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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CUSTOM APPEAL NO.1 OF 2016

Rakesh Rathi, Partner of
M/s.S.G.Sales Corporation ...Appellant
vs.
The Commissioner of Customs
(Imports) ...Respondent

ALONG WITH
CUSTOM APPEAL NO.2 OF 2016

Nirmal Kumar Rathi ...Appellant
vs.
The Commissioner of Customs
(Imports) ...Respondent

ALONG WITH
CUSTOM APPEAL NO.3 OF 2016

M/s.Laminate Distributors (India) ...Appellant
vs.
The Commissioner of Customs
(Imports) ...Respondent

ALONG WITH
CUSTOM APPEAL NO.4 OF 2016

Shri S. Gopal Rathi ...Appellant
vs.
The Commissioner of Customs
(Imports) ...Respondent

ALONG WITH
CUSTOM APPEAL NO.5 OF 2016

M/s.S.G.Sales Corporation ...Appellant
vs.
The Commissioner of Customs
(Imports) ...Respondent

ALONG WITH
CUSTOM APPEAL NO.6 OF 2016

Nirmal Kumar Rathi Partner of
M/s.S.G.Sales Corporation ...Appellant
vs.
The Commissioner of Customs
(Imports) ...Respondent

Mr.Vikram Nankani, Senior Counsel a/w Mr.Jitendra Motwani and Mr.Nanda Gopal i/b Economic Laws Practice for the appellant in all appeals
Mr.P.S.Jetly for the respondent in all appeals

CORAM : A.S.OKA, &
RIYAZ I. CHAGLA,JJ.
DATE : SEPTEMBER 25, 2017

P.C.:

1 Heard the learned senior counsel for the appellants. Since similar issues are involved in this group of appeals, for the sake of convenience, we are referring to the facts of the case in Custom Appeal No.1 of 2016. This appeal arises out of orders passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai (for short “Appellate Tribunal”). The challenge in this appeal is to the three orders passed by the Appellate Tribunal. The first is stay order dated 6th June 2014, the second is the modification order dated 13th January 2015 and the third is the consequential order passed by the Tribunal on 16th April 2015 of dismissal of the appeal preferred by the appellants.

2 Appeal No.1 of 2016 has been preferred by Shri Rakesh Rathi in his capacity as a partner of M/s. S.G.Sales Corporation. M/s.S.G.Sales Corporation and M/s.Laminates Distributors (India) are the sister concerns. As far as S.G.Sales Corporation is concerned, imports are being made by the said firm through Mumbai and Nhava Sheva. As far as M/s.Laminates Distributors (India) is concerned, it is stated that the imports made by the said firm have been cleared through Calcutta.

3 The firms are of the family members of Rathi family and the goods like Medium Density Fibre Boards with Veneer face, hardboard/hard board cut sizes and soft boards are being imported by the company from Thailand.

4 Searches were conducted in various offices of the firms. Hard disks and one Laptop has been seized from Mumbai and Jaipur. There were other documents which were seized. It was alleged that the data retrieved from the hard disks/Laptop consisted of e-mails 400 in number in relation to shipment details etc. According to the case of the respondent-revenue, goods imported were under declared and custom duty was paid on declared value. The amount corresponding to the declared value was being paid to the supplier through normal banking channels. It is alleged that the additional amount being the difference between the actual transaction value and the declared value was being sent through Hawala transaction or through telegraphic transfers

from the places like Singapore etc.

5 On 17th April 2007, M/s.S.G.Sales Corporation addressed a letter to the Joint Commissioner, DRI, stating that the Panchnama proceedings on 28th March 2007 were not proper. The statements were recorded of the said Rakesh Rathi and others.

6 Demands issued to the said firms were confirmed in adjudication proceedings by the Commissioner and penalties were imposed.

7 By the first impugned order dated 6th June 2014, the Appellate Tribunal held that the Appellants have not been able to make out a prima facie case of waiver of duty. However, keeping in view the facts and circumstances of the case, M/s.S.G.Sales Corporation and the M/s.Laminates Distributors (India) were directed to deposit 50% of the duty demanded against the liability of the full duty within a period of eight weeks. It was directed that on pre-deposit of the said amount, the pre-deposit of the remaining amount of duty and penalty will stand waived. As far as partners of the firms are concerned, they were directed to deposit 20% of the penalty amount imposed on them within a period of eight weeks from the receipt of the order.

8 Applications for modification of the order dated 6th June 2014 were made which have been rejected by the second impugned order dated 13th January 2015. As stated earlier, as a result

of failure of the appellants to deposit the amounts as directed, the appeals have been dismissed by the third impugned order dated 16th April 2015.

9 The learned senior counsel for the appellants firstly submitted that for considering the questions H and I, the case may be remanded to the Appellate Tribunal. He submitted that number of orders of remand have been passed by the Appellate Tribunal on the question whether the DRI was a proper Officer to issue a show cause notice under the Customs Act,1962. Moreover, he submitted that the other issue of non compliance with the requirement of sub-section (2) of section 138(C) goes to the root of the matter. He submitted that the cross examination of the witnesses was not permitted in the adjudication proceedings. Inviting our attention to the order made in rectification proceedings, he submitted that the findings recorded by the Appellate Tribunal overlook the express provisions of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 and the law laid down by the Apex in the case of Commissioner of Customs, Commissioner of Customs, Calcutta vs. South India Television (P) Ltd.[1]. He submitted that this is a case where there is no evidence adduced by the department showing prices of the contemporaneous import. In any event, it was necessary to follow the mandatory regime of the said Rules of 1988. He, therefore, submitted that this was an appeal where a strong prima facie case was made out before the

1 2007 (214) E.L.T. (S.C.)

Appellate Tribunal and therefore, the order of pre-deposit passed by the Tribunal is completely illegal.

10 The learned senior counsel submitted that by setting aside the order of dismissal of the appeal, an opportunity may be granted to the petitioner to make appropriate application to enable the appellants to urge the grounds H and I. He accepted that grounds H and I were not urged before the Appellate Tribunal though they were urged before the Authorities below.

11 We have perused the impugned orders and we have given careful consideration to the findings in the stay order dated 6th June 2014 (first impugned order). The Appellate Tribunal, while deciding stay/waiver application, has made in depth consideration of the case made out by the appellant and has considered whether there was a prima facie case. There was a delay on the part of the appellants in disputing the correctness of the panchnama. The Appellate Tribunal prima facie found that the reasons for delay have not been explained. About the e-mails, the Appellate Tribunal held thus:

> "7....We also note that the e-mails are at the address ramrakswa@hotmail.com . In many of the e-mails the name of Shri Rakesh Rathi is mentioned in the address part of it. <u>However, when we go through the contents of the e-mails we find that in almost all the e-</u>

<u>mails the names of Gopal Rathi/Rakesh Rathi is mentioned in the content part. The details of the e-mails have not only been confirmed by Rakesh Rathi but explained also including the e-mails address of different suppliers. We also note that in his statement dated 28.11.2007 Shri Rakesh Rathi has admitted that the said e-mails address is theirs and we have no hesitation in assuming that the said e-mails address and e-mails are pertaining to the applicants and applicants alone. There is no explanation whatsoever from the applicants why the e-mails of someone else, if it all, should be available in their Hard Disks/Laptop. In any case, the details in e-mails precisely correspond with the imports made, quantity, value etc. E-mails indicate date, time and are over a period of years. The e-mails clearly indicate that the declared prices in the documents were not the real transaction value</u>. Shri Rakesh Rathi was asked to explain such details and he did not state anything about this aspect but stated that the said e-mails are self explanatory. It is to be noted that Shri Rakesh Rathi as also Shri Gopal Rathi explained the contents of all the e-mails numbering about 400, so recovered. Even if one was to tamper the information, nobody can provide such details and therefore contents cannot be even tampered. Under the circumstances, we do

> not find prima facie case for the applicants...”

(underlines supplied)

12 It is in the context of the aforesaid findings of fact that the Tribunal observed that prima facie, in the facts and circumstances of the case, the fact that no cross examination of panch witnesses as well as assistant Government Examiner was permitted may not be fatal. It was observed that the Panchnama was signed by Shri Rakesh Rathi. The Tribunal did not accept the argument of delay of 22 days in sending the hard disk/Laptop to the Forensic Science Laboratory at Hyderabad.

13 In paragraph 8 of the said order, the learned Member of the Tribunal observed that the panchnama was drawn in presence of said Rakesh who has signed the same. The Appellate Tribunal considered the fact that hard disk and Laptop were recovered, the details of the same are tallying with that given in the report of Government Examiner of questioned Documents. The Appellate Tribunal considered the explanation of the appellants to 400 or more e-mails retrieved from the Hard Disk/Laptop. Though it was held that no prima facie case was made out, even after recording the said finding, the Appellate Tribunal directed both the firms to deposit 50% of the duty. As far as penalty imposed on the partners is concerned, they were directed to deposit only 20% of the penalty amount.

14 In the order dated 13th January 2015, in paragraph (5) while deciding the modification application made by the appellants, the following are the findings recorded :

> "5...Ld. Sr.Counsel also emphasized on the part of the statement of Rakesh Rathi, where he stated that "I am not in position to explain the discrepancy" and hence exercised the right of silence. We find that Ld. Sr.Counsel has read half of the sentence in the statement, remaining part of the sentence of the statement clearly stated that the e-mails are self explanatory. We do not find any force in the argument. Another main argument of Ld.Sr.Counsel was that they have produced the details of contemporaneous import made through various ports at value which are comparable to their declared value. We are not impressed with this argument. <u>The whole case of the Revenue is based upon precise data recovered from the hard disk/computer, which were recovered during search operation. The date recovered gives the precise transaction value or the price paid by the appellants to the overseas supplier. From the data it is very clear that only part was paid through official banking channels and remaining part was paid through unofficial channels. When the transaction value and the precise details at</u>

which the goods have been purchased by the appellant is available, there is no reason to consider or examine the value declared by other importers. Once the correct transaction values of appellant are available, in our view there is no need to go into values of other importers. Yet another argument advance by the Ld.Sr.Counsel is that the Tribunal decision in the case of Bothra Metal & Alloys (supra). We have gone through the said judgment and found that the facts of that case are entirely different. In that case there were discrepancies in the title/number of the pen drives recovered and those from which data was retrieved. There were other discrepancies also. Moreover, in respect of 275 bills of entry, the value proposed was based upon LME price of the prime metal and using deductive system to arrive at the scrap value. This scheme was not approved and it is in this context that the Tribunal observed that prices of contemporaneous import be taken into account. Overall facts of the case of Bothra Metal & Alloys are totally different and can not be compared to the present case and therefore direction and decision in that case are not relevant for the present case. Going to the financial hardship, we firstly note that even though the financial hardship was stated in the stay petition, the same was not supported by any document either in the stay petition

> or at the time of hearing. We also note that main appellant is partnership firm and from the investigation it is clear that for official accounts they declared only part of the actual prices of the goods. Thus official accounts of such firm would be manipulated and balance sheet of such firm will not be correct representative of their financial position..."
>
> (underline supplied)

15 The law laid down by the Apex Court in the case of the Commissioner of Customs at Calcutta will not affect the correctness of the prima facie findings recorded in the first two impugned orders which are based on consideration of the material on record and the conduct of the appellants.

16 The impugned orders are discretionary in nature dealing with the prayer for interim relief.

17 Only because certain contentions were not raised by the appellants, an order of remand cannot not be made.

18 In the facts of the case and in the light of the prima facie findings, the impugned order dated 6th June 2014 is just and fair. No modification is warranted. No substantial question of law arises in these appeals. Though we had shown inclination to extend the time granted to deposit the amount, under the said order, the learned senior counsel for the

appellants stated that the appellants are not in a position to comply with the said order.

19 We make it clear that all observations made in this Judgment and Order are for limited purpose and for considering of these appeals and the same shall not be construed as final findings on the contested issues.

20 Hence, the Appeals are dismissed. Pending Notices of Motion are disposed of.

(RIYAZ I. CHAGLA,J.) (A.S.OKA,J.)