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

CENTRAL EXCISE APPEAL NO. 160 OF 2006

The Commissioner of Central }
Excise, Mumbai-II } Appellant
versus
M/s. Cona Industries and Ors.} Respondents

Mr. Swapnil Bangur with Mr. Sham V.Walve for the appellant.

Mr. M. H. Patil with Mr. Sachin Chitnis for the respondents.

CORAM :- S. C. DHARMADHIKARI &
PRAKASH. D. NAIK, JJ.
DATED :- APRIL 24, 2017

P.C. :-

1. In this appeal of the Revenue, the order of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) dated 15th July, 2005 is challenged. This appeal was admitted on 11th April, 2007 on the following substantial question of law:-

> "Whether the CESTAT was justified in holding that the SCN dated 13.1.1999 invoking the provisions of Section 11A(1) is barred by limitation on the basis of SCN dated 23.6.1997 which is issued only for the purpose of seizure of the goods and not for any demand under Section 11A?"

2. The tribunal, in the order under challenge, was considering the issue arising out of the order passed by the Commissioner of Central Excise decided on 29th October, 2004.

3. After setting out the facts and the circumstances leading to the investigation and issuance of a show cause notice, it is found by the tribunal that the Preventive Officers commenced an

inquiry on 29th September, 1996 and a show cause notice dated 26th March, 1997 was issued. The adjudication was held and an order came to be passed on 12th December, 1997. An appeal was filed with the Commissioner of Central Excise (Appeals) but it was not pressed. Based on the very investigation and documents, another show cause notice dated 13th January, 1999 was issued by the Commissioner to deny benefit of Notification No. 56/95CE and recover duty for the period 1994-95 to 1996-97. This demand in the show cause notice was confirmed on 29th October, 2004 under proviso to section 11A(1). Therefore, the appeal to the tribunal. The Commissioner's order has been referred to and the Hon'ble Supreme Court judgment in the case of *Sanghi Textile Processors*[1] to submit that on the same set of allegations, a second show cause notice could not have been issued. After having considered all this, the tribunal concluded that the documents were not supplied, in any case, after the inquiry was over, those documents, which were not relied upon were taken into consideration. That has caused prejudice and no effective defence could be placed by the assessee. Therefore, the principles of natural justice have been violated. They have been violated additionally by denial of cross examination of the witnesses. Preceding that, in para 2.1, the tribunal observed thus:-

1 **1997 (68) ECR 570**

> "2.1. The Commissioner in para 21 of the order impugned before us observes that all the documents were supplied to the appellants on four occasions i.e. 17.11.97, 1.12.97, 5.3.99 & 7.5.99 & therefore the non receipt claim on documents in the show cause notice issued on 13.1.1999 was not upheld after considering the correspondence exchanged and taking note of the Supreme Court decision in case of Sanghi Textile Processors 1997 (68) ECR 570 SC brought to the notice of the department. We cannot uphold the supply of documents prior to issue of the present proceedings i.e. 27.11.97 & 1.12.97, to be compliance of the onus on the department to supply the copies relied upon documents in the case initiated by notice dt. 13.1.1999. Moreover, if the department is arguing that the material documents are the same as in the earlier proceedings conducted by the Additional Commissioner, then this subsequent notice dt. 13.1.1999 invoking the proviso to section 11A(1) should be held to be barred by limitation as it demands duties for the period 1994-95 & 1996-97 when facts were already known and cognizance of evasion taken in notice dt. 26.3.1997 reliance on the apex courts decision in the case of E. C. E. Industries 2004 (164) ELT 236 SC is well founded to hold the proceedings to be barred by limitation."

4. When this appeal was placed before us, it was argued that the tribunal has set aside the order under challenge before it for violation of principles of natural justice, the demand being barred by limitation and then on merits. Therefore, the question on which the appeal has been admitted is still alive. The question has been framed on the footing that once the show cause notice dated 13th January, 1999 invoking the provisions of Section 11A(1) is barred by limitation, then, the show cause notice dated 23rd June, 1997, which is only issued for the purpose of seizure of the goods and not for any demand, can be sustained.

5. The respondent, appearing through Mr. Patil relied upon a judgment of the Hon'ble Supreme Court in the case of *Nizam Sugar Factory vs. Collector of Central Excise, Andhra Pradesh*[2]. That judgment refers to all prior cases. He submits that the Hon'ble Supreme Court has held that when the first show cause notice was issued, all the relevant facts were in the knowledge of the authorities. Later on, while issuing the further show cause notice, the same/similar facts could not be taken as suppression on the part of the assessee as these facts were already in the knowledge of the authorities. That is how the Hon'ble Supreme Court has been consistently approaching the issue.

6. On the other hand, Mr. Bangur appearing for the appellant would submit that despite this position emerging from the law laid down by the Hon'ble Supreme Court and relied upon by Mr.Patil, this court admitted this appeal on 11th April, 2007 and on the above reproduced substantial question of law. Therefore, the matter is not covered by the judgment of the Hon'ble Supreme Court of India.

7. Having heard both sides, what we have found is that the tribunal, in the impugned order, has rested its conclusion on all three aspects. However, what was material for our purpose is the

2 **2006 (197) ELT 465**

undisputed fact that the Preventive Officers started inquiry on 29th June, 1996 and issued a show cause notice dated 26th March, 1997. The adjudication proceedings were held and an order came to passed on 12th December, 1997, which was under challenge before the Commissioner of Central Excise (Appeals). This appeal was withdrawn as the respondent had availed of Karvivad Samadhan Scheme. Thereafter, on the very same allegations and documents, another show cause notice dated 13th January, 1999 was issued and that was for the above purpose. Though the Commissioner (Appeals) confirmed this demand, what one finds from a reading of his order as well that the basis for the show cause notice dated 26th March, 1997 was the seizure. It is in these circumstances that we find that the CESTAT's conclusion is unassailable. The very issue, which was raised before the Hon'ble Supreme Court in the judgment relied upon by Mr. Patil, has been considered and we do not think that a different view of the matter can be taken in the light of the binding pronouncement.

8. As a result of the above discussion, this appeal fails. The substantial question of law is answered against the Revenue and in favour of the assessee. There would be no order as to costs.

(PRAKASH.D.NAIK, J.) **(S.C.DHARMADHIKARI, J.)**