IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
BENCH AT AURANGABAD.

CENTRAL EXCISE APPEAL NO. 2 OF 2015

Commissioner of Customs, Central Excise &
Service Tax, Aurangabad. … Appellant

VERSUS

M/s. Kinetic Engineering Ltd.,
Ahmednagar. … Respondent

WITH
CENTRAL EXCISE APPEAL NO. 1 OF 2018

Commissioner of Central Excise &
Customs, Aurangabad. … Appellant

VERSUS

Chaudaki R. Hanamappa … Respondent

WITH
CENTRAL EXCISE APPEAL NO. 2 OF 2018

Commissioner of Central Excise &
Customs, Aurangabad. … Appellant

VERSUS

M/s. Kinetic Engineering Ltd.,
Nagar-Dhond road, Supa, Ahmednagar. … Respondent

WITH
CENTRAL EXCISE APPEAL NO. 3 OF 2018

Commissioner of Central Excise &
Customs, Aurangabad. … Appellant

VERSUS

Manmohan K. Khera … Respondent

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In all matters :

Mr D. S. Ladda, Advocate for the appellant

Mr Prabhakar Shetty, Advocate h/f Mr V. S. Bedre, Advocate for respondent

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CORAM : S. V. GANGAPURWALA &
A. M. DHAVALE, JJ.

DATE : 30TH JANUARY, 2018.

ORDER :

1. The present appeal is filed on following questions of law.

(a) Whether the CESTAT committed error in non-considering that the Respondents deliberately cleared goods under Rule 4(5) of CENVAT rules as if cleared for repairing/reconditioning i.e. Job work with intention to avoid payment of amount equal to CENVAT Credit as required under Rule 3(5) of CENVAT Rules and therefore contravened Rule 4(5) and Rule 3(5) of CENVAT Rules 2004?

(b) Whether the CESTAT committed error in applying the ratio in the case of Harsh International (Khaini) Pvt. Ltd., when the facts were different?

(c) Whether the expression "Capital goods cleared as such" includes capital goods cleared as such after being used in terms of CENVAT Credit Rules as applicable in 2005?

(d) Whether CESTAT was right in setting aside OIO confirming the demand under Rule 3(5) of CENVAT Credit Rules 2004 in respect of capital goods cleared in 2005 for repairing/reconditioning from a unit to another unit and used for manufacture of final products by another unit?

2. Mr Ladda, learned counsel for the appellant submits that, in fact the case is covered under Rule 4(5)(A) of the CENVAT Credit Rules. The goods were removed after two years without any work being done on the said goods. The statements of the employees of the respondent were recorded, who categorically admitted that, no work of repair or reconditioning was done on the said machines. The learned counsel to buttress his submission relies on the judgment of the Tribunal in case of **Commissioner of Central Excise, Hyderabad-III v. Navodhaya Plastic Industries Ltd. (2013) 298 ELT 541** and another judgment of Madras High Court in case of **Commissioner of C. Ex. Vs. Rogini Mills Ltd. (2011) 264 ELT 367**.

3. The learned counsel for the respondent submits that the goods have been removed in August-2005. The goods were in the premises of the appellant for almost two years. The said goods were removed to its parent unit to Ahmednagar. According to the learned

counsel, even the Commissioner while passing the order in original has applied Rule 3(5) and not Rule 4(5)(A) of CENVAT Credit Rules. The Department had not assailed the same before CESTAT on the said ground. The learned advocate relies on the judgment of this Court upholding the judgment of CESTAT West Zonal Bench, Mumbai in case of **Cummins India Ltd. v Commissioner of C. Ex. Pune-III** reported in **2007 (219) E.L.T. 911 (Tri. - Mumbai)** and the judgment of the Delhi High Court in a case of **Harsh International Pvt. Ltd. v Commissioner of Central Excise & Customs, BBSR-I** reported in **2012(05)LCX0040**.

4. We have considered the submissions canvassed by the learned counsel for the respective parties so also have gone through the judgment of the CESTAT and the order in original.

5. The Commissioner also while passing the order in original has affirmed that Rule 3(5) of the CENVAT Credit Rules would apply. He has also not brought the case within the ambit of Rule 4(5)(A) of the CENVAT Credit Rules. The department has not challenged the said aspect before the CESTAT. It would not be open for the department now to change their course and put forth their case relying on Rule 4(5)(A) of the CENVAT Credit Rules.

6. It is not disputed that, before the amended Rule 3(5) came into force, the goods have been removed by the respondent. The word as such has been interpreted by this court and also by the Delhi High Court in case of Harsh International Pvt. Ltd. (supra) and it has been held that, after retaining the goods for more than two years, the same have been sent back to the parent unit.

7. Considering the aforesaid aspect of the matter, the Tribunal has rightly decided the issue.

8. In the result, no substantial question of law arises. The appeals are dismissed. No costs.

[A. M. DHAVALE]
JUDGE

[S. V. GANGAPURWALA]
JUDGE

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