IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD

903 WRIT PETITION NO.2492 OF 2012
WITH CA/14337/2017 IN WP/2492/2012 WITH WP/2493/2012 WITH CA/14336/2017 IN WP/2493/2012 WITH WP/2532/2012 WITH CA/14335/2017 IN WP/2532/2012

VATAN TEXTILES LIMITED THRU SHAFEEQ AHMED KHAN
VERSUS
UNION OF INDIA AND ORS
...
Advocate for Petitioner : Mr. R.F. Totala
Advocate for Respondents 2 to 4: Mr. D.S. Ladda
...

CORAM :T.V. NALAWADE AND
SMT. VIBHA KANKANWADI, JJ.
RESERVED ON : 13/12/2018
PRONOUNCED ON : 20/12/2018

ORDER : [PER T.V. NALAWADE, J.]

1. The petitioner from all the proceedings is the same and as the relief is claimed in respect of similar orders, all the three proceedings are being decided by common order. Orders are made by Custom, Central Excise and Service Tax Appellate Tribunal (in short 'C.E.S.T.A.T.'), West Zonal Bench, Mumbai. In the first proceeding, order dated 25.3.2011 made in proceeding No. S/248/2011/EB/C/-II and order dated 11.7.2011 passed in Application No. E/MODFN/674/11 in Appeal No. E/686/09 are challenged. In the second proceeding, order dated 25.3.2011 made in proceeding No. S/247/2011/EB/C/-II and order dated 11.7.2011 passed in Application No. E/MODFN/676/11 in Appeal No. E/737/09

are challenged. In the third proceeding, order dated 25.3.2011 made in proceeding No. S/249/2011/EB/C/-II and order dated 11.7.2011 passed in Application No. E/MODFN/675/11 in Appeal No. E/687/09 are challenged. Both the sides are heard.

2. In the first proceeding, which was filed before the Tribunal, the petitioner had challenged the demand of excise duty of Rs.19,32,507/- which was made in the year 2008 for the period May 2005 to August 2006. This order was confirmed by Commissioner in the first appeal in the year 2009. By order dated 25.3.2011, C.E.S.T.A.T. directed the petitioner to make pre-deposit of 50% of duty amount within four weeks for entertaining the appeal filed before the Tribunal. The petitioner filed application for modification of this order and this application came to be rejected on 11.7.2011. The order dated 11.7.2011 shows that due to non payment of amount of 50% duty as per the directions given in the past, the appeal itself came to be dismissed. In the second proceeding, there was demand of custom duty of Rs.13,66,632/- and excise duty of Rs.19,561/-. The demand was of the year 2002 and the Commissioner had dismissed the appeal. The decision of the Commissioner was challenged by petitioner before C.E.S.T.A.T. and in the initial, C.E.S.T.A.T. had set aside the order and had remanded the matter back to the Commissioner. The Commissioner again made

similar order in the year 2007 and this decision was then challenged before C.E.S.T.A.T. On this occasion, C.E.S.T.A.T. directed to make pre-deposit of 50% of the duty amount within four weeks by the order dated 25.3.2011. In this proceeding also, the application was moved for modification and it came to be rejected. In the third proceeding, the demand of Rs.4,54,144/- was made for the period September 2006 to May 2007 against the petitioner. In this proceeding also, similar proceedings were filed by the petitioner and similar orders came to be passed by C.E.S.T.A.T.

3. The record of all the three petitions shows that after filing of the petitions in February 2012, nobody was turning up for petitioner to prosecute the matters. This was noticed by this Court on 21.3.2012 and order was made that the matters would be dismissed after two weeks if they were not prosecuted. No interim relief was given by this Court in any of the three matters. Similar orders were again made on 26.3.2013 and 7.5.2013. For some time, matter was not listed before the Court and on 9.1.2014 matter was listed before the Court. Nobody turned up for petitioner. When the matter was listed before this Court on 9.3.2017 after gap of three years, the counsel of the petitioner filed leave note. By order dated 31.10.2017, this Court specifically directed the petitioner by passing reasoned order to deposit 50% of the duty amount (Rs.21 lakh) and

it was directed that the matters would be dismissed if the amount is not deposited within four weeks. This order was also not complied with. The learned counsel for petitioner insisted that hearing needs to be given to him on merits of the matters and due to the insistence, this Court gave him hearing even when the period given by this Court was over long back.

4. It needs to be mentioned that by order dated 24.11.2018, this Court has already dismissed two similar writ petitions (Writ Petition Nos. 5885/2015 & 1346/2016) of the petitioner. The point of entitlement of getting the relief of dispensing with the condition of pre-deposit of the duty amount was considered by this Court. In view of the discussion made in the previous order by this Court, it can be said that the present petitions could have been disposed of on the same day by common order, but to see that the other matters were decided as early as possible, this Court decided those matters. The relevant portion of the order dated 24.11.2018 is as under :-

> "2. Both the proceedings were filed under section 35 (f) of Central Excise Act, 1944 by the petitioner for relief of dispensing with/for relief of waiver of condition of pre-deposit of duty and penalty amount for filing appeal in the Tribunal. In the first proceeding, the liability to pay duty was around Rs.1.0032 Crore and C.E.S.T.A.T. had initially directed to deposit Rs. 25 % of this amount as pre-condition for entertaining the

appeal. The appellant deposited the amount of Rs. six lakh out of Rs.25 lakh and then challenged the said order of C.E.S.T.A.T. by filing Writ Petition No. 2622/1996 in this Court. This Court set aside the order of C.E.S.T.A.T. on 26.6.2006 and remanded the matter with direction to consider the plea of 'technical hardship' raised by the present petitioner. After remand, the aforesaid amount was reduced by C.E.S.T.A.T. to make it Rs. 12 lakh. As already amount of Rs. six lakh was deposited, the remaining amount was deposited by the petitioner and then the appeal was decided by C.E.S.T.A.T. The matter was remanded back by C.E.S.T.A.T. to Assistant Commissioner, Central Excise. The Assistant Commissioner maintained the previous order by deciding the matter in the year 2013. This order was again challeneged before C.E.S.T.A.T. and this time for entertaining this appeal C.E.S.T.A.T. directed the petitioner to deposit Rs. 20 lakh as pre-condition for filing the appeal.

3. In the second proceeding, the liability of duty was assessed at Rs. 2.73 Crore and penalty of Rs. 1.35 Crore was also imposed for getting redemption of capital goods which were worth of Rs.5.29 Crore. The penalty of Rs.2.73 Crore was imposed in respect of capital goods in this case. C.E.S.T.A.T. ordered petitioner to deposit 50% of the customs duty and 50% of Central Excise Duty. This order was challenged in this Court by filing Writ Petition No. 3700/2011. This petition was also allowed by this Court and the matter was remanded back for considering the ground of technical hardship raised by the present petitioner. C.E.S.T.A.T. has reduced the pre-condition amount to make it Rs. 25% in place of 50%. This order is challenged now in the second proceeding.

4. It is the case of petitioner from both the proceedings that on 5.11.2014 the petitioner company came to be declared as sick industry under Sick Industrial Companies (Special Provisions) Act, 1985 (in short 'S.I.C.A.') by the Board of Industries and Financial Reconstruction

(in short 'B.I.F.R.') and the petitioner is preparing scheme for rehabilitation. It is contention of the petitioner company that this circumstance is not considered by C.E.S.T.A.T. even after directions given by this Court and so, the orders made by C.E.S.T.A.T. which are challenged in the two proceedings are liable to be set aside.

5. The two proceedings relate to different periods. The industry was set up in the year 1994 and from the submissions and record, it can be said that atleast five orders were made of the assessment of duty and penalty against the petitioner company which are in respect of the period starting from the date of setting up of the company and all these orders are challenged by the petitioner company. In addition to present two petitions, there are three other petitions of the petitioner company like Writ Petition No. 2492/12, 2493/13 and 2532/12. The submissions made and the record show that total liability of the company to the respondents is more than Rs. 20 Crore at present and the liability may be more if the interest amount is considered. The submissions made and the record show that the other Court had made order in one petition to deposit amount of Rs. 21 lakh for getting the interim relief, but this order is not complied with. There was interim relief in the present two proceedings granted by this Court due to which the two proceedings remained pending and the appeals pending before C.E.S.T.A.T. did not make progress. It appears that due to pendency of these proceedings the amount due is also not deposited by the petitioner company. Only when this Court vacated the interim relief as the counsels were changed atleast on two occasions in the present matters, the argument was advanced in both the matters.

6. In view of the grounds mentioned to challenge the orders made by C.E.S.T.A.T., the relevant portion of the provisions of Central Excise Act, 1944 which needs to be considered is mentioned below :-

> "**35-F. Deposit, pending appeal of duty demanded or penalty levied.** -Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of central excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied:
>
> Provided that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue:"

7. The aforesaid provision of Central Excise Act shows that discretionary power is given to C.E.S.T.A.T., the appellate forum and the appellate forum can dispense with the pre-condition of depositing the amount of duty, penalty etc. if such condition would cause '<u>undue hardship</u>' to the appellant (emphasis added).

8. When the matter involves use of discretion by Court/Tribunal, in ordinary course, the appellate Court or this Court in a proceeding like present one is not expected to interfere with such order. This Court can only ascertain as to whether for refusal to use discretion, there were some circumstances including the conduct of the party and whether case of undue hardship is made out by the appellant.

9. In the first order which was made by the Tribunal in the year 2006 in the first proceeding the Tribunal had mentioned a circumstance like increase in sales from the year 2002 to 2004, though losses were shown by the

petitioner company. It was held that due to this circumstance and other circumstances, the petitioner had failed to make out prima facie case for total waiver. Thus, the ground of financial hardship from other angle was considered by the Tribunal. At that time, the relevant record of the company was also considered by the Tribunal. In the second proceeding, the order made by the Tribunal shows that Tribunal has touched the merits of the grounds of challenge to the assessment also to ascertain as to whether there is some arguable case in the appeal. The learned counsel for petitioner submitted that this approach is not permissible. This Court holds that such submission cannot be accepted. When the Court is expected to use the discretion, the Court is expected to consider to some extent the merits of the grounds also. In the present case, that was more necessary due to peculiar facts of the present matter.

10. The submissions made and the record show that the appellant company had imported material for manufacturing of goods in India and for that 100% exemption in duty was taken at the time of importing the material. The reasoning given by the assessing authority and the order of the Tribunal also show that all the documents are considered by the department and the learned counsel for the petitioner company was asked to explain the things before the Tribunal also. There was no record to show that the goods which were cleared in domestic market were manufactured from indigenous domestic material alone. Further, there was no D.T.A. permission and goods were cleared in domestic market in the names of various fictitious units. Three units found on the record were being managed by the same family. These manufacturing units were not having manufacturing facilities of their own and they had tried to show that goods were manufactured by outsourcing. This claim was found to be false and it was noticed that the units of the petitioner were used for manufacturing of the goods of these fictitious units and then the goods were cleared in

domestic market. There was no satisfactory account of utilization of imported material of the petitioner company. Thus, the goods manufactured by the petitioner company were sold by using the names of some fictitious units. Thus, the peculiar modus operandi was used for evasion of duty. The assessing authority has imposed penalty not only on the petitioner company, but also on the other units which were shown to be managed by the same family. Thus, the activity involved fraud, criminal wrong and it was not only irregularity or mistake. Such circumstances, conduct of the party cannot be ignored by the Court or Tribunal while using discretionary power. Thus, apparently false record was prepared for evasion of duty. In spite of these circumstances, the concession is given by the Tribunal in condition of pre-deposit and the order shows that the order was made after 'keeping in view the financial condition and also the admitted liability'. Thus, other things like admitted liability in respect of duty are also considered by the Tribunal and financial condition is also considered.

11. The aforesaid circumstances show that false record was created, there was criminal wrong committed to avoid the liability to pay the duty to respondents. Even when sales had increased, by creating false record of aforesaid nature, the liability was avoided and money was diverted to other fictitious units. In view of these circumstances, the contention of the petitioner company that it was declared as sick unit cannot be considered. The discretionary power cannot be used in favour of such company, persons.

12. From the aforesaid circumstances, it can also be said that due to the orders made by this Court of allowing the petitions, the Tribunal gave more concession and the pre-condition amount was reduced. Unfortunately, such orders are made by the Tribunals and the Courts after the order of remand of the matter made by this Court. By filing proceedings in this Court and by filing applications for waiver of the pre-condition, the

> petitioner has apparently misused the process of law and petitioner has successfully avoided the payment of huge amount of duty, penalty and interest for more than 10 years.
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> 13. The learned counsel for petitioner placed reliance on some observations made in the cases reported as **MANU/MH/0206/2004 [Universal Ferro and Allied Chemicals Ltd. Vs. Customs, Excise and Service Tax Appellate Tribunal and Ors.]** decided by this Court and **MANU/MH/0135/2005 [Polymermann (ASIA) P. Ltd. Vs. The Union of India (UOI) and Ors.].** The facts and circumstances of each and every case are always different. When it is a matter of use of discretion by the Court, the facts and circumstances of each case need to be considered separately. There is no dispute over the proposition made in the aforesaid two cases, but the present matter has peculiar circumstances, which cannot be ignored. At the cost of repetition, this Court wants to observe that even when appellant company does not deserve, concession to much extent is given to the appellant company by C.E.S.T.A.T. This Court holds that no interference is possible in the orders made by C.E.S.T.A.T. which are under challenge. In the result, both the proceedings stand dismissed."

The aforesaid observations and the facts of the present matters show that right from beginning the petitioner avoided to pay the duty. Every time the petitioner misused the process of law and by giving excuse of pendecy of the matters in this Court to the department, avoided to make the payment of duty. It is also surprising that even when this Court has not granted stay in favour of petitioner, steps were not taken by the department to see that the duty amount is recovered. It is noticed that the Government departments and Corporations most of the times do not take steps which they can take due to pendency of the matter in this Court when that is not expected by this Court. Some times, this circumstance is misused by some officers to help the defaulters. Such possibility cannot be ruled out in the present matters.

5. A strange and not acceptable submission was made by the learned counsel for petitioner that C.E.S.T.A.T. could not have dismissed the appeals and hearing ought to have been given on merits. This submission is not at all acceptable in view of the pre-condition which is appearing in the provisions of Central Excise Act and which is discussed by this Court in previous decision. If the order of pre-deposit is not complied with, then the appeal itself can be definitely dismissed by C.E.S.T.A.T. In the present matters, specific period of four weeks was given by C.E.S.T.A.T. to deposit the duty amount, which was only 50% of the duty amount. That order was not challenged and an attempt was made to protract the things by filing applications for modification of that order. The conduct of the petitioner in that proceeding is discussed by C.E.S.T.A.T. in the order dated 11.7.2011 which is as follows :-

> "2. The Ld. SDR has opposed these applications by pointing out that the powers of this Tribunal to modify its stay order are limited. In this connection, he has referred to the Hon'ble High Court's judgment in *Baron International Vs. UOI,*

> *2004 (163) ELT 150 (Bom),* wherein it was held that, where a modification application was filed by an appellant seeking modification of stay order passed by this Tribunal, it was to be, at the outset, determined as to whether any *prima facie* case for modification was made out and, only if such case found to have been made out, the Tribunal shall entertain the application on merits. In the present case, the applicant or their Counsel has not chosen to turn up for moving these applications. Nonetheless, we have gone through the averments contained in these applications. We have not found any *prima facie* case made out. Hence, in terms of the ruling of the Hon'ble High Court, we reject these applications. The appeals are also dismissed for want of pre-deposit."

6. In the present proceedings, copy of the first application which was filed before C.E.S.T.A.T. for dispensing with the condition of pre-deposit is not filed. Even if it is presumed that there was the contention of financial hardship, similar to the contention made in the past, which was considered in Writ Petition No. 5885/2015 by this Court, in view of the observations made, this Court holds that no relief could have been granted to the petitioner by C.E.S.T.A.T.

7. The learned counsel for petitioner placed reliance on some observations made by Apex Court in the case reported as **2003 (154) ELT 347 SC [Mehsana Dist. Co-Op. Milk P.U. Vs. Union of India] decided on 31st March 2003.** The observations are in respect of need to consider prima facie merits of the matter before giving direction to pre-deposit the duty amount. It is

observed by the Apex Court in aforesaid case that financial hardship and other such relevant factors need to be considered. There cannot be dispute over this observation made by the Apex Court. The relevant facts of the present matters are already quoted by this Court. Facts of the present matter show that the conduct of the petitioner is such that no discretion can be used in favour of such petitioner. Other cases on which reliance was placed by the learned counsel for petitioner are already discussed by this Court in previous decision.

8. The learned counsel for department submitted that petitioner has misused the process of law and compelled the department to spend on the litigation and so, the cost needs to be imposed on the petitioner in each proceeding. It was submitted that by misusing circumstance that the proceedings are pending in the Court, petitioner avoided to deposit the duty amount and so, the cost needs to be imposed. This Court has already made some observations with regard to approach of the department. This Court holds that for misusing the process of law, cost needs to be imposed on the petitioner, but it need to be deposited with High Court Legal Services Authority for it's use in favour of needy persons. In the result, the petitions are dismissed. The petitioner is to pay cost of Rs.25,000/- (Rupees twenty five thousand) in each proceeding with

High Court Legal Services Authority, Aurangabad within four weeks from today. Civil Applications are disposed of.

[SMT. VIBHA KANKANWADI, J.] **[T.V. NALAWADE, J.]**

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