.

Sd/-
Assistant Registrar(CS-VI)

//True Copy//

Sub Assistant Registrar

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To

The Commissioner of Central Excise,
Chennai II Commissionerate,
692, Anna Salai, M.H.U. Complex,
Nandanam, Chennai - 600 035

1 cc to Mr.A.P.Srinivas, Advocate, sr.31268
1 cc to Mr.Hari Radhakrishnan, Advocate, sr.31430

W.A.No.539 of 2016

bvr co
kra 14.06.2016