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

CENTRAL EXCISE APPEAL NO. 108 OF 2007

Commissioner of Central Excise ...**Appellant**

Versus

1. **M/s. Bansal Steel Corporation & Ors**
2. **Shri Ashok Kumar Nageshwar Singh**
3. **Partner of M/s. Bansal Steel Corporation** ...**Respondents**

Ms. P.S. Cardozo, i/b Mr. H.P. Chaturvedi, for the Appellant.

Mr. Sudhakar Thorat, a/w Mr. Deepak N. Salvi, for the Respondents.

**CORAM : ABHAY S. OKA AND
RIYAZ I. CHAGLA, JJ.**

Reserved on : 16 August 2017
Pronounced on : 12 September 2017

JUDGMENT : ***(Per RIYAZ I. CHAGLA J.)***

1. The Appeal has been filed against order dated 7 March 2006 passed by the Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench at Mumbai ("***CESTAT***" for short). This Appeal raises a substantial question of law, which reads thus :-

> *"Whether in the facts and circumstances of the case and in law, the CESTAT is correct to hold that the ingredients of Rule 209A of Central Excise Rules, 1944 under which the penalty has been imposed in this case are attracted only if the persons concerned have physically dealt with excisable goods with the knowledge or belief that such goods were liable to confiscation & that the provisions are not attracted unless the person concerned has physically dealt with such goods?"*

2. The facts in brief that arise in the present Appeal are

as under :-

3. Respondent No. 1 is a partnership firm of which Respondent No. 2 is the Work Manager and Respondent No. 3 is a Partner and responsible for the day today affairs, trading function, etc. of Respondent No. 1.

4. One M/s. Singhal Swaroop Ispat Ltd. was engaged in manufacturing of mild steel ingots. Pursuant to certain information regarding misuse of modvat credit by way of using fake/forged/invalid documents, searches were conducted on 13 mini steel plants on 11 March 1992 and certain incriminating documents had been seized. The investigations revealed that M/s. Singhal Swaroop Ispat Ltd. had availed modvat credit on 19 gate passes and 158 certificates/subsidiary gate passes. Out of these 19 gate passes, 12 gate passes were issued by Respondent No. 1 and which were alleged to be forged/fake/fictitious. It was alleged that Respondents No. 2 and 3 who were looking after day-to-day affairs of Respondent

No. 1 as well as one Shri. M.S.R.S. Gadhwal had used blank gate passbooks of Respondent No. 1 for issuing fake gate passes, which gate passes were endorsed by Shri. Gadhwal to M/s. Singhal Swaroop Ispat Ltd. to enable them to avail modvat credit. A show cause notice was issued to M/s. Singhal Swaroop Ispat Ltd. demanding duty of Rs. 42,74,268.50 as well as Rs. 4,36,278.15 and proposing to issue penalty and confiscation of land, building, plant, machinery, etc. Show cause notices were also issued to 37 other parties including the Respondents. The penal provision under Rule 209A of the Central Excise Rules, 1944 (for short "***the said Rules***") was invoked, *inter alia*, upon the Respondents. The Adjudicating Authority being Commissioner of Central Excise, Mumbai-III, (now Thane – I) vide order in original dated 29 April 1997, disallowed the modvat credit of Rs. 47,10,546.65 and imposed a penalty of Rs. 10,00,000/- each on Respondents No. 1 and 2 and Rs. 5,00,000/- on Respondent No. 3 under Rule 209A of the said Rules.

5. The Respondents being aggrieved by the order in original dated 29 April 1997 filed Appeals in CESTAT. The CESTAT initially dismissed the Appeals by order dated 31 August 2004 for non prosecution. However, the same were restored subsequently by the CESTAT vide order dated 4 January 2006 in view of the explanation given by the Respondents that they did not receive notice for hearing of Appeal. The CESTAT vide impugned order dated 7 March 2006 allowed the Appeals filed by the Respondents and set aside the penalty imposed on them, by observing that the ingredients of Rule 209A of the said Rules under which the penalties were imposed is attracted only if the person concerned physically dealt with the excisable goods with the knowledge or belief that such goods were liable to confiscation. The Appellant being aggrieved by the impugned order, has filed the present Appeal.

6. The Division Bench of this Court by an order dated 5 June 2008 had admitted this Appeal on the substantial questions of law framed therein.

7. Ms. P.S. Cardozo, the learned Counsel appearing for the Appellant, has submitted that the CESTAT has erroneously found in favour of the Respondents by setting aside the penalties imposed against them under Rule 209A of the said Rules, despite the gate passbooks being misused for the purpose of issuing of fake/forged gate passes.

8. Mr. Deepak N. Salvi, the learned Counsel appearing for the Respondents has supported the impugned order of CESTAT and submitted that CESTAT had correctly arrived at the finding that the ingredients of Rule 209A of the said Rules under which the penalties were imposed could be attracted only if the persons had physically dealt with the excisable goods with the knowledge or belief that the goods were liable to confiscation. It is submitted that CESTAT has relied upon its own orders in case of ***Kamdeep Marketing Pvt.Ltd. Vs. CCE, Indore***[1] and in case of Ram ***Nath Singh Vs. CCE, Delhi***[2] in support of this finding.

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1 ***2004(165)ELT 206***

2 ***2003(151)ELT 451***

9. Having heard the parties, we are of the view that the only question of law which would arise for determination is whether Rule 209A of the said Rules under which the penalty has been imposed is attracted only when the person has physically dealt with the excisable goods with the knowledge or belief that the goods were liable to confiscation. Rule 209A of the said Rules reads thus :-

> *"Rule 209A. Penalty for certain of fences. - Any person who acquires possession of, or is any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding three times the value of such goods or five thousand rupees, whichever is greater."*

10. The Division Bench of this Court by a judgment dated 14 September 2010 passed in ***The Commissioner of Central Excise Vs. M/s. Ramesh Kumar Rajendra Kumar & Co. & Anr***.[3], in paragraph 7 after extracting Rule 209A has held that :-

> *"The sine qua non for a penalty on any person under the above rule is: either he has acquired possession of any excisable goods with the knowledge or belief that the goods are liable to confiscation under the Act or Rules or he has been in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing or has in any other manner dealt with any excisable goods with such knowledge or belief. Acquisition of possession of goods is, indisputably, a physical act i.e. the act which could not have been done without handling or movement of excisable*

3 ***Central Excise Appeal No. 18 of 2006***

> *goods as mentioned in the rule. The words "who acquires possession" would indicate that the person sought to be penalized under this rule has to first acquire the possession and then do the activity of transportation etc. as contained in the rule. It is, thus, clear that the physical possession of the goods is a must for doing the activity of transporting referred in rule 209A. The ratio laid down by this Court in* ***Jayantilal Thakkar & Co****. (supra) covers the issue. In the said judgment, it is held that in the given situation, if the assess is only issuing invoices wherein there is no movement of the goods, they cannot be visited with penalty under rule 209A."*

11. From the above judgment, it is clear that Rule 209A can be invoked and the penalty imposed only when the person has physically dealt with the excisable goods with the knowledge or belief that the goods are liable for confiscation. In the present case, the allegation was of unused gate passbooks

being misused by the Respondents for the purpose of issuing fake/forged gate passes to assist M/s. Singhal Swaroop Ispat Ltd. There was no case of the Respondents having physically dealt with the excisable goods with the knowledge or belief that such goods were liable to confiscation. We are thus, of the view that Rule 209A cannot be invoked in the present case. We follow the view taken by the Division Bench of this Court in Judgment dated 14 September 2010 (supra) whilst interpreting Rule 209A of the said Rules. The question of law framed, thus, stands answered in favour of the Respondents and against the Appellant.

12. The Appeal is accordingly, dismissed, with no order as to costs.

[RIYAZ I. CHAGLA J.] **[ABHAY S. OKA, J.]**