

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.06.2017

CORAM

THE HONOURABLE MR. JUSTICE RAJIV SHAKDHER

And

THE HONOURABLE MR. JUSTICE R.SURESH KUMAR

C.M.A.No.2004 of 2015

and M.P.No.1 of 2015

M/s. Akbar Knitting Company
S.F.No.243/2d, Kuppandampalayam,
Veerapandi (PO), Tirupur-641 605. ... Appellant/Respondent

-Vs-

1. The Commissioner of Customs (Exports)
Custom House, No.60. Rajaji Salai
Chennai-600 001. ...R1/Appellant

2. The Customs, Excise and Service Tax Appellate Tribunal,
South Zonal Bench,
No.26, Shastri Bhavan Annexe Building,
Haddows Road, Chennai-600 006. ...Respondent No.2/
Respondent

Civil Miscellaneous Appeal filed under Section 130 of the
Customs Act, 1962 to set aside the impugned final order
No.40373/2015 dated 10.04.2015 of the Tribunal.

For Petitioner : Mr.Hari Radhakrishnan

For Respondents : Dr.S.Seethalakshmi

JUDGMENT

(Judgment of the Court was delivered by Rajiv Shakdher, J.)

1. This is an appeal preferred by the assessee against the
Judgment and Order, dated 10.04.2015 passed by the Customs,
Excise and Service Tax Appellate Tribunal (in short, 'the
Tribunal').

2. The assessee is aggrieved by the fact that the Tribunal
has sustained the Order-in-original, dated 11.5.2010, whereby,
it was directed to pay interest at the rate of 15% on account

of failure to fulfill export obligation. The assessee's one and only contention before us is that, at the relevant time, there was no statutory provision in place for levy of interest and, therefore, the provisions in the bond executed by it, which provided for payment of interest, upon failure to fulfill export obligation could not to be enforced under the provisions of Customs Act, 1962 (in short, 'the Customs Act').

2.1. Furthermore, it is the assessee's submission that, since, the bond was furnished to the licensing authority, i.e., the Director General of Foreign Trade (in short, 'the DGFT'), the Customs Authorities cannot enforce the bond.

3. In order to adjudicate upon these issues, the following broad facts are required to be noticed:

3.1. The assessee, who was in the business of export of cotton garments, had, at the relevant time, imported polyurethane Spandex Yarn/Lycra Spandex Yarn, under two (2) advanced licences issued to it under the DEEC scheme, albeit, without payment of duty. The benefit of exemption from payment of duty was extended to the assessee under notification 204/92, dated 19.5.1992 (in short, 'the 1992 notification'). This notification has been issued under Section 25(1) of the Customs Act. The record shows that there is no dispute about the fact that, the assessee failed to fulfill his export obligation and, consequently, the adjudicating authority vide order, dated 31.7.2000 confirmed the demand qua duty, in the sum of Rs.3,83,990/-, along with interest, at the rate of 24%, and penalty, in the sum of Rs.34,400/-.

3.2. The assessee, being aggrieved, filed an appeal with the Commissioner of Customs (Appeals) [in short, 'the Commissioner (Appeals)']. The Commissioner (Appeals) rejected the appeal vide order, dated 11.1.2001. Against this order, the assessee preferred an appeal with the Tribunal. The Tribunal vide order, dated 08.12.2009 remanded the matter to the adjudicating authority for calculating afresh, the duty payable by the assessee, after taking into consideration 5% wastage, in respect of the imported lycra yarn, which was used for manufacturing the final product.

3.3. Upon remand, the adjudicating authority, vide order-in-original, dated 11.5.2010 directed the assessee to pay the duty, in the sum of Rs.1,34,210/- along with penalty, in the sum of Rs.34,400/-. In addition there to, the assessee was directed to pay interest, amounting to Rs.4,84,222/-. It was further directed that the interest would run till such time, the duty is paid.

3.4. The assessee, being aggrieved, once again, preferred an appeal to the Commissioner (Appeals). This time around, the Commissioner (Appeals) vide order, dated 01.12.2012, modified the Order-in-original, to the extent, it imposed interest on the assessee. The Commissioner (Appeals), was of the view that since, the 1992 notification did not provide for payment of interest, the same could not be demanded.

3.5. This time around, the Revenue was aggrieved and, therefore, preferred an appeal with the Tribunal. As indicated above, via the impugned Judgment, the Tribunal has concluded that the interest would be payable by the assessee, as determined in the Order-in-original, dated 11.5.2010. In coming to the said conclusion, the Tribunal has relied upon the Judgment of the Supreme Court in: REXNORD ELECTRONICS AND CONTROLS LTD. VS. UNION OF INDIA, 2008 (224) ELT 184(SC) and the Judgment of the Bombay High Court in the matter of: PRATHIBHA SYNTEXT LTD.VS. UNION OF INDIA, 2003(157) ELT 141(BOM.).

3.6. It is, in this background, that the assessee has approached this Court.

4. Mr.Hari Radhakrishnan, learned counsel, who appears for the assessee, says that, the impugned Judgment and Order of the Tribunal is flawed for the following reasons:

(i) At the relevant time, there was no provision in the 1962 Act, to levy interest qua duty "not paid" or "short levied". The provision in that behalf, according to the learned counsel, was inserted only on 20.08.1996 via Section 62 of Finance (No.2) Act, 1996 (33 of 1996).

(ii) The liability to pay interest got foisted on the assessee, by virtue of the bond, which was furnished to the licensing authority i.e., the DGFT and not to the Customs authorities. There was, in that sense, according to the learned counsel, no privity of contract between the assessee and the customs authorities.

(iii) The customs authorities, could therefore, not enforce the bond, in order to recover the interest, under the 1962 Act, as it obtained at the relevant point of time.

(iv) The Judgments relied upon by the Tribunal, both the Bombay High Court and the Supreme Court, to which we have made a reference above, have no applicability, in the facts and circumstances of the case.

4.1. In support of his submissions, learned counsel also relied upon the Judgment of the Tribunal in the matter of:

VARALAKSHMI EXPORTS VS. COMMISSIONER OF CUSTOMS (SEAPORT - EXPORT), CHENNAI [2014 (314) E.L.T.257 (TRI.-CHENNAI)].

5. As against this, Dr.Ms.Seethalakshmi, who appears for the Revenue, submitted that the interest demanded qua the assessee was payable under the notification. For this purpose, learned counsel drew our attention to Part 1 [part G] of the annexure appended to the 1992 notification.

5.1. It was further submitted that since the exemption from duty in respect of imports was linked to fulfillment of the export obligation, failure to fulfill the export obligation would automatically involve, inter alia, imposition of liability, in the form of interest and, therefore, the same could be recovered, in terms of the provisions of the Act.

5.2. In support of her submissions, learned counsel, in sum, relied upon the impugned Judgment in rebuttal to the pleas raised by the counsel for the assessee. Furthermore, the learned counsel submitted that the Judgment of the Supreme Court in: REXNORD ELECTRONICS AND CONTROLS LTD and the Judgment of the Bombay High Court in the matter of: PRATHIBHA SYNTEXT LTD, was, on all fours, applicable to the instant appeal and, therefore, the appeal should be dismissed.

5.3. Dr.S.Seethalakshmi, learned counsel for the Revenue, in support of her submissions, apart from the Judgments cited above, also, relied upon the Judgment of this Court in: FAL INDUSTRIES LIMITED VS. DIRECTORATE GENERAL OF FOREIGN TRADE, 2014 (306) E.L.T.58.

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

6.1. What emerges, on a perusal of record and the fact, which is not in dispute is that, the assessee failed to fulfill his export obligation and, therefore, violated the terms of the bond. The bond was executed by the assessee in respect of which, again, there is no dispute, in favour of the licensing authority i.e. DGFT. We may only indicate that the copy of the bond has not been placed on record, by either of the parties. Counsel for the parties also agree that the bond provided for payment of interest at the rate of 24%; a fact, which is reflected in the orders of the authorities below.

6.2. Therefore, in these circumstances, we are called upon to decide, as to whether, the customs authorities could enforce the bond and recover the interest.

6.3. Learned counsel for the assessee has argued that the provisions for payment of interest, in such like circumstances, where duty was not paid or short levied, was brought on to the Statute book, i.e.1962 Act, for the first time on 20.08.1996, with the insertion of Section 28AB. The record shows that, goods were imported by the assessee under two (2) advance licenses on 08.02.1995, which is the date, clearly, prior to the insertion of Section 28AB. Therefore, quite clearly, in our view, the provisions of Section 28AB, would not be applicable. For the sake of convenience the relevant portion of Section 28AB is extracted hereunder:

"28AB. Interest on delayed payment of duty in special cases. -(1) Where any duty has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person who is liable to pay the duty as determined under sub- (2), or has paid the duty under sub- (2B), of 28, shall, in addition to the duty, be liable to pay interest at such rate not below ten per cent. and not exceeding thirty-six per cent. per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette, from the first day of the month succeeding the month in which the duty ought to have been paid under this Act, or from the date of such erroneous refund, as the case may be, but for the provisions contained in sub- (2), or sub- (2B), of 28, till the date of payment of such duty :"

(Emphasis is ours)

7. This is a case, where Section 28AB, if at all, would have given the right to the Revenue to demand interest, provided the imports had been made after the Section was brought on to the Statute book. Because of the failure to fulfill the export obligation by the Assessee, the Assessee's case would have, if at all, fallen within the ambit of Section 28AB, which, inter alia, imposes a liability on an Assessee to pay interest, where any duty has not been levied or paid, or has been short-levied or short-paid or erroneously refunded. Therefore, Section 28AB, to our minds, would not be applicable in the instant case.

8. Interest, as is well known, is payable, broadly, in three circumstances. First, where the statute provides for the same. Second, where there is a contract or agreement in place for payment of interest. Third, where it is payable by usage of

trade having the force of law. This principle is deducible from the Judgment of the Privy Council, in the matter of: BENGAL NAGPUR RAILWAY COMPANY LIMITED V. RATANJI RAMJI [1938 ILR 72]. The observations of the Privy Council, in this behalf, are set forth herein below:

"....The crucial question, however, is whether the Court has authority to allow interest for the period prior to the institution of the suit; and the solution of this question depends, not upon the Civil Procedure Code, but upon substantive law. Now, interest for the period prior to the date of the suit may be awarded, if there is an agreement for the payment of interest at a fixed rate, or it is payable by the usage of trade having the force of law, or under the provision of any substantive law entitling the plaintiff to recover interest, as for instance, under s. 80 of the Negotiable Instruments Act, 1881; the Court may award interest at the rate of 6 per cent, per annum, when no rate of interest is specified in the promissory note or bill of exchange. There is in the present case neither usage nor any contract express or implied to justify the award of interest. Nor is interest payable by virtue of any provision of the law governing the case....."

(Emphasis is ours)

9. Therefore, in our opinion, the assessee could not have been called upon to pay interest by the customs authorities, by taking recourse to the provisions of the 1962 Act, as it obtained at the relevant time i.e., in and about, February, 1995.

10. The next question, which arises for consideration, which is connected with the aspect referred to above is: as to whether the Supreme Court in REXNORD ELECTRONICS AND CONTROLS LTD has stated anything to the contrary.

10.1. According to us, the Tribunal has misread the ratio of the Judgment rendered by the Supreme Court in: REXNORD ELECTRONICS AND CONTROLS LTD.

11. This was a case, where the appellant had failed to fulfill the export obligations and, therefore, was called upon to pay duty along with interest under a bond executed by it, before the DGFT.

11.1. Accordingly, the demand was raised on the appellant with regard to duty as also interest. The appellant in that case filed applications before the Settlement Commission. The Settlement Commission passed an order settling the dispute between the parties. However, the order required the assessee to pay certain amount of duty along with interest. The appellant was, in addition, granted immunity from prosecution and penalty.

11.2. The appellant, being aggrieved by the directions of the Settlement Commission, which required him to pay interest at the rate of 15% per annum, filed Writ Petitions before the Bombay High Court, which were dismissed. It is, in this background, that the matter travelled to the Supreme Court. The question, which was, raised before the Supreme Court by the appellant, was that, since, the interest payable under the bond had a direct nexus with payment of excise duty, the Settlement Commission had the requisite jurisdiction to waive the whole or a part of the interest payable under the bond, as well (See para 8 of the Judgment).

11.3. The Supreme Court held that under the provisions of 28AA, the customs authority, for non payment of duty, would seek payment of interest, by initiating proceedings under Section 28 of the 1962, Act. Insofar as the interest on bond was concerned, the Court went on to observe that, since, the bond had been executed in favour of a different authority i.e. DGFT, and, it was payable in terms thereof and not in terms of the statutory scheme, the customs authorities would not be able to proceed, in terms of Section 28 of the Act.

11.4. In sum, the Supreme Court held that, since, interest was payable under the bond furnished to the DGFT, the Settlement Commission had no jurisdiction to pass any orders qua the same, as it is operated within the realm of the 1962 Act.

11.5. We may also note that the Supreme Court in the very same Judgment cited with the approval the Judgment of the learned single Judge of the Calcutta High Court in the matter of: COMMISSIONER OF CUSTOMS (PORT) V. SETTLEMENT COMMISSION, CUSTOMS & CENTRAL EXCISE - 2005 (179) E.L.T 386 (Cal.)

11.6. The said Judgment of Calcutta High Court clearly held that "unlike civil court the waiver either of full or of partial interest in contractual bargain cannot be granted by the

commission without consent of both the parties". In sum, the ratio of the Judgment was that the Settlement Commission, which operated within the four corners of the 1962 Act, had no jurisdiction to waive payment of interest, which was otherwise payable by the appellant in that case, under a bond furnished to a different authority, i.e. the DGFT.

12. In our view, therefore, the Judgment rendered in: REXNORD ELECTRONICS AND CONTROLS LTD would not further the cause of the Revenue, in the instant case, as a matter of fact, if at all, it dilutes the tenability of the stand taken by the Revenue. The Judgment, clearly, hold that the liability to pay interest, emanating from a bond, falls in the realm of a contractual bargain and the authority, which can enforce the bond, if at all, would be the licensing authority i.e. DGFT. The other Judgment, which has been cited, on behalf of the Revenue, is the Judgment in the case of PRATHIBHA SYNTEXT LTD.

12.1. A perusal of the said Judgment would show that, this was also the matter, which arose out of an order passed by the Settlement Commission. Since, PRATHIBHA SYNTEXT LTD judgment was cited in REXNORD ELECTRONICS AND CONTROLS LTD case, by the counsel for appellant, we do not think that it is necessary to elaborate on the same. What we have said with respect to our understanding of the ratio of the Judgment of the Supreme Court in REXNORD ELECTRONICS AND CONTROLS LTD, would apply to the Judgment rendered in: PRATHIBHA SYNTEXT LTD case, as well.

12.2. This brings us to the other Judgment cited on behalf of the Revenue, which is a judgment, rendered by the learned Single Judge of this Court in: FAL INDUSTRIES LIMITED VS. DIRECTORATE GENERAL OF FOREIGN TRADE, 2014 (306) E.L.T.58.

12.3. A perusal of the said Judgment would show that the respondent, in that matter, was DGFT. The bond was being enforced by the DGFT, and not by the customs authority. As a matter of fact, in paragraph 23 of the said Judgment, the learned single Judge relied upon a Division Bench Judgment of this Court in the matter of: COMMISSIONER OF CUSTOMS (SEA) V. M/S. MEIRS PHARMA INDIA PRIVATE LIMITED., which, fortifies the view taken by us in the instant appeal. For the sake of convenience, the observations made in paragraph 23 are extracted hereunder:

"23. But, the learned counsel for the petitioner would rely on an unreported judgment of a Division Bench of this Court in Commissioner of Customs (Sea) vs. M/s.Meirs Pharma India Private Limited (C.M.A.No.3221 of 2004) (referred to above). I have

carefully gone through the said judgment. In my considered opinion, the said judgment cannot be taken as a precedent in respect of the law, which is under discussion in the present judgment. In that case, the judgment of the Hon'ble Supreme Court in Rexnord Electronics and Controls Limited case (cited supra), was not at all brought to the notice of the Division Bench. It was also not argued before the Division Bench that interest could be levied under a bond, which is outside the scope of the Customs Act. The whole gamut of argument of the Customs Department before the Division Bench was that, as per the provisions of the Customs Act, interest could be demanded for the failure of the exporter to fulfil the licence conditions issued under the Foreign Trade (Development and Regulation) Act, 1992. The Division Bench, after having elaborately dealt with the provisions of the Customs Act, ultimately held that for such failure to fulfil the export obligation in terms of the licence, the customs authority has got no power to demand interest. Regarding that proposition laid down by the Division Bench, I am in full agreement. But, before the Division Bench, it was not at all argued that the demand of interest could be made by the authority under the Foreign Trade (Development and Regulation) Act, 1992, in terms of the bond, which is outside the purview of the Customs Act. "

(Emphasis is ours)

12.4. A perusal of the above Judgment would show that, the learned single Judge has observed that, for failure to fulfill the export obligation in terms of the license, the customs authorities have no power to demand interest. We need not say anything further. The Judgment is clearly distinguishable from the facts and circumstances, which obtain in the present case.

13. We may only note, before we conclude, that the following substantial questions of law were framed by the Court on 10.9.2015, when the appeal was admitted:

"(i) When the liability to pay interest on the duty that becomes payable in view of non fulfilment of the export obligations arises in terms of the bond or undertaking executed by the assessee, is it open to the Department to slab (sic slap) the liability to pay interest under the statutory prescription?

(ii) Whether the liability to pay interest on the duty that becomes leviable on account of non fulfillment of the obligations arising out of the bond or undertaking, which is contractual in nature, can be collected by invoking the statutory prescription ?

(iii) When the import was made by the assessee prior to the introduction of Section 28AA with effect from 26.5.1995, whether the Tribunal was right in allowing the demand for interest under the statutory provisions?"

13.1. In the background of the discussion above, we are of the view that the impugned Judgment and Order of the Tribunal deserves to be set aside. It is ordered accordingly. The questions of law framed are answered in favour of the assessee and against the Revenue.

14. The appeal is disposed of in the aforesaid terms. Consequently, pending application is closed. However, there shall be no order as to costs.

सत्यमेव जयते

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

kua/sl

To

1. The Customs, Excise and Service Tax Appellate Tribunal,
South Zonal Bench,
No.26, Shastri Bhavan Annexe Building,
Haddows Road, Chennai-600 006.

2. The Commissioner of Central Excise & Service Tax,
No.1, Williams Road,
Cantonment,
Tiruchirapalli-620 001.

3. The Commissioner of Customs (Exports)
Customs House, No.60 Rajaji Salai
Chennai-1

+1 cc to Dr.S.Seethalakshmi Advocate sr 41467

+1 cc to Mr.Hari Radhakrishnan Advocate sr 41394

C.M.A.No.2004 of 2015

ev(co)
aa06/07/2017



WEB COPY