IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 18.09.2019

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A.No.173 of 2018
and
CMP.No.2105 of 2018

M/s.Baburam Premchand
No.52, Vaidyanatha Street
Tondiarpet
Chennai – 600 081. .. Appellant

Versus

The Commissioner of Central Excise (Adjudication)
No.60, Rajaji Salai, Customs House
Chennai – 600 001. .. Respondent

Civil Miscellaneous Appeal has been filed under Section 130 of the Customs Act, 1962 praying to set aside the final order No.40487/2017 dated 08.03.2017 in Appeal No.C/237/2008-DB passed by the respondent herein.

For Appellant : Mr.N.Viswanathan

For Respondent : Mr.K.S.Ramasamy, CGSC.

JUDGMENT

(Judgment of the Court was delivered by **V.BHAVANI SUBBAROYAN**,J.)

The present Appeal is filed against the final order No.40487/2017 dated 08.03.2017 in C/237/2008-DB passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

2. The brief facts leading to the present case are that the petitioner is a partnership firm engaged in import and trading of various tin coils including secondary and defective tin free sheets used in various industrial production. During the course of their business, on the basis of the information received, the officers of DRI (Directorate of Revenue Intelligence) searched the factory

premises of the appellant on 22.06.2002 and on verification of stock available in the factory premises, tin coils/sheets totally weighing 68.400 MTs were found.

3. On enquiry, partner of the appellant firm has stated that the goods were part of their earlier consignment of 100 MTs of tin coils, when they have imported the same in consignment of total 167 MTs of secondary/defective TFS coils vide Bill of Entry No.011630 dated 27.05.2002, Bill of Entry No.011612 dated 27.05.2002 and Bill of Entry No.38969 dated 16.04.2002. The said goods weighing 68.400 MTs of tin sheets/coils were seized for further action under Customs Act, 1962.

4. The Directorate of Revenue Intelligence, Ministry of Finance, thereafter, issued a show cause notice dated 17.09.2002 asking the appellant to show cause as to why the declared value for the past and live consignments should not be rejected and refixed

as US$ 465/MTs and interest under Section 20(AB) of Customs Act, should not be demanded on duty valuation of past clearance and differential duty amount already deposited by the importer should not be appropriated and the tin coils of width above 600 mm seized from the godown as well as the live consignment should not be confiscated under Section 111(d)(l) & (m) of the Customs Act and the defective coils used for concealing the tin coils should not be held liable for confiscation under Section 119 of the Customs Act, besides proposal for penalty under Section 114(A) in respect of past clearance and under Section 112(a) in respect of live consignment. The appellant seems to have given their reply to the show cause notice on 17.01.2003.

5. The respondent vide its Order-in- Original No.1059/2003-CAU dated 16.09.2003 had confiscated the seized 48.851 MTs of tin sheets/coils along with 67.13 MTs of secondary defective tin sheets in respect of past consignments and ordered

payment of duty of Rs.7,79,287/- on 48.851 MTs (live consignment) along with demand of interest under Section 28(AB) of Customs Act and had also appropriated amount of Rs.10,26,000/- already paid towards duty liability in respect of past consignment and also offered an option to redeem the confiscated goods on payment of fine of Rs.10,00,000/- under Section 125 of Customs Act and also imposed penalty equal to duty demand with interest under Section 114(A) and Rs.1,00,000/- under Section 112(a) of Customs Act.

6. The order-in-original dated 16.09.2003 was challenged by way of an Appeal before the Appellate Tribunal, wherein the Appellate Tribunal by its final order No.1260/2006 dated 11.12.2006 had set aside the order-in-original dated 16.09.2003 and remanded the matter back to the department for fresh consideration and the Tribunal while doing so, has directed the department to offer opportunity to the importer to contest the proposal to enhance the value of impugned goods by furnishing

copies of the Bills of Entries relied upon by them.

7. Thereafter, the respondent conducted a denova enquiry and passed the order-in-original No.7461/2008 dated 25.03.2008 and rejected the declared value for the past and live consignment and refixed the value. The appellant herein, being aggrieved by the denova adjudication order dated 25.03.2008, had preferred the statutory appeal before the Tribunal in C/237/2008-DB and the Tribunal vide final order No.40487/2017 dated 08.03.2017 had rejected the appeal and refused to interfere with the order-in-original dated 25.03.2008.

8. Aggrieved by the final order dated 08.03.2017, the present Civil Miscellaneous Appeal is filed on the following substantial questions of law:-

1. *Whether the Tribunal was correct in basing its findings on the conduct of appellant and the confiscable nature of goods to record the*

sweeping findings to reject their appeal by overlooking the various statutory provisions relating to the determine the correct value of the goods or the confiscability of the goods and the sustainability of the huge penalty on them under the provisions of the Customs Act and the rules made thereunder ?

2. *Whether the Tribunal was correct in not even taking note of the earlier order passed by it remanding the case back to the original adjudicating authority with a specific direction to supply the copies of contemporaneous Bills of Entry based on which, the value is proposed to be redetermined by following the judgment of the Hon'ble Apex Court cited in the said order and to reject their appeal without taking judicial notice of the fact that the original adjudicating authority had totally omitted to follow the directions given by it and failed to comply with their directions ?*

3. *Whether the Tribunal was correct in*

overlooking the contention raised in show cause notice concerning the redetermination of the value of the imported goods only to the extent of invoking Rule 6 of Customs Valuation Rules, 1988 and relying upon certain contemporaneous Bills of Entry without furnishing the copies of said Bills of Entry or establishing that such import are at the same commercial level as required under the said rule so as to sustain the redetermination of value under the said rule ?

4. *Whether the Tribunal was correct in overlooking the impropriety committed by the original adjudicating authority in observing that the minimum floor price of USD 465/MT (CIF) is prescribed by the Ministry of Commerce and that if the import price is lower, licence is required for the import, which is not at all the proposals/contentions raised in the show cause notice ?*

5. *Whether the Tribunal was correct in not taking note of the claim of the appellant that 16.5 MT*

of goods seized were of mixed sizes and were not physically confirmed as having the size over 600 mm and as such, the seizure itself is illegal, warranting the unconditional release of goods, instead of being confiscated and allowed redemption ?

6. *Whether the Tribunal was correct in not taking note of the fact of the appellant paying the entire duty and penalty even before the issuance of show cause notice and not extending the benefit of the reduced penalty under proviso to Sec.114A of the Customs Act?"*

9. In support of the above questions of law, the appellant has canvassed mainly on the following grounds:-

(a) The Tribunal seems to have passed the impugned order in utter haste and in a most mechanical manner with total non-application of mind, without taking into consideration any of the subtle and legal grounds canvassed by the appellant herein before it and in the process had overlooked the judicial pronouncements specifically brought to its notice and is thus, guilty of total violation to the principles of natural justice and judicial discipline, which require the impugned order passed by it to be vacated in limini.

(b) The Tribunal had abruptly rejected the appeal filed by the appellant without giving any specific findings by not considering any of the statutory provisions relating to the determination of the correct value of the goods, the confiscability of the goods and the sustainability of the huge penalty on the appellant and in that view of the said omissions, the impugned order is not legally sustainable.

(c) The Tribunal had committed gross injustice in passing the impugned order without taking cognizance of its earlier order, which had remanded the case back to the original adjudicating authority with a specific direction to supply the copies of contemporaneous Bills of Entry, in support of the redetermination of the value, which the lower adjudicating authority had miserably failed to comply with thereby, committing gross judicial indiscipline, which the Tribunal had not taken note of before passing the impugned order.

(d) The Tribunal also failed to see that while the proposal made in the show cause notice for the redetermination of value was by invoking Rule 6 of Customs Valuation Rules 1988, the action of the lower adjudicating authority in relying upon certain contemporaneous imports, (the copies of which were not given to the appellant even after the directions issued by the Tribunal in its previous order of remand) failed to establish that the imports made by the appellant at the relevant time was of same commercial level in respect of the contemporaneous imports relied upon by the department, and when the revenue failed to discharge the burden of proof for adopting the value of contemporaneous import, the enhancement of the value of imported goods ordered is totally bereft of any merits.

10. On the above said grounds, learned counsel Mr.N.Viswanathan, had urged upon this Court that the Tribunal has grossly misconstrued the entire case and without passing any speaking order and not considering the merits or discussing any of the grounds raised by the appellant, the Tribunal has rejected the appeal at threshold itself. Learned counsel also submitted that the Tribunal necessarily has to give reasons for its conclusion, that too, when the order-in-original arising initially has been remanded for a denova enquiry and for passing fresh order, the Tribunal ought to have considered each and every aspect before deciding the same, however, in a cryptic manner, the Tribunal had dismissed the appeal.

11. Per contra, learned counsel appearing for the respondent contended that the order passed by the Tribunal is well within its purview and a reasoned order, as the Tribunal had

considered each and every rival submissions made by the appellant before the Tribunal and sought for dismissal of the appeal.

12. Heard the learned counsel appearing on both sides and perused the materials available on record.

13. It could be seen from the records that it is a second round of litigation, wherein which, earlier the Tribunal vide its final order No.1260/2006 dated 11.12.2006 had set aside the order-in-original No.1059/2003 (CAU) dated 16.09.2003 and remanded the matter back to the respondent for fresh adjudication. While doing so, the Tribunal has observed as follows:-

> *"17. It was decided in **Orion Systems Vs. CC.Cochin - 2005 (192) ELT 1117 (Tri.Bang)**, and upheld by the Apex Court that the requirement that when Bill of Entry relied upon by the department to enhance value was not available on record, it could not be concluded that the goods imported on such Bill*

of Entry were identical to the goods imported by the assessee. In view of the above ratio, it is essential that the importer is given an opportunity to contest the proposal to enhance the value of the impugned goods by furnishing him copies of the Bills of Entry relied upon. As the duty, penalty, fine, interest etc., depend on the assessable value to be determined, the impugned order is set aside and the matter is remanded to the Commissioner for adjudicating the allegations afresh in the light of our various observations above. Of course, the appellants will be given adequate opportunity of being heard before such adjudication."

14. It is the case of the appellant that after remand, denova enquiry was conducted and during such enquiry, the appellant contended that immediately after registering the offence on 32 MTs, which were not physically found and verified by the officers during Mahazar time and was also not seized, Rs.2,28,360/-

was collected as bank guarantee for provisional release. Eventhough, those 32 MTs were not provisionally released. Thus, a total sum of Rs.4,56,720/- was collected by the department, without giving any valid reasons. That apart, it could be seen from the order-in-original dated 16.09.2003, wherein which, the department had given an option to the appellant to redeem the above mentioned goods on payment of redemption fine. Learned counsel for the appellant would further submit that when quantities were not verified by the department and were not also seized by the department, the question of confiscation and redemption does not arise.

15. About careful scrutiny of the final order, which is under challenge before this Court, it is seen that the Tribunal had not given any reason and had not considered the non-seizure, however made as if there was a seizure. When the order-in-original was challenged based on certain vital facts, the Tribunal, being the fact

finding authority, ought to have given reasons for non-interference of the order-in-original. Learned counsel for the appellant relied on the judgment rendered by this Court in ***CMA.No.1753 of 2016 (Commissioner of Central Excise, Puducherry ..vs.. Customs, Excise and Service Tax Appellate Tribunal (CESTAT), Chennai-6 and another) dated 07.07.2017***, especially para No.11, which is extracted hereunder:-

> *"11. 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 2nd respondent and denied by the Department. At this juncture, we deem it fit to consider few decisions, on this aspect,*
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> > *(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. It is clear that the order of Tribunal is certainly a non-speaking order and the Tribunal failed to consider the grounds raised by the appellant. Merely reproduction of comments from the show cause notice or order-in-original is not sufficient for a Tribunal to dismiss the appeal filed by the appellant. Each and every ground raised should be sufficiently discussed by the Tribunal while passing any order, that too, upon recording the rival contentions raised by either parties before it. The order passed by the Appellate Authority does not show any light on such discussions and it is merely reproduction of the contents raised in the show cause notice. The Tribunal has not independently applied its mind for dismissal of the appeal.

17. Going through the materials on record, We are of the view that the Tribunal is obligated to record the reasons for its decision and bereft of such reasons in the order impugned, order of the Tribunal deserves to be set aside. Accordingly, We set aside

the impugned order and answer substantial questions of law Nos.1 and 2 in favour of the appellant and the matter is remitted back to the Tribunal for fresh consideration on merits with reference to the grounds raised by the appellant and pass orders in accordance with the questions of law raised by the appellant in the appeal, within a period of twelve weeks from the date of receipt of a copy of this order.

18. In the result, the Civil Miscellaneous Appeal stands allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

(S.M.K.J.,) (V.B.S.J.,)

mra 18.09.2019

Speaking / Non-speaking order
Index : Yes/No
Internet : Yes/No

To

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No.60, Rajaji Salai, Customs House
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