Sharayu.

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

CENTRAL EXCISE APPEAL NO. 308 OF 2016

ALONG WITH

CENTRAL EXCISE APPEAL NO. 309 OF 2016

Control Touch Electronics (Poona)
Pvt. Ltd.
a company duly registered under
the Companies Act, 1956,
having their factory at 93/B
of S.No. 50, Pune Satara Road,
Pune – 411 009 **...Appellant**

Versus

The Commissioner Of Central Excise
Pune – III,
having his office at ICE House,
41-A, Sassoon Road,
Opposite Wadia College,
Pune – 411 001. **...Respondent**

Mr. V. Sridharan, Senior Counsel, a/w Mr. Prakash Shah & Mr. Jas Sanghvi, i/b PDS Legal, for the Appellant.

Ms. P.S. Cardozo, a/w Mr. J.J. Carlos, for respondent.

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

DATE : 13 September 2017

ORAL JUDGMENT : ***[Per Abhay S. Oka, J.]***

1. Heard the learned Senior Counsel appearing for the Appellant and the learned Counsel appearing for the Respondent. The submissions were heard on the earlier date, when the parties were put to the notice that the Appeals will be taken up for final disposal at the admission stage.

2. For the sake of convenience, we are referring to the facts of the case in Appeal No. 308 of 2016. By this Appeal, the Appellant has taken an exception to the judgment and order dated 17 May 2016 passed by the Customs, Excise and Service Tax Appellate Tribunal (for short "***Appellate Tribunal***'), West Zonal Bench at Mumbai. The said Appeal preferred before the Appellate Tribunal was directed against the order in Appeal dated 20 October 2006 passed by the Commissioner of Central Excise (Appeals), Pune-III. An order was made by the Deputy

Commissioner, Central Excise, Customs, Pune confirming the demands in the sum of Rs. 32,52,923/- against the Appellant covered by 12 show cause notices. The Deputy Commissioner imposed penalty of Rs. 2,00,000/- on the Appellant under Rule 173 (Q) of the Central Excise Rules, 1944. The said order was subjected to a challenge by Revenue as well as the present Appellant. By the order in Appeal, the Commissioner (Appeals) dismissed the Appeal preferred by the Appellant and partly allowed the Appeal preferred by the Revenue. The Commissioner mainly considered the issue of applicability of Notification 1 of 1993. The controversy arises as a result of the claim made by the Appellant on the basis of the said Notification 1 of 1993 dated 28 February 1993. The case of the Appellant was that while it was manufacturing membrane switches as per drawings and specifications given by its purchaser, the Appellant was printing the name of its customer on the membrane switches. The contention of the Appellant was that its customers themselves are manufacturers of electrical machines and equipments and the membrane switches are used by them for manufacture of electrical machines. The printing of the names of its customers did not amount to use of brand name or trade name as defined in explanation 9 in the said Notification 1 of 1993. The Deputy Commissioner denied the benefit of Notification 1 of 1993. In Appeal, the Commissioner (Appeals) accepted the stand of the Revenue that in view of Clause 9 of the Notification 1 of 1993, the Appellant was not entitled to benefit of exemption, because the Appellant was using brand name.

3. In the Appeal preferred by the Appellant before the Appellate Tribunal, an Application was made by the Appellant invoking proviso Rule 10 of the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982 (for short "***Procedure Rules***"). A leave was sought by making the said Application to raise additional grounds in the Memorandum of Appeal. The said Application was made basically for raising a contention that the Appellant has not collected any duty from its customers. It was sought to be contended that the sale price of

goods should be treated as cum duty value and the demand be assessed accordingly. By judgment and order dated 5 January 2016, the Appellate Tribunal rejected the said Application made by the Appellant by going into the merits of the additional grounds sought to be canvassed by the Appellant at the time of hearing of the Appeal. By the impugned judgment and order, the Appellate Tribunal dismissed the Appeal preferred by the Appellant. The only question considered by the Appellate Tribunal was whether the Appellant was entitled to the benefit of SSI exemption Notification 1 of 1993. The Tribunal relied upon the decision of the Apex Court in a case of ***Kohinoor Elastics Pvt. Ltd. Vs. Commissioner of Central Excise, Indore***[1]. The Appellate Tribunal also relied upon the decision of the Apex Court in a case of Appellant itself i.e. ***Control Touch Electronics (Poona) Pvt. Ltd. Vs. Commissioner of C. Ex., Pune***[2], which was decided on the basis of the decision in the case of ***Kohinoor*** (supra). In the case of Kohinoor, the Apex Court held in paragraph 5 thereof that the said Notification does not apply

1 ***2005(188) E.L.T.3 (SC)***

2 ***2005(190)ELT (SC)***

when the goods bear brand name or trade name and the exemption is lost, if the goods bear a brand or trade name.

4. In the Appeal preferred before this Court, the Appellant is seeking admission of the Appeal on four alleged substantial questions of law set out in paragraph 26, which read thus:-

"(a) *Whether in the facts and circumstances of the case, the Appellant Tribunal is correct in upholding the order dated 20.10.2006 of the Commissioner (Appeals) and dismissing the appeals of Appellants before it?*

(b) *Whether in the facts and circumstances of the case, Miscellaneous Order No. M/85258-85259/16/EB dated 5.1.2016 passed in Miscellaneous Application in Appeal No. E/128-129/2007 passed by the Appellate Tribunal was* *correct in rejecting the application urging additional ground that duty now demanded should be excluded from the price to arrive the correct quantum of demand of duty?*

(c) *Whether in the facts & circumstances of the case, since decision of Supreme Court in Kohinoor Elastic was delivered on 4.8.2005 and decision in Appellants case was delivered on 19.10.2005, Circular No. 71/71/94-CX dated 27.10.1994 issued by CBEC, Ministry of Finance, Government of India would be ineffective from 4.8.2005 and hence demand of duty raised in the present case, which relates to period up to December 1999, is incorrect?*

(d) *Whether in the facts and circumstances of the present case and in view of decision of Supreme Court in* ***Godfrey Phillips India Vs. UOI –***

> ***1985(22) ELT 306 (SC)*** *on the doctrine of Promissory Estoppel, can revenue enforce any demand of duty, prior to the date of judgment of Supreme Court i.e. 4.8.2005, in view of Circular No. 71/71/94-CX, dated 27.10.1994 issued by CBEC, Ministry of Finance, Government of India?"*

5. The learned Senior Counsel appearing for the Appellant invited our attention to the decision of the Apex Court in a case of ***Union of India & Ors Vs. Godfrey Phillips India Ltd. & Ors***.[3] on the issue of promissory estoppel. The learned Senior Counsel appearing for the Appellant also submitted that the substantial question (b) also calls for consideration by this Court. He urged that the application made for grant of permission to urge additional ground ought to have been allowed. The learned Counsel appearing for the Respondent supported the impugned judgment and order.

3 ***1985(22) E.L.T. 306(SC)***

6. We have given careful consideration to the submissions. Firstly, we must deal with the Application made by the Appellant by invoking proviso to Rule 10 of the Procedure Rules. Only prayer made in the said Application submitted on 17 November 2015 was that the Appellant be granted leave/permission to urge additional grounds set out in paragraph 9 of the said Application. Paragraph 9 of the Application reads thus:-

> *"The above submissions substantiate the contention of the appellants that the demand of duty ought to have been computed by deducting the duty demand from the price realized to arrive at the transaction value/assessable value. The computation of assessable value for the purpose of demand of duty in the show cause notice is incorrect and contrary to the aforesaid legal position."*

7. By order dated 5 January 2016, the said Application

was dismissed of by the Appellate Tribunal. While dealing with the said Application, the Appellate Tribunal was required to deal with only one issue whether the Appellant is entitled to grant of leave to urge the ground set out in paragraph 9 quoted above at the time of hearing of the pending Appeal, which was not set out in the original Memorandum of Appeal. However, the Appellate Tribunal went into the merits of the additional ground set out in paragraph 9 and decided the same on merits.

8. The first question which arises for our consideration is, whether the order dated 5 January 2016 is lawful. For that purpose, it will be necessary to make a reference to Rule 10, which reads thus:-

> *"Grounds which may be taken in appeal: The appellant shall not, except by leave of the Tribunal, urge or be heard in support of any grounds not set forth in the memorandum of appeal, but the Tribunal, in deciding the appeal, shall not be*

confined to the grounds set forth in the memorandum of appeal or those taken by leave of the Tribunal under these rules:

Provided that the Tribunal shall not rest its decision on any other grounds unless the party who may be affected thereby has had a sufficient opportunity of being hard on that ground."

(emphasis added)

9. The purport of Rule 10 is that the Appellate Tribunal in deciding an Appeal, need not remain confined to the grounds set forth in Memorandum of Appeal. However, if the Tribunal wants to consider a ground which is not set forth in Memorandum of Appeal, it is a duty of the Tribunal to give sufficient opportunity to the parties to the Appeal of being heard on the said ground. If the Appellant wants to urge a ground, which is not taken in the Memorandum of Appeal, he is entitled

to do so by seeking a leave of the Tribunal. On plain reading of Rule 10, it is not necessary for the Appellant to make an Application in writing for grant of leave to urge additional grounds. Such Application can be orally made at the time of hearing of the Appeal. If the Tribunal is inclined to grant leave, the Tribunal may grant sufficient time to the Respondent to argue on the additional ground so that the Respondent is not taken by surprise. The purport of Rule 10 is that the hearing of an Appeal need not remain confined to the grounds taken in the Memorandum of Appeal. The object of requiring the Appellant to seek leave is obviously to ensure that the Respondent in Appeal is not taken by surprise.

10. Our attention is invited to a decision of the Division Bench of this Court in a case of ***New India Life Assurance Co.Ltd. Vs. Commissioner of Income Tax, Bombay E.P.Tax***[4]. The Division Bench of this Court had an occasion to deal with Rule 12, which is a *pari materia* with Rule 10 of the Procedure Rules. The Division Bench observed that the Rule is

4 ***AIR 1958 Bom. 143***

identical in terms with Rule 2 Order XLI of the Code of Civil Procedure, 1908. Paragraph 5 of the said decision reads thus:-

> *"It will be noticed that this rule is identical in terms with R. 2 of O. 41. What has happened in this case is that* ***the appellant (the Commissioner) undoubtedly has travelled outside the subject-matter of the appeal in that he has pressed upon the Tribunal a point of view with regard to apportionment which is not covered by the grounds of appeal; but he being the appellant, it was open to him to do so if leave was granted by the Court of appeal. It is true that on the record there does not appear any formal leave. It is also true that the appellant has not amended his grounds of appeal. But leave May be implied and the very fact that the Tribunal permitted the Commissioner to urge this ground goes to show that leave was granted to him. With***

regard to the proviso, it is not suggested by the assessee that he did not have a sufficient opportunity of contesting this ground. Therefore, this rule is satisfied, Indeed, if the case had arisen under the Civil Procedure Code and the question was of interpreting O. 41, R. 2, it could not possibly have been urged by the respondent that the Court of appeal could not permit the appellant to argue the appeal on a different ground from the one taken up by him in the grounds of appeal."

(emphasis added)

11. The Division Bench went to the extent of observing that a leave as contemplated by proviso can be implied in a given case.

12. In the present case, instead of orally seeking leave at the time of hearing of Appeal, for putting the

Respondent to notice in advance, the Appellant made a separate Application for grant of leave. While deciding the said Application, only issue to be considered was whether in the facts of the case such a leave could be granted. In a given case, if a factual contention is sought to be raised by seeking leave for which there is no foundation on facts either before the Adjudicating Authority or Appellate Tribunal, the Tribunal can exercise discretion of declining to grant leave. While dealing with such an Application made for seeking leave under Rule 10 of the Procedure Rules, the Appellate Tribunal is required to apply its mind to a limited issue whether leave is required to be granted. However, while deciding the said Application, the Appellate Tribunal cannot decide the merits of the additional grounds sought to be urged. When such an Application is made for grant of leave, either a leave has to be granted or rejected. If leave is granted, at the time of final hearing of the Appeal, it is open to the Appellant to urge the ground in respect of which leave has been granted. In the present case, the Appellate Tribunal has purported to go into the merits of the additional grounds sought to be raised in the Application seeking grant of leave under Rule 10. The said course adopted by the Appellate Tribunal is completely erroneous and therefore, the order passed in the Application made by the Appellant for grant of leave is completely illegal.

13. According to us, the error committed by the Appellate Tribunal is not merely a procedural error. The Appellate Tribunal has completely overlooked the object of proviso Rule 10.

14. Therefore, by setting aside the order dated 5 January 2016, the Appeal will have to be remanded to the Appellate Tribunal for the decision on the ground sought to be urged in paragraph 9 of the said Application. Even going by the order dated 5 January 2016, it is obvious that even the Appellate Tribunal was of the view that the merits of the said additional ground was required to be considered.

15. Now coming to the questions (c) and (d), it will be necessary to make a reference of the decision of the Apex Court in the case of ***Kohinoor*** (supra). In paragraph 2, the Apex Court noted the issue which arose for consideration, which reads thus:-

> *"The question for consideration, in both these Appeals, is whether or not the Appellants i.e. M/s Kohinoor Elastics Private Limited are entitled to the benefit of the afore-mentioned Notification. The Appellants manufacture elastics as per specific orders of customers, who are manufacturers of undergarments. As per the orders of the customers the Appellants affix brand/trade names belonging to the respective customers, on the elastic manufactured for that customer."*

16. In paragraph 3, the Apex Court referred to clause 4 of the Notification 1 of 1993 dated 28 February 1993.

In paragraph 5, the Apex Court has held thus:-

> *"Clause 4 of the Notification is unambiguous and clear. It specifically states that the exemption contained in the Notification shall not apply to specific goods which bear a brand name or trade name (registered or not) of another person. It is settled law that to claim exemption under a Notification one must strictly comply with the terms of the Notification. It is not permissible to imply words into the Notification which the Legislature has purposely not used. The framers were aware that use of a brand/trade name is generally to show to a consumer a connection between the goods and a person. The framers were aware that goods may be manufactured on order for captive consumption by that customer and bear the brand/trade name of that customer. The framers were aware that such goods may not reach the market in the form in*

which they were supplied to the customer. The framers were aware that the customer may merely use such goods as an input for the goods manufactured by him. Yet Clause 4 provides in categoric terms that the exemption is lost if the goods bear the brand/trade name of another. Clause 4 does not state that the exception is lost only in respect of such goods as reach the market. It does not carve out an exception for goods manufactured for captive consumption. The framers meant what they provided. The exemption was to be available only to goods which did not bear a brand/trade name of another. The reason for this is obvious. If use of brand/trade names were to permitted on goods manufactured as per orders of customers or which are to be captively consumed then manufacturers, who are otherwise not entitled to exemption, would get their goods or some inputs manufactured on job work basis or through some

> *small party, freely use their brand/trade name on the goods and avail of the exemption. It is to foreclose such a thing that Clause 4 provides, in unambiguous terms, that the exemption is lost if the "goods" bear a brand/trade name of another."*

17. In paragraph 7, the Apex Court considered the arguments of the learned Senior Counsel appearing for the Appellant on the use of words "*that is to say*" which qualified the words brand name or trade name in explanation 9 in the said circular. The said arguments was rejected by the Apex Court for the reasons recorded in paragraph 7. The Apex Court observed thus:-

> *"It is on just such a reasoning that the Full Bench of the Tribunal has held that the exemption is not lost. We are afraid that there is complete misreading and a misunderstanding of the Notification. As set out hereinabove, Clause 4 of the Notification is clear*

and unambiguous. It says that the exemption is lost if the "goods" bear the brand/trade name of another. There are no other qualifying words. The term "goods" admittedly refers to "goods" which are otherwise excisable except for the exemption granted by the Notification. In this case admittedly "goods" are the elastic manufactured by the Appellants. As stated above Clause 4 does not provide that exemption is lost only for "goods(elastic)" which are sold in the market or on those "goods (elastic)" which reach customers without any change in form. Clause 4 does not provide that the exemption will not be lost if the "goods(elastic)" are only used as inputs in the manufacture of other goods. Most importantly Clause 4 does not provide that exemption is not lost if the "goods (elastic)" are manufactured as per orders of a customer and for use only by that customer. Explanation IX nowhere detracts from this position. It is correct that the *words "that is to say" qualify the words "Brand name" or "Trade name". However the words "used in relation to such specified goods for the purpose of indicating or so as to indicate a connection in the course of trade between such specified goods and some person using such name or mark" cannot be read dehors Clause 4. They have to be read in the context of Clause 4. The words "used" indicates use by the manufacturer. It is the manufacturer, in this case the Appellant, who is applying/affixing the brand/trade name on the goods. Thus the words "for the purpose of indicating" refers to the purpose of the manufacturer(Appellant). The "course of trade" is of that manufacturer and not the general course of trade. Even if a manufacturer only manufactures as per orders of customer and delivers only to that customer, the course of trade, for him is such manufacture and sale. In such cases it can hardly be argued that he has no trade. In fairness it must be* stated that it was not argued that there was no trade. Such a manufacturer may, as per the order of his customer, affix the brand/trade name of the customer on the "goods" manufactured by him. This will be for the purpose of indicating a connection between the "goods" manufactured by him and his customer. In such cases it makes no difference that the "goods" as manufactured did not reach the market. The "use" of the brand/trade name was "in the course of trade" of the manufacturer for the "purpose of indicating a connection between the goods and the customer who used the brand/trade name". Clearly in such a case the exemption is lost. Now in this case there is no dispute on facts. The "course of trade" of the Appellant is making elastics for specified customers. It is an admitted position that the Appellants are affixing the brand/trade name of their customers on the elastics. They are being so affixed because the Appellants and/or the *customer wants to indicate that the "goods(elastic)" have a connection with that customer. This is clear from the fact that the elastics on which brand/trade name of "A" is affixed will not and cannot be used by any person other than the person using that brand/trade name. As set out hereinabove once a brand/trade name is used in the course of trade of the manufacturer, who is indicating a connection between the "goods" manufactured by him and the person using the brand/trade name, the exemption is lost. In any case it cannot be forgotten that the customer wants his brand/trade name affixed on the product not for his own knowledge or interest. The elastic supplied by the Appellants is becoming part and parcel of the undergarment. The customer is getting the brand/trade name affixed because he wants the ultimate customer to know that there is a connection between the product and him. Of course the intention of the customer is not relevant for the* *purposes of this Notification. This is being mentioned only to indicate that interpretation sought to be placed by Mr. Sridharan would enable manufacturers, who are otherwise not eligible, to get manufactured from small scale industries like the Appellants their "goods" or some inputs, affix their brand/trade name and still avail of exemption. When the wording of the Notification are clear and unambiguous, they must be given effect to. By a strained reasoning benefit cannot be given when it is clearly not available."*

18. Now we turn to the decision of the Apex Court in the case of Appellant itself. The Apex Court followed its decision in the case of ***Kohinoor*** (supra). In paragraph 1 of the judgment in the case of Appellant, the Apex Court quoted paragraph 9 of its decision in the case of ***Kohinoor*** (supra) and in paragraph 2, the Apex Court observed thus:-

> *"Thus on merits we hold that this case will also be covered by that judgment. However, on the limited aspect as to whether or not the circular of the Board can prevail, we also tag this matter along with those cases which are pending before the Constitution Bench. If ultimately it is held by the Constitution Bench that judgments of this Court would prevail then this appeal would stand dismissed. If however the Constitution Bench takes a contrary view, then of course the reverse will follow. In either case there will be order as to costs."*

19. Now the issue whether or not the circular of the Board will prevail or the decision of the Apex Court will prevail is no more *res integra* and therefore, the decision of the Apex Court in the case of ***Kohinoor*** and in particular what is held in paragraphs 5 and 7 continue to hold good with all force. Even the judgment of the Apex Court in case of the Appellant itself holds the field. Now it is not open for the Appellant to

contend that the law laid down by the Apex Court in the case of Kohinoor (supra) should be applied prospectively.

20. Therefore, we see no merit in questions (c) and (d) formulated in paragraph 26 of the Appeal. However, an order of remand confined to question (b) will have to be passed. Accordingly, we disposed of the Appeal by passing the following order:-

(i) The order dated 5 January 2016 passed by the Appellate Tribunal in Applications E/MA(Ors)/95264 & 95265/15-Mum is hereby set aside and both Applications stand allowed in terms of prayer clause (a) thereof;

(ii) Subject to what is observed above, the impugned judgment and order dated 17 May 2016 stands set aside and the Appeal No. E/128 of 2007 and E/129 of 2007 are remanded to the Appellate Tribunal for fresh hearing confined to the issue raised in paragraph 9 of the Application and question (b) quoted above. As far as questions (c) and (d) which are quoted above are concerned, the issue stands concluded by this judgment;

(iii) We are sure that considering the fact that the Appeals which are remanded to the Appellate Tribunal are of the year 2007, necessary priority will be given by the Appellate Tribunal for disposal of the Appeals;

(iv) Appeals are partly allowed in the aforesaid terms;

(v) All concerned parties to act upon the authenticated copy of this judgment and order.

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