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

CENTRAL EXCISE APPEAL NO. 77 OF 2007
WITH
CENTRAL EXCISE APPEAL NO. 78 OF 2007

M/s. Mukund Limited …Appellant
Versus
The Commissioner of Central Excise, Belapur & Ors. …Respondents

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Mr. Anupam Dighe, i/b Mr. P.V. Patankar for the Appellant
Ms. P.S. Cardoza, for the Respondent.

CORAM: A.S. OKA AND RIYAZ I. CHAGLA, JJ.
DATED: 20th September 2017

ORAL JUDGMENT (**Per A.S. Oka, J.)**

1. The submissions of the learned counsel appearing for the parties were heard yesterday. The Appeals were admitted on 14th February 2008. As the facts of the Appeals are more or less similar, the Appeals have been admitted on the same substantial questions of law. The Appeals have been admitted on the following substantial questions of law:-

(i) Whether the amount demanded by the

Superintendent of Central Excise as duty of Central Excise by a mere letter DD2 without issuance of Show Cause Notice under Section 11A (1) of the Central Excise Act, 1944 and without determination of the Central Excise duty due under Section 11A (2) of the Central Excise Act, 1944 and without granting any opportunity of being heard in the matter is an amount which can be recovered as Government dues under Section 142 of the Customs Act, 1962 as Central Excise duty due to the Government?

(ii) Whether in the facts and circumstances of the case and in law the demand of duty under the said DD2 dated 3rd September 1986 or any part thereof could be adjusted against the sanctioned rebate claim?

(iii) Whether in the facts and circumstances of the case and in law any interest can be charged on the demand of duty made under the DD2 dated 3rd September 1986 issued by the Superintendent of

Central Excise?

2. For the sake of convenience, we are referring to facts of Central Excise Appeal No. 77 of 2007. By a letter dated 3rd September 1986 (styled as DD2), the Superintendent of Central Excise Range – VII, Division – III, Thane demanded from the Appellant a sum of Rs.8,87,294.90 being differential excise duty of 3% as mentioned in the said letter. Being aggrieved by the said demand, the present Petitioner filed Writ Petition No. 1299 of 1988. The said Writ Petition was admitted for final hearing and interim order was passed in favour of the Appellant subject to Appellant depositing a sum of Rs.7 lakhs in this Court. The said Writ Petition was dismissed for default by the order dated 4th October 1999. It is an admitted position that the Appellant did not apply for restoration of the said Writ Petition which was dismissed for non-prosecution.

3. On 16th April 2004, the Appellant filed an application claiming rebate of Rs.3,92,934/- on the ground that the Appellant has paid Central Excise duty on export assignments which were exported out of India under Rule 18

of the Central Excise Rules, 2002. By order dated 7th June 2004, the Assistant Commissioner of Central Excise, Belapur – IV, Division – Belapur sanctioned the rebate claim of Rs.3,92,939/-. However in the operative part, he issued following directions:

O R D E R

> *In view of the above I hereby sanctioned the rebate amount of Rs.3,92,939/- (Rupees three lacs ninety two thousand nine hundred thirty nine only) to M/s. Mukund Ltd., Thane.*
>
> *However, I find that there is a Govt. dues amounting to Rs.5,06,056/- (duty Rs. 1,87,295.00 + Interest Rs.3,18,761.00) as listed below arisen out of DD2 dated 03.09.1986 are still pending against them. The Hon'ble Bombay High Court has dismissed the assessee's Writ Petition No. 1299 of 1986 on 04.10.1999 against said DD2 dated 03.09.1986.*

Dues pending amt. In Rs.	Periods (29.05.95 to 07.06.04)	Days	Rate of Int. @	Int. amn. In Rs.	Int. worked out as per Notfn. No.
187295	29.05.95 to 31.12.95	217	'20%	22270.14	21/95 dt.29.05.95
	01.01.96 to 31.12.01	6	'20%	224754	21/95 dt.29.05.95
	01.01.02 to 12.05.02	132	'20%	13546.82	21/95 dt.29.05.95
	13.05.02 to 31.12.02	235	'15%	17857.16	18/02 dt.13.05.02

	01.01.03 to 31.12.03	1 Year	'15%	28094.25	18/02 dt.13.05.02
	01.01.04 to 07.06.04	159	'15%	12238.32	18/02 dt.13.05.02
			Total	**318760.69**	

Total dues Rs.1,87,295.00 + Rs.3,18,761 = Rs.5,06,056.00 (Rupees five lakhs six thousand and fifty six only). The Assistant Commissioner observed that the Appellants have paid duty amount of Rs.1,87,295/- vide debit Ex.No. 37 dated 23.03.2004 in CENVAT account. In this regard, the Range Superintendent informed the assessee that Cenvat credit availed / earned after the relevant months could not be used for payment of duty. Therefore, <u>I am inclined to adjust amount of Rs.3,18,761/- (Rupess three lakhs eighteen thousand seven hundred sixty one only) against the Govt. dues i.e. interest arisen out on Govt. dues / duty amount of Rs.1,87,295/00 (details given above) total sanctioned Rebate amount of Rs.3,92,939.00, as per Section 142 of the Customs Act, 1962 which is made applicable in the Central Excise cases vide Notification No. 48/97 CE (NT) dated 02.09.1997 and further order that the remaining sanctioned amount i.e. Rs.74,178/- (Rupees seventy four thousand one hundred seventy eight only) shall be paid in cash through cheque after adjustment of Govt. dues from sanctioned rebate amount</u>.

(Underline supplied)

4. Being aggrieved by the second part of the said order dated 7th June 2004, an Appeal was preferred by the Appellant before the Commissioner (Appeals), Central Excise

Mumbai- II. By the Order-in-Appeal dated 19th November 2004, the said Appeal was dismissed. Being aggrieved by the said order, the Appellant preferred an Appeal before the Customs, Excise and Service Tax Appellate Tribunal (for short "**CESTAT**") Mumbai. By the impugned judgment and order, the said Appeal as well as Appeal which is the subject matter of companion Appeal No. 78 of 2007 were dismissed by CESTAT. That is the reason why there are two Appeals preferred by the present Appellant.

5. The first submission of the learned counsel appearing for the Appellant is that order of dismissal of the Writ Petition for non-prosecution will not operate as *res judicata* or it will not be governed by principles analogous to *res judicata.* His submission is that as the demand made by the said letter DD2 was null and void, the Appellant was entitled to raise said contention in the Appeal before CESTAT. He submitted that the letter DD2 was issued without issuing a show cause notice under Section 11A(1) of the Central Excise Act, 1944 (for short "**said Act**") and without determination of Central Excise duty. He submitted that in any event, by taking

recourse to Section 142 of the Customs Act, 1944 (for short "**Customs Act**"), set off of the amount payable under letter DD2 could not have been ordered as by virtue of the Notification issued by Central Government only Clause (b) and sub-clause (ii) of Clause (c) of sub-section (1) of Section 142 of the Customs Act, 1962 were made applicable to the payment of excise duty under the Central Excise Act, 1944.

6. The submission of the learned counsel appearing for the Respondent is that as the Writ Petition challenging demand made by the letter DD2 was dismissed for non-prosecution, the said demand has become final as the Appellant has not chosen for apply for restoration of the said Writ Petition. She pointed out that the Appellant deposited sum of Rs.7 lakhs as per the interim order passed in the said Writ Petition. She submits that the fact that the direction is issued by Division Bench of this Court to deposit Rs.7 lakhs shows that the Division Bench was satisfied that *prima facie,* there was a merit in the demand made by the letter DD2.

7. We have considered submissions. Perusal of the impugned judgment and order of CESTAT shows that a specific contention was raised that the demand made by the letter DD2 was nullity and was not executable and hence, the balance amount payable as per the said letter could not have been set off against the rebate claim of the Appellant. The law on this aspect is well settled. If an order is wholly without jurisdiction and void, for avoiding the same, no specific declaration is required to be obtained. In collateral proceedings, a contention can be always raised that the order is null and void and therefore, it should be disregarded. The Apex Court has consistently taken the said view. Only for the sake of reference, we are referring to the law laid down by the Apex Court in paragraph 22 of the decision in the case of ***Dhurandhar Prasad Singh Versus Jai Prakash University and Others*[1]*.*** Therefore, the Appeal before the CESTAT being a collateral proceedings, the Appellant was entitled to raise a contention that the demand made by the letter DD2 was null and void and therefore, the said demand needs to be ignored. In paragraph 4 of the impugned order,

1(2001) 6 Supreme Court Case 534.

CESTAT has declined to decide the said contention on merits. In our view, the said contention ought to have been gone into by CESTAT as the Appellant was entitled to raise a contention that the demand made by the letter DD-2 was void *ab initio and, hence,* deserves to be disregarded and ignored.

8. The second contention raised by the Appellant is as regards the power of the Assistant Commissioner who had directed set off of the balance amount due and payable by the Petitioner in terms of the said letter DD2 against the sanctioned rebate claim of the Appellant. It goes without saying that such a set off could have been ordered provided there was a statutory power vesting in the Assistant Commissioner to do so.

9. Under Section 142 of the Customs Act, there is a provision authorising authorities under the Customs Act to deduct any sum payable by any person under the Customs Act while ordering payment of any amount under the provisions of the said Act. The submission of the learned counsel appearing for the Appellant based on a Notification is

that provisions of only clause (b) and sub-clause (ii) of clause (c) of Sub Section (1) of Section 142 of the Customs Act have been made applicable to the provisions of the Central Excise Act, 1944 and in the facts of the case, both the clause (b) and sub clause(ii) of clause (c) of Sub Section (1) of Section 142 of Customs Act are not applicable.

10. Before Commissioner (Appeals) and CESTAT, the issue of the validity of directions issued for set off was raised. Therefore, the issue of applicability of Section 142 of the Customs Act or the issue of the power of the Assistant Commissioner of ordering the set off ought to have been decided by CESTAT.

11. Perusal of the impugned order of CESTAT shows that the said Tribunal was impressed by the order of dismissal of Writ Petition filed by the Appellant for challenging demand made by the said letter DD2. The CESTAT has not decided the contentions raised by the Appellant on merits. CESTAT has held that as Writ Petition has been dismissed it cannot go

into question of legality of the demand made by the said letter DD2. According to us, the said approach of CESTAT is completely erroneous.

12. Therefore, there is no option but to set aside the impugned judgment and order and to remand the Appeals to the CESTAT for deciding the same on merits in the light of findings recorded in this judgment.

13. We may note here that in terms of the interim order passed in Writ Petition No. 1299 of 1988, the Appellant had deposited a sum of Rs.7 lakhs in this Court on 2nd April 1988. From the file of the disposed of Writ Petition produced before us, it appears that as a consequences of dismissal of the said Writ Petition for default, the amount of Rs.7 lakhs was paid by the Registry to the Assistant Commissioner, Central Excise, Belapur – II. In the event Appellant succeeds in the Appeals before the CESTAT, it will be open for the Appellant to file appropriate proceedings as regards the refund sum of Rs.7 lakhs permitted to be withdrawn by the revenue.

14. Hence, we dispose of the Appeals by passing following order:

(a) The impugned judgment and order dated 30th March 2006 is hereby set aside and the Appeals Nos. E/490 & 491 / 05 are restored to the file of the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai;

(b) The Appeals shall be decided afresh in accordance with law in the light of the findings recorded in this judgment;

(c) Considering the fact the Appeals are of year 2005, we are sure that the Tribunal will give necessary priority to the disposal of the said Appeals;

(d) Appeals are partly allowed on the above terms with no order as to costs;

(e) The Prothonotary and Senior Master of this Court to return the file of the disposed of Writ Petition No. 1299 of 1988 to the Registrar Judicial (I).

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