IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.04.2017

CORAM:

THE HONOURABLE MR.**JUSTICE RAJIV SHAKDHER**
and
THE HONOURABLE MR.**JUSTICE R.SURESH KUMAR**

C.M.A.Nos.522 & 523 of 2007

M/s.Shree Ganesh Steel Rolling Mills Ltd.,
6-H, Century Plaza,
560/562, Anna Salai,
Chennai – 600 002. ... Appellant in C.M.A.No.522/2007

Mr.Ashok Saraf, Managing Director,
M/s.Shree Ganesh Steel Rolling Mills Ltd.,
6-H, Century Plaza,
560/562, Anna Salai,
Chennai – 600 002. ... Appellant in C.M.A.No.523/2007

vs.

1.The Commissioner of Customs Sea Port (Export),
Customs House, 33, Rajaji Salai,
Chennai – 600 001.

2.The Assistant Commissioner of Customs (SIIB),
Customs House, 33, Rajaji Salai,
Chennai – 600 001. ... Respondents in both C.M.As'
(R1 is deleted from the array of parties,
as per the order of this Court dated 05.04.2017)

Civil Miscellaneous Appeals filed under Section 130 of the Customs Act, 1962 against Final Order No.1140 of 2006 dated 30.11.2006 in Appeal Nos.C/533 and C/534 of 2005 passed by the Customs, Excise & Service Tax Appellate Tribunal, Chennai.

For Appellant : Mr.C.Saravanan
for Mr.P.Rajkumar

For Respondents : Mr.A.T.Pramod Kumar Chopda

COMMON JUDGMENT

[Judgment of the Court was made by **RAJIV SHAKDHER, J.**]

1.These appeals are directed against the judgment and order of the Customs, Excise and Service Tax Appellate Tribunal (in short "the Tribunal").

1.1.The appeals were admitted on 28.02.2017 and the following questions of law, were framed for consideration of this Court:

> *(i) Whether the appellant is liable to pay redemption fine of Rs.20,00,000/- under Section 125 of the Customs Act, 1962?*
>
> *(ii) Whether the first respondent was justified in coming to a conclusion that as far as valuation, levy and redemption fine of 20,00,000/- with penalty fine of Rs.2,00,000/- on the Managing Director of the Company is infructuous, in view of the first respondent's earlier order dated 12.12.1997 made in Final Order Nos.3259-3269/1997?*
>
> *(iii) Whether the first respondent was justified in upholding the levy of redemption fine having concluded that the imported goods were indeed Heave Melting Scrap and therefore, not liable to confiscation?"*

2. In order to adjudicate upon the appeals, the following broad facts are required to be noticed. In this behalf, we would be adverting to the

parties and facts referred to in C.M.A.No.522 of 2007, the issues and questions of law, being common. Consequently, the Company, i.e., Shree Ganesh Steel Rolling Mills Ltd., the appellant in C.M.A.No.522 of 2007 will be referred to as the "appellant company". Mr.Ashok Saraf, the appellant in C.M.A.No.523 of 2007, will be referred to by his name. Collectively, Shree Ganesh Steel Rolling Mills Ltd. and Ms.Ashok Saraf, its Managing Director will be referred to as the "appellants".

2.1.It appears that the appellant company had imported 7544 Metric Tons of Steel Products, which included 4506 Metric Tons of non-alloy steel re-rollable scrap; 2900 Metric Tons of Heavy Melting Scrap (in short "HMS") in the form of plate cuttings and coils; and 138 Metric Tons of hot rolled coils.

2.2.The said consignment was allowed to be bonded on the basis of declaration made by the appellant company. The goods were subjected to inspection by the concerned Authorities, which, revealed that 2900 Metric Tons of HMS had been misdescribed and correct declaration had not been given in that regard.

2.3.Accordingly, the Authorities subjected 2900 Metric Tons of HMS, to an examination by the National Metallurgical Laboratory, Madras Centre (in short “NML”).

2.4.The report generated led to the respondents coming to the conclusion that out of 2900 Metric Tons, 675 metric Tons would be treated as HMS, while the balance 2275 Metric Tons being re-rollable scrap, having been misdescribed would require issuance of Show Cause Notice (in short "SCN").

2.5.Resultantly, a notice dated 20.05.1997 was issued, whereby, the appellant was called upon to show cause, as to why, 2275 Metric Tons of scrap ought not to be treated as re-rollable scrap.

2.6.Furthermore, the appellant company was called upon to the pay duty, in the sum of Rs.53,31,831/-which according to the respondents, had been evaded by misdescribing re-rollable scrap as HMS.

2.7.The appellant company, admittedly, filed a response to the same, which, after being taken into consideration, was subjected to an adjudication.

2.8.The Commissioner of Customs (in short, "Commissioner"), after considering the stand taken by the appellant company, in the reply and after hearing its representative, passed an order-in-Original dated 31.07.1977.

2.9.The Commissioner, by virtue of the said order, came to the conclusion, that the stand taken by the appellant company, that 2275 Metric Tons of scrap was re-rollable scrap was not tenable and the same was rejected. Resultantly, the Commissioner held the appellant company guilty of making incorrect declaration and, consequently, directed confiscation of 2275 Metric Tons of scrap under Section 111(m) of the Customs Act, 1952. Furthermore, the Commissioner permitted redemption of goods, upon payment of fine of Rs.20,00,000/- (Rupees Twenty Lakhs only), in lieu of confiscation. In addition thereto, penalty in the sum of Rs.2,00,000/- (Rupees Two Lakhs only) each, was imposed on the appellant company and its Managing Director, Mr.Ashok Saraf, who is the appellant in C.M.A.No.523 of 2007.

2.10.The appellant company being aggrieved by the said order, carried the matter in appeal to the Tribunal. The Tribunal vide judgment dated 12.12.1997, disposed of the appeals, by directing the Commissioner to consider, as to whether or not, the appellants ought to be allowed the benefit of Notification No.83/90 r/w Board Circular or Board Letter No.528/163/93-Customs (TU) dated 04.01.1994, as indicated to the authorities vide APDO No.6/94. The Tribunal, however, sustained the findings of the Commissioner with regard to valuation, confiscation and, redemption of fine and penalty. These findings are contained in paragraph Nos.41 to 45 and 48 of the impugned judgment.

2.11.In sum, the Tribunal remanded the matter to the Commissioner for considering, as to whether, in terms of the Board's instructions, it ought to be allowed, to use the subject scrap for melting purpose, albeit, under the supervision of jurisdictional Central Excise Authorities, provided the appellants furnished an end-use bond. The exact contours of the remand are contained in paragraph No.46 of the Tribunal's order. For the sake of convenience, the same is extracted hereafter:

> *"...46. In view of the above, we hold that in the facts and circumstances of the case, the appellants are entitled to the benefit of the instructions of the Board.*

The appellants had taken this plea before the learned lower authority, but no finding in this regard had been given by him as pointed out by the learned lower authority. We, therefore, remand the matter to the learned lower authority for consideration in the light of the allowing the benefit in terms of the Board's instructions in the light of the Supreme Court judgment for allowing the appellants to use the material for melting purposes, subject to execution of end-use bond and also subject to the use of the material under supervision of the jurisdictional Central Excise authorities."

3. The appellants being aggrieved by the order of the Tribunal dated 12.12.1997, preferred a writ petition to this Court under Article 226 of the Constitution of India. This writ petition was numbered as: W.P.No.1148 of 1998. The said writ petition was disposed of by a Single Judge of this Court vide order dated 16.02.2005. The operative direction, which was issued by this Court, are contained in paragraph No.4 of the order. The said directions are extracted hereinafter, for the sake of convenience:

"...4. Having heard the learned counsel appearing for the parties, I feel interest of justice would be served by directing the third respondent to consider the matter afresh in the light of the observation made by the appellate tribunal as indicated in paragraph-46 of the order in accordance with law. It would be open to the parties to produce the relevant materials before the Commissioner...."

4. The appellants, admittedly, did not carry the matter further and rested their case with the direction of remand, issued by the Tribunal via paragraph No.46 of the order dated 12.12.1997. Accordingly, the Commissioner passed a fresh order in the matter, though, in passing the order, he, evidently, travelled beyond the scope of the remand.

4.1.The Commissioner construed the order of Tribunal as a direction for de-novo proceedings and thus, returned the following finding in its order dated 23.08.2005.

4.2. The Commissioner, while passing the order held that the entire scrap amounting to 2275 Metric Tons was only re-rollable scrap and therefore, the appellants were not entitled to the benefit of end use certificate furnished by them.

4.3.Accordingly, the Commissioner directed the appellants to pay the differential duty on 2275 Metric Tons of re-rollable scrap, which was cleared provisionally, by the Customs Authorities, pursuant to a direction issued by this Court vide order dated 14.08.1998.

4.4.The Commissioner further sustained the direction of confiscation of 2275 Metric Tons of scrap, which was categorised as re-rollable scrap under Section 111(m) of the Customs Act, 1962. Imposition of redemption and penalty was also sustained by the Commissioner. In addition thereto, encashment of bank guarantee was directed by the Commissioner.

4.5. Aggrieved by the said order, the appellant carried the matter in appeal to the Tribunal for the second time. The Tribunal, by way of the impugned judgment and order, passed the following directions, which are contained in paragraph No.9. For the sake of convenience, the same are extracted hereinafter:

> *"..9. In the result, it is ordered as under:-*
>
> *(a) The scrap in question weighing 2275 Mts shall be treated as melting scrap for the purpose of assessment of duty and the benefit of Notification No.11/97-Cus. Shall be given to the assessee.*
>
> *(b) The value of these goods shall be US $ 230 per MT in respect of 1600 Mts of plate cuttings and US $ 207 per MT in respect of 675 Mts of coils as already held in our Final Order Nos.3259 to 3269/1997 dated 12.12.1997.*
>
> *(c) The liability of the goods to be confiscated and the importers' liability to be penalized remain settled against the appellants in our Final Order Nos.3259 to 3269/97 dated 12.12.1997. The quanta of redemption fine and penalties shall also be as already held in the said Final Order.*
>
> *(d) Any encashment of bank guarantee shall only be to the extent permitted by this order.*
>
> *The impugned order shall stand set aside to the extent noted above...."*

5. The appellants, being aggrieved, have approached this Court once again.

6. Mr.C.Saravanan, who appears for the appellants, says that the

operative direction of the Tribunal are flawed for the reason that once the Tribunal holds that 2275 Metric Tons of scrap was in fact melting scrap, it could not have fixed the value, which pertains to re-rollable scrap.

6.1.Learned counsel further submitted that, for the very same reason, the directions which have been issued by the Tribunal in the impugned judgment and order, whereby, confiscation, fine and penalty have been ordered are erroneous.

6.2.In other words, the learned counsel submits that having given the benefit of low rate of duty, on the ground that the subject scrap was melting scrap, the other directions, to which, he made a reference could not have been passed by the Tribunal via the impugned judment and order.

7. On the other hand, relying upon the records and the impugned judgment passed by the Tribunal, it is Mr.T.Pramod Kumar Chopda's contention that remand by the Tribunal, in the first round vide order dated 12.12.1997, was qua a limited aspect.

7.1.It is the learned counsel's contention that the only aspect which the Commissioner was required to go into was: as to whether or not, the appellants were entitled to the benefit of the confiscation Notification No.83/90 based on the end use certificate, which they had been directed to furnish. Since, the appellants had furnished a certificate, the benefit of Notification No.83/90 was extended to them. According to the learned counsel, in so far as the other findings are concerned, (which were recorded by the Tribunal, in its earlier order dated 12.12.1997), they had attained finality, specially, after an attempt had been made to assail the said findings by way of a writ petition, albeit, without success.

8. We have heard the learned counsel for the parties and perused the records.

9. According to us, what clearly emerges is as follows:

(i)The subject proceedings, both in the first round and in the second round, were confined to only that part of the imported consignment which comprised of 2900 Metric Tons of scrap.

(ii)The respondents, even at the time of issuance of the show cause notice had treated only 675 Metric Tons out of 2900 metric Tons of scrap imported by the appellants, as HMS, based on the report of NML.

(iii)The show cause notice, was thus, confined to the balance quantity, which is 2275 Metric Tons. It has been the respondents stand all through out, that 2275 Metric Tons of scrap was re-rollable scrap and not HMS, as was contended by the appellants.

(iv) The respondents, thus, proceeded to claim differential duty and ordered confiscation, as also redemption on payment of fine and penalty.

9.1. The adjudication by the Tribunal in the first round vide order dated 12.12.1997, led, to the appellants, getting only one relief which too was based on an alternative argument propounded by it. The argument being that even if, it was assumed that 2275 metric ton of scrap, was to be classified as re-rollable scrap, the appellants ought to get benefit of Notification No.83/90, based on execution of an end use bond, which would oblige them to make use of the said scrap as prescribed.

9.2.The Tribunal, therefore, directed the Commissioner to examine this aspect of the matter and return findings, limited to the benefit claimed by the appellants in respect of Notification No.83/90. The contours of the directions are contained in paragraph No.46 of the Tribunal's Order dated 12.12.1997, which stand extracted hereinabove.

9.3. It appears, that the Commissioner, contrary to the remand direction, acted beyond its scope by carrying out de novo proceedings.

9.4. In the impugned judgment, the Tribunal commented upon the same and thus, came to the conclusion that while all other findings which had been returned in the first round by it were sustained, in so far as the benefit of the Notification No.83/90 was concerned, the same would have to be granted to the appellants by treating 2275 Metric Tons of scrap as HMS.

9.5.Thus, in so far as the other aspects were concerned, which is, confiscation, redemption of fine and penalty, they were sustained by the Tribunal via the impugned judgment.

10. These being the factual aspects, which have emerged from the

record, we are not impressed by Mr.Saravanan's contention that since 2275 Metric Tons of scrap was treated as HMS, no confiscation could have been ordered or other directions, such as redemption and payment of fine and penalty could have been issued.

10.1.According to us, it is quite clear that the Tribunal, both in the first and in the second round, returned a finding of fact that an incorrect declaration had been made inasmuch there was misdescription of the subject goods. The only concession, that the appellants obtained was with regard to the end use benefit provided via the Notification No.83/90, and since the appellants had furnished the end use certificate, which indicated that they had ultimately used 2275 Metric tons of scrap, as prescribed, that benefit was given to the appellants. The net effect of the said benefit was that 2275 Metric tons of scrap was amenable to a concessional rate of duty of 5% as against 20%. The subject goods were, thus, as held re-rollable scrap.

10.2. These, according to us, are findings of fact and therefore, cannot be disturbed by us, at this stage. If this finding of fact is accepted, then the other aspects would logically fall in place. Other aspects, being with regard to the directions issued for confiscation, redemption upon payment of fine and penalty. Therefore, for the foregoing reasons, we find no error in the approach adopted by the Tribunal via the impugned and judment order dated 30.11.2006.

11.Accordingly, we find no merit in the appeals. The Civil

Miscellaneous Appeals are dismissed. Questions of law, which had been adverted to above, are answered in favour of the Revenue and against the Assessee. However, given the facts and circumstances of the case, there shall be no order as to costs.

(R.S.A., J.) (R.S.K., J.)

vsm **21.04.2017**

To

1.The Commissioner of Customs Sea Port (Export),
Customs House, 33, Rajaji Salai,
Chennai – 600 001.

2.The Assistant Commissioner of Customs (SIIB),
Customs House, 33, Rajaji Salai,
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RAJIV SHAKDHER, J.
and
R.SURESH KUMAR, J.
vsm

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