

**In the High Court of Judicature at Hyderabad
for the State of Telangana and the State of Andhra Pradesh**

C.E.A. No. 79 of 2015

Between:

The Commissioner of Customs

... Petitioner

and

**M/s Jai Balaji Industries Ltd.,
Kolkata.**

...Respondent

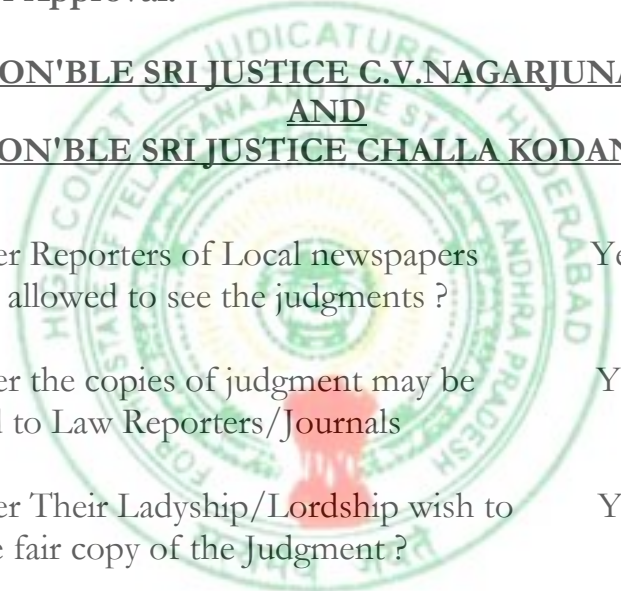
Date of Judgment Pronounced: 16-11-2017

Submitted for Approval:

THE HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY

AND

THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

- 
1. Whether Reporters of Local newspapers
may be allowed to see the judgments ? Yes/No
 2. Whether the copies of judgment may be
marked to Law Reporters/Journals Yes/No
 3. Whether Their Ladyship/Lordship wish to
see the fair copy of the Judgment ? Yes/No

C.V. NAGARJUNA REDDY, J

CHALLA KODANDA RAM, J

***THE HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY**
AND
THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

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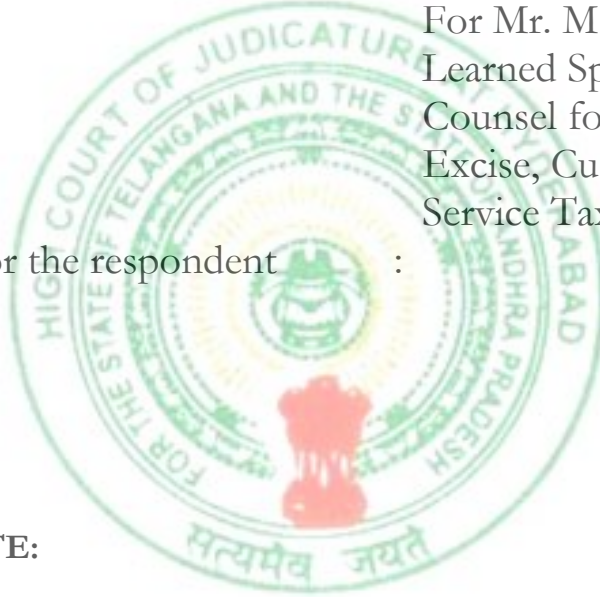
! Counsel for the Appellant : Mr. Swaroop Orilla
 For Mr. M.V.J.K. Kumar
 Learned Special Standing
 Counsel for Central
 Excise, Customs &
 Service Tax

^ Counsel for the respondent :

<GIST:

>HEAD NOTE:

? Cases cited:



THE HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY
AND
THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

C.E.A. No. 79 OF 2015

DATE: 16th NOVEMBER 2017

Between:

The Commissioner of Customs,
Custom House, Port Area, Visakhapatnam.

... Appellant

AND

M/s Jai Balaji Industries Ltd.

... Respondent

Counsel for the Appellant : Mr. Swaroop Orilla
For Mr. M.V.J.K. Kumar
Learned Special Standing
Counsel for Central
Excise, Customs &
Service Tax

Counsel for the respondent :

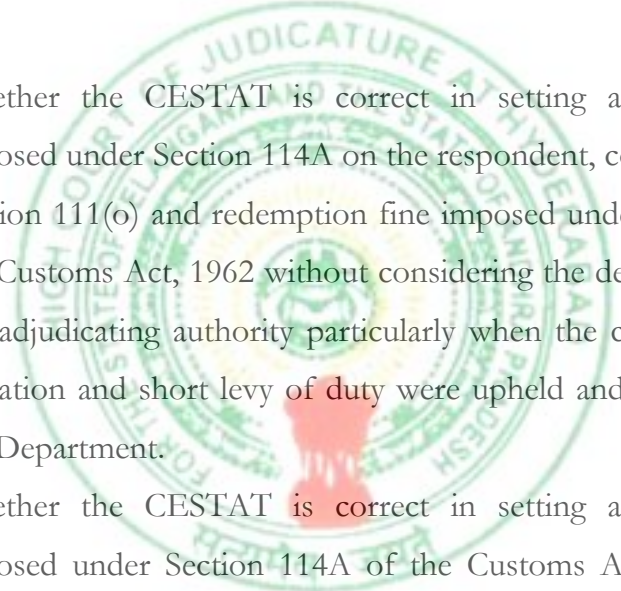


THE COURT DELIVERED THE FOLLOWING:

J U D G M E N T: (per Hon'ble Sri Justice C.V. Nagarjuna Reddy)

The Revenue filed this Appeal against common order dated 12.09.2014 to the extent it pertains to Appeal No. C/797/2010-DB on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Bangalore (for short, 'the Tribunal')

The Revenue has raised the following questions of law in the Appeal:

- 
- (a) Whether the CESTAT is correct in setting aside the penalty imposed under Section 114A on the respondent, confiscation under Section 111(o) and redemption fine imposed under Section 125 of the Customs Act, 1962 without considering the detailed findings of the adjudicating authority particularly when the charges of under-valuation and short levy of duty were upheld and are in favour of the Department.
 - (b) Whether the CESTAT is correct in setting aside the penalty imposed under Section 114A of the Customs Act, 1962 merely because the differential duty was paid before issuance of show cause notice particularly when such short payment of duty was on account of suppression of facts and mis-declaration and particularly when the importers were operating under Risk Management System, wherein the clearance was allowed without subjecting them to assessment and examination and when the importers themselves admitted that there was a mis-declaration and short payment of duty.
 - (c) Whether the CESTAT is correct in setting aside the confiscation and redemption fine merely because penalty was set aside particularly when such penalty was imposed under Section 114A of the Customs Act, 1962 on account of suppression of facts, which is independent and has nothing to do with the applicability of the

provisions of Section 111 of the Customs Act, 1962 for imposing such penalty.

- (d) Whether the CESTAT's final order No. 21712-21713/2014 dated 12.09.2014 is legally tenable to the extent of setting aside the penalty, confiscation and redemption fine particularly when the same being a non-speaking order, inasmuch as none of the detailed findings of the adjudicating authority were either considered or discussed by the Hon'ble Tribunal on the issues of imposition of penalty and redemption fine.

Mr. B. Narasimha Sarma, learned Senior Standing Counsel for Income Tax Department strenuously submitted that in as many as five transactions, involving import of equipment by the respondent, the goods were undervalued, obviously, with a view to evade customs duty and that therefore, the Customs Officer (Proper Officer) has rightly valued the penalty under Section 114AA of the Customs Act, 1962 (for short, 'the Act'). He has further submitted that the Commissioner of Customs, who valued the penalty in his original Order, has assigned elaborate reasons for imposing the penalty; and that the Tribunal has set aside the said Order through a cryptic order and in a perfunctory manner.

Opposing the above submission, Mr. G. Prahlad, learned counsel representing Mr. Laxmi Kumaran and Sridharan submitted that under Section 28 of the Act, when any duty has not been levied or has been short-levied or erroneously

refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the Proper Officer may serve a notice on the person chargeable with the duty or interest as the case may be and that under sub-section (2B) thereof, where any duty has not been levied or has been short-levied, or erroneously refunded, or any interest payable has not been paid, part paid or erroneously refunded, the person, chargeable with the duty or the interest, may pay the amount of duty or interest before service of notice on him as envisaged under sub-section 2(1) and that Proper Officer, who on receipt of such information, shall not serve any notice on the person in respect of his duty or interest so paid. He has further submitted that it is not in dispute that even before the show cause notice was issued by the Proper officer to the respondent, the differential duty was paid and that therefore, the penal provisions of Section 114AA are not attracted. The learned counsel further submitted that under Section 18 of the Act, the importer is provided with the facility of making provisional assessment of duty and he be liable to pay the differential duty on final assessment under sub-section (2). He has accordingly, submitted that the assessment of the value of the goods shown by the respondent has to be treated as a provisional assessment

and that on the Proper Officer making a final assessment of the duty, the differential duty was paid by the respondent even before the issue of notice and that therefore, the Tribunal has rightly set aside the penalty in the above facts and circumstances of the case.

The learned Senior Standing Counsel has not disputed the fact that the importer is entitled to make a provisional assessment of the duty which pre-supposes that such provisional assessment need not be accurate. Further, he has also not disputed the fact that before the show cause notice was issued, the respondent has paid the differential duty, as found by the Tribunal in its order questioned in this Appeal. While setting aside the penalty, the Tribunal gave adequate reasons in paras 4 and 7 which are re-produced hereunder:

“4. Learned counsel on behalf of the appellants submitted that as regards the advance paid by the appellants in terms of the contract, the appellants have no dispute since it was omitted inadvertently and there was no intention to evade payment of duty on the advance. Learned counsel admitted that advance paid was part of the value and therefore, duty liability should have been discharged. However, he submits that no penalty could have been imposed since it was only an error and assessment was provisional. He also submits that as soon as the appellants were informed that they were liable to pay the same, they paid it immediately with interest without waiting for show-cause

notice and without any dispute. He submits that the amount was paid before all the imports took place and therefore while filing the bill of entry and submitting the documents this got left out. It has to be noted that the appellants never concealed any fact from the Department and as soon as they were asked to furnish documents, they submitted all the documents such as contracts and detailed agreements, etc. When the documents were received, the department objected that design and engineering charges also should suffer duty and this was also paid by them with interest and it is the appellant's submission that appellant's did not even wait for all the clearances to take place even though the design and engineering charges were being paid in instalments and not exactly lump sum and when the duty was paid, the amount had not yet been paid in full to the supplier. He submits that this shows *bona fide* nature of the appellant's transaction and the appellant's intention to abide by the law. *Prima facie*, we are satisfied with the submissions even though the learned AR opposed this strongly and drew our attention to paragraph 25 and 26 of the order-in-original. However, we find that the facts remains that the advance amount received by the appellant was accepted as part of the consideration without any objection and without any hesitation and differential duty with interest was paid. Therefore, we find that in respect of advance amount received and duty paid, the imposition of penalty cannot be sustained. Accordingly, we set aside the penalty in respect of this alone.

7. As regards the penalty, in respect of design and engineering charges and technical supervision charges, we find that it is always a disputable item and requires interpretation of the agreement, application of valuation rules and unless there is evidence to show that such agreement was deliberately withheld and was not part of the contract for supply of

equipment or it was not declared at all and there was a considerable effort to hide the fact of payment of such charges, it may not be appreciate to impose penalty. In this case, from the second bill of entry, always the assessment was provisional and therefore, on that ground also, it may not be appropriate to impose penalty. Therefore, the penalty imposed on this basis is also set aside.”

In the aforementioned admitted facts of the case and provision of law, we are of the opinion that Section 114AA does not get attracted as *sine qua non* for invoking the said provision is that it must be established that a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document, which is false or incorrect in any material particular, in the transaction of any business for the purposes of the Act. As noted herein before, when the Act itself has envisaged provisional assessment, it cannot be said that incorrect value of the imported goods *per se* amount to any of the acts referred to in the said provision.

As could be seen from the reasons assigned by the Tribunal, in respect of design, engineering and technical supervision charges, the actual value of the services requires interpretation of the agreement and from the nature of the contract, which includes design, engineering and technical

supervision charges, it is a matter of interpretation of contract as to whether value of those services form part of the value of goods and services and if so, how to quantify the same.

In the light of the above facts and circumstances of the case, we are of the opinion that the Tribunal has assigned sound reasons for setting aside the penalty and therefore, all the questions of law framed by the Revenue are answered against it.

In the result, the Appeal is dismissed. No costs.

C.V. NAGARJUNA REDDY, J

CHALLA KODANDA RAM, J

16th November 2017

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