

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28/11/2017

C O R A M

THE HON'BLE MR.JUSTICE S.MANIKUMAR

AND

THE HON'BLE MR.JUSTICE R.SURESH KUMAR

Civil Miscellaneous Appeal No.3247 of 2017

Suresh Kumar Agarwal ... Appellant

Vs

The Commissioner of Central Excise
Coimbatore 641 018. ... Respondent

Appeal filed under Section 35 G of the Central Excise Act, 1944, against the Final Order No.41766 of 2016, dated 28/9/2016, on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Regional Bench, Chennai 6.

For appellant ... Ms.D.Naveena
For respondent ... Mr.A.P.Srinivas

J U D G M E N T

(Judgment of the Court was made by S.MANIKUMAR, J)

Mr.A.P.Srinivas, learned counsel for the Commissioner of Central Excise, Coimbatore, takes notice.

2. Earlier, vide, final order No.41765-41766 of 2016, dated 28/9/2016, CESTAT, Madras, has dismissed the appeals filed by M/s. A & S Textiles Limited, Tamil Nadu and Mr.Suresh Kumar Agarwal, Managing Director of M/s. A & S Textiles Limited.

3. The company filed Civil Miscellaneous Appeal No.2035 of 2017, challenging Final Order No.41765/2016, dated 28/9/2016, on the following substantial questions of law:-

"a) Whether, in the facts and circumstances of the case, the Hon'ble CESTAT has passed a cryptic and non-speaking order without showing any reasoning or deliberation of the materials that were placed before it for

consideration;

b) Whether, in the facts and circumstances of the case, the Hon'ble CESTAT had committed serious infirmity in appreciation of evidence by overlooking material evidence vital to determination of issues involved;

c) Whether, in the facts and circumstances of the case, the Hon'ble CESTAT had made patent error in confirming the demand without any corroborative or affirmative evidence."

4. Subsequently, C.M.P.No.12613 of 2017, in C.M.A.No.2035 of 2017 has been filed, seeking permission to raise the following substantial questions of law:-

"1. Whether the principles of preponderance of probabilities applies to establish clandestine sale of cone yarn as hank yarn or the doctrine of proof beyond all reasonable doubt applies in adjudication proceedings under the Central Excise Act, 1944 as the same is quasi-judicial proceedings.

2. Whether in the absence of witnesses, whose statements were the basis of show cause notice, being made available for cross examination in adjudication proceedings, the burden of proving that the Respondent-assessee was liable has been discharged.

3. Whether the charges against the Appellant stands proved in the absence of the witnesses, whose statement were the basis of charge, not being available inspite of summons under Sec 40 of the Act issued by the Authorities and the Authorities not taking any positive step to ensure appearance."

5. Arguments have been advanced on the additional substantial questions of law Nos.2 and 3 respectively. Attention of this Court was also invited to ground No.'w', in the appeal filed by CESTAT, Madras, and the same, reads thus:-

"w. The appellants submit that from the records of cross examination, it is clear that there is no marks and numbers on the said materials. The appellants further submit that most of the persons who have given the statement stating that they have purchased the materials from the appellants have made the statement based on the information given to them by the broker and they do not have any direct knowledge. The

appellants further submit that none of the statements bring out any evidence regarding clandestine clearance by them. The appellants submit that the statements based on hearsay evidence will not be sufficient to establish non payment of duty and the respondent as well as the original authority erred in passing the impugned orders relying on such statements. The appellants further submit that the statements of persons who did not appear for the cross-examination should not be relied upon. In this regard, the appellants rely on the following decisions.

- a) HMT Ltd., & Ors. Vs. CCE & C.Meerut reported in 2004(63) RLT 244 (CESTAT-Del.).
- b) Balbir Steel (P) Ltd., Vs. Commissioner of Central Excise, Kanpur reported in 1999 (114) ELT 561 (Tribunal).

At page 15 of the impugned order, the respondent has referred to the statement of Shri Maria Selvam, the driver of vehicle 31J3093. However, Shri Maria Selvam failed to turn up for cross-examination and consequently his statement has to be discarded. The respondent also has drawn a conclusion that the persons who gave statements have not retracted their statement subsequently and only during cross-examination they have reversed their stand. The respondent has wrongly concluded that none of the deponents who were cross-examined denied what they have already stated in their statements given before the officers during investigation. The details of the cross-examination already mentioned in the previous paragraphs will be sufficient testimony to show that the earlier versions were no correct. It is to be noted that only when a witness is called upon to confirm the correctness of the statement made earlier and when he is subjected to cross-examination to find out the truth of the earlier statement, then only the factual position emerges. If what emerges during the cross-examination has to be denied all the time then the purpose of cross-examination is rendered meaningless. Since the outcome of the cross-examination is contrary to the statement given earlier, the respondent cannot take a stand that the earlier statements were not retracted and therefore, they have to be given credence. In such a case, cross-examination of a person will be an empty formality and will not serve any purpose. As that is not the intention, the conclusion made by the respondent in this regard is misconceived."

6. Though rival submissions have been made, Mr.S.R.Rajagopal, learned counsel, for the appellant, therein, in C.M.A.No.2035 of 2017, submitted that the said Miscellaneous Appeal required to be adjudged, only on the additional substantial questions of law Nos.2 and 3, stated supra. Adverting to the above, this Court, on the facts and circumstances of the case, at paragraph Nos.9 to 16, in C.M.A.No.2035 of 2017, while allowing the appeal, ordered as hereunder:-

"9. In NGA Steels (P) Ltd., Vs. CESTAT, Chennai reported in 2016 (339) ELT 217 (Mad.), one of the contentions, made before the appellate authority was that there was a violation of principles of natural justice, in not permitting the appellant therein, to cross examine the persons from whom, statements were recorded. By observing that cross examination is not a matter of right, when burden of proof has been discharged by the department, the Commissioner of Central Excise (Appeals), the appellate authority rejected the contention. When the matter reached CESTAT, Madras, one of the grounds raised therein was that when the department has mainly relied on the statement of third parties i.e. purchasers / buyers of the impugned goods to come to conclusion of the clandestine removal of the goods by the appellant therein, opportunity ought to have been given. However, CESTAT, rejected the same. Thereafter, the appellant therein filed Civil Miscellaneous Appeal before this Court, by raising the following substantial questions of law.

"A. Whether the Tribunal is justified in holding clandestine removal of final products without any corroborative evidences such as unaccounted purchase of raw materials, transportation of raw materials to the factory and transportation of final products from the factory and suppression of production with electricity consumption?

B. Whether the Tribunal is justified in passing the final order without discussing or without giving a finding on the specific plea raised in the grounds of appeal that cross-examination of persons who gave statements against the appellant and which were relied on by the Dept. is mandatory?

C. Whether the documents maintained by

third parties and statements alone constitute sufficient evidence to come to the conclusion of clandestine removal of goods without payment of duty without any correspondent documents recovered from the appellant?"

10. After perusal of the order of CESTAT, impugned therein, a Hon'ble Division Bench to which one of us [Hon'ble Mr. Justice S. Manikumar] is a party, found that the plea regarding violation of principles of natural justice in not permitting the appellant to cross examine the persons from whom statements were recorded, has not been dealt with, and answered by the tribunal.

11. In NGA Steels (P) Limited's case [Cited supra], the learned counsel for the department was also not in a position to point out, as to whether CESTAT, Chennai has adverted to the said plea. Similar to the case on hand, learned counsel therein made submissions justifying orders of CESTAT.

12. In Karan Traders Vs. Joint Commissioner of C. Ex., Salem reported in 2016 (339) ELT 249 (Mad.), one of the questions, which came for consideration before a learned Single Judge was that,

"5..... whether the authority could have proceeded to adjudicate the matter and pass the final order, without acceding to the request made by the petitioners for cross-examination of two of the persons, from whom statements were recorded by the department, namely, V. Kumaraswamy and S. Padmanabhan. These persons are said to be job workers, who have given statements with regard to the amount charged by them for carrying on the job work. The petitioner's specific request was to cross-examine these two persons."

13. The Department tried to justify the orders by filing a counter affidavit, extract of which is reproduced from Karan Traders' case [cited supra].

"8. From paragraph Nos. 13 and 14 of the counter affidavit it is seen that the Department had sent summons to those two persons, namely, V. Kumaraswamy and S. Padmanabhan, to appear before the authority to enable the authority to afford the petitioners an opportunity to cross-examine those two persons. However, Kumaraswamy has

received the summons and did not turn up for cross-examination. But the summons sent to Padmanabhan has returned as unserved on the ground that no such person was residing in the address mentioned in the summons. Thus, the respondent department was unable to produce those two persons for cross-examination. If that be the case, then the statements recorded from them should have been eschewed by the adjudicating authority and thereafter, the adjudicating officer ought to have proceeded with the adjudication. But, from a reading of the impugned proceedings, it is seen that the adjudicating authority has not eschewed the statements given by those two persons and in fact, there is reference to the statements recorded from them even in paragraph No.12 of the impugned proceedings.

14. Adverting to the rival contentions, at paragraphs 9 and 10, a learned Single Judge held as follows:

"9. The other angle from which the matter can be approached is that if those two persons are not available for cross-examination, then their statements could not have been relied upon and the petitioners should have been afforded an opportunity to contest the matter, without reference to those two statements. This exercise also has not been done by the adjudicating authority while passing the impugned order. That apart, the impugned order levies Central Excise duty and the quantification for the job works has also been made, relying upon the statements given by those two persons.

10. It may be true that the impugned proceedings are not solely based upon those two statements. But nevertheless, those statements having been taken into consideration and those persons not having been available for cross-examination, this Court is of the view that the matter requires to be remanded for fresh consideration."

15. Going through the materials on record, we are of the view that the order of the Tribunal is a non-speaking order, with reference to what is claimed by the appellant and denied by the Department. At this juncture, we deem it fit to consider few decisions, on this aspect,

(i) The Hon'ble Apex Court in HVPNL v. Mahavir reported in (2004) 10 SCC 86, while dealing with an order passed by the State Consumer Disputes Redressal Commission, held that the appellate forum is bound to refer to the pleadings of the case, submissions of the counsel, necessary points for consideration,

discuss the evidence, and then to dispose of the matter by giving valid reasons.

(ii) In Tata Engineering & Locomotive Co. Ltd., v. Collector of Central Excise, Pune reported in 2006 (203) ELT 360 (SC), the Hon'ble Supreme Court, dealing with a case, whereby, a cryptic and non-speaking order, the Tribunal upheld the order passed by the Commissioner, by applying the ratio of the decision of a Larger Bench in TISCO Ltd., v. CCE, Madras [2000 (118) ELT 104 (T-LB)], without recording any findings of fact. On the facts and circumstances of the case, the Hon'ble Apex Court, while holding that it is not sufficient in a judgment, to give conclusions alone, but it is necessary to give reasons, in support of the conclusions arrived at, set aside the order of the Tribunal, holding that the findings recorded by the Tribunal therein, were cryptic and non-speaking, and remitted the matter to the Tribunal for taking a fresh decision, by a speaking order, in accordance with law, after affording due opportunity to both the parties.

(iii) In Commr. of Central Excise, Bangalore-II v. Fitwel Tools & Forgings (P) Ltd., reported in 2010 (256) ELT 212 (Kar.), a

Hon'ble Division Bench of Karnataka High Court, at Paragraph 5, held as follows:

"After careful perusal of the order impugned, it is manifest on the face of the order that the Tribunal has committed a grave error in passing the order impugned without assigning any valid reasons and without any discussion. By merely following the order passed in similar matters, it has proceeded to pass the impugned order, allowing the appeal filed by the respondent. Hence, we are of the opinion that the impugned order is cryptic in

nature and such a non-speaking order cannot be sustained."

16. Placing on record, the contention of Mr.S.R.Rajagopal, learned counsel for the appellant that additional Substantial Question of Law Nos.2 and 3, made in CMP No.12613 of 2017 in CMA No.2035 of 2017, alone be adjudged and going through the materials on record, we are of the view that the appellant has made out a case, for interference, on the aspect that the Tribunal has failed to address the issue regarding cross examination of witnesses. Decision in NGA Steels (P) Limited's case [Cited supral], squarely applies to the case on hand and we are inclined to set aside the order impugned in this Civil Miscellaneous Appeal i.e., Final Order No.41765 of 2016 dated 28.09.2016, and remand the matter to CESTAT, Madras to consider and record a specific finding, on the issues regarding cross examination, within two months from the date of receipt of a copy of this order, after giving sufficient opportunity to both parties. Additional Substantial questions of law Nos.2 and 3 are answered in favour of the appellant."

8. Instant C.M.A.No.3247 of 2017 has been filed by the Managing Director, Mr.Suresh Kumar Agarwal, challenging the Final Order No.41766 of 2016, dated 28/9/2016

"1. Whether the Hon'ble CESTAT was justified in upholding the penalty imposed on the appellant under Rule 26 of the Central Excise (No.2) Rules, 2001, when the categorical finding of the Commissioner (Appeals) is that there was no material on record to show personal involvement of the appellant?

"2. Whether the Tribunal is justified in passing the final order without discussing or without giving a finding on the specific plea raised in the grounds of appeal that cross-examination of persons who gave statements against the appellant and which were relied on by the Dept. is mandatory?

3. Whether the documents maintained by the third parties and statements alone constitute sufficient evidence to come to the conclusion of clandestine removal of goods

without payment of duty without any corresponding documents recovered from the appellant?"

9. Following the decision in C.M.A.No.2035 of 2017, dated 22/8/2017, present C.M.A.No.3247 of 2017, is also allowed, leaving the substantial questions of law open. No costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

mvs.

To

1. The Customs, Excise and Service Tax Appellate Tribunal,
South Regional Bench
Chennai 6.
2. The Commissioner of Central Excise
Coimbatore 641 018.

+1cc to Mr.S.Dorai Raj, Advocate SR.No.84589
+1cc to Mr.A.P.Srinivas, Advocate SR.No.84595

C.M.A.No.3247 of 2017

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