

THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE T.AMARNATH GOUD

C.E.A. NO.142 OF 2017

J U D G M E N T

(Per Hon'ble Sri Justice Sanjay Kumar)

This appeal under Section 130 of the Customs Act, 1962 (wrongly shown as Section 35G of the Central Excise Act, 1944), is directed against the order dated 14.07.2016 passed by the Customs, Excise and Service Tax Appellant Tribunal, Regional Bench, Hyderabad, in Appeal Nos.C/604-605/2008. The appellants are the assessee company and its Executive Director. The appeals before the Tribunal were filed by them against the Adjudication Order dated 30.05.2008 of the Commissioner of Customs and Central Excise, Visakhapatnam-2 Commissionerate. The present appeal was admitted by this Court on 19.09.2017 for consideration of the following substantial questions of law:

1. Whether the Tribunal is correct in confirming the customs duty, when the show cause notice was issued without the finalization of assessment of bills of entries which was provisionally assessed at the time of clearance of goods for home consumption?
2. Whether the extended period of limitation under Section 28 of Customs Act can be invoked when there is no suppression or misstatement with intent to evade payment of duty by the Appellant?
3. Whether the confirmation of demand by the Tribunal is correct when the Bills of Entry were finally assessed only on 19.03.2004 and no dispute was raised or show cause notice was issued subsequent to such final assessment?
4. Whether the Tribunal is correct in not considering the submission that the adjudication order was passed in violation of natural justice?

It may be noted that against the Adjudication Order dated 30.05.2008 of the Commissioner of Customs and Central Excise, Visakhapatnam-2

Commissionerate, two appeals were filed before the Tribunal at Hyderabad. Appeal No.C/604/2008 was filed by the assessee company while Appeal No.C/605/2008 was filed by its Executive Director. Final Order No.A/30582 – 30583/2016 dated 14.07.2016 was passed by the Tribunal disposing of these two appeals. However, the company and its Executive Director, in their wisdom, chose to file this single appeal against the common order in relation to both their appeals. As the Executive Director of the company would have been individually aggrieved by the Adjudication Order dated 30.05.2008 in so far as it related to imposition of a separate penalty upon him under Section 112(a) of the Customs Act, 1962 (*for brevity*, 'the Act of 1962'), the setting aside of such penalty by the Tribunal under its common order dated 14.07.2016 settled his grievance. We therefore treat this appeal as one filed only by the company against the said common order in so far as it relates to its appeal bearing No.C/604/2008 and adjudicate the same accordingly.

The assessee company is an importer of edible oils through Kakinada Port. It filed three bills of entry for import of edible oil (crude palmolein) in December 2002 and January 2003. The imported oil was stored in its customs bonded warehouse at Kakinada. For clearance of this imported oil, the assessee company submitted 7 Duty Entitlement Pass Book (DEPB) scrips and corresponding Telegraphic Release Advices (TRAs) towards discharge of its duty liability. The bills of entry were assessed provisionally with the endorsement that clearance was under the DEPB Scheme and that the goods of the value of Rs.3,12,27,340/- were cleared on payment of duty partly against the debits in the DEPB scrips, in terms of Notification No.45/2002-Customs dated 22.04.2002, and partly through cash. The Deputy Commissioner, Kakinada-I Division, initiated action thereafter for verification of the DEPB scrips with the TRA issuing authorities in

Maharashtra. Upon such verification, it came to light that 5 of the DEPB scrips in question related to issue of advance licences to some other parties who had no connection with the DEPB scrips under reference. As regards the other two DEPB scrips, it was found that the file numbers were not matching. The 7 DEPB scrips were therefore not genuine and were not valid for discharge of the duty liability. The results of this enquiry were received on 21.08.2003 from the Assistant Commissioner of Customs, Special Investigation and Intelligence Branch, Nhava Sheva, Mumbai.

In consequence, proceedings were initiated by the Assistant Commissioner, Kakinada, to recover the duty of Rs.1,98,78,418/-, *vide* letter dated 01.09.2003 calling upon the company and its Executive Director to pay the said amount with interest. The company filed W.P.No.20753 of 2003 assailing the said communication on the ground that it was without enquiry and violated the principles of natural justice. The said writ petition was disposed of by a Division Bench of this Court, *vide* order dated 21.10.2003. Therein, the Division Bench opined that the authorities should have afforded an opportunity to the assessee company to verify whether the DEPB/TRAs obtained by it from the sources indicated were not genuine and if so, the remedies available to it against such bodies. The Bench further opined that the authorities should have disclosed the gist of their enquiry to the company which would have helped it to verify and file a detailed reply on the basis of which an appropriate decision could have been taken by the authorities. The assessee company was accordingly directed to be given an opportunity to file its explanation to the impugned letter dated 01.09.2003 which, for all purposes, was directed to be treated as a notice. Upon filing of such explanation by the assessee company, the authorities were given liberty to take an appropriate decision as per law.

Thereupon, show-cause notice dated 11.12.2003 was issued by the authorities calling upon the assessee company and its Executive Director to explain as to why the customs duty of Rs.1,98,78,418/- should not be recovered from them under the *proviso* to Section 28(1) of the Act of 1962, apart from interest on the duty payable under Section 28AB thereof and as to why penalty should not be imposed upon them under Section 114A/112(a) of the Act of 1962. The case culminated in the Order-in-Original dated 27.02.2004 of the Commissioner of Customs and Central Excise, Visakhapatnam-II Commissionerate. Therein, while confirming the demand for payment of duty along with interest, the Commissioner decided against imposition of penalty under Section 114A but held that penalty was leviable on the Executive Director of the Company under Section 112(a) of the Act of 1962, as he had not taken necessary precautions in the acquisition of the DEPB scrips and TRAs. Aggrieved thereby, the company and its Executive Director preferred appeals before the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Bangalore. By common order dated 02.11.2004, the Tribunal held that non-furnishing of certain documents by the authorities violated the principles of natural justice and set aside the Order-in-Original dated 27.02.2004, directing the authorities to give an opportunity to the company and its Executive Director to cross-examine the customs officials, as they would not be in a position to establish their case unless afforded such an opportunity. The Tribunal accordingly remanded the matter to the Commissioner for *de novo* consideration.

Aggrieved by the remand of the case, the customs authorities filed C.E.A.Nos.42 and 74 of 2005 before this Court. It appears that C.E.A.No.42 of 2005 was initially filed by the Deputy Commissioner of Customs, Kakinada-I Division. When an objection was raised by the other side that he did not

have the authority to maintain the appeal, C.E.A.No.74 of 2005 was filed against the very same Order-in-Original dated 02.11.2004 by the Commissioner of Customs, Visakhapatnam-II Commissionerate. As Fixed Deposit Receipts (FDRs) to the tune of Rs.44,95,629/- furnished by the company to the Deputy Commissioner of Customs, Kakinada-I Division, had been encashed on 16.03.2004 and adjusted towards part-payment of the customs duty of Rs.1,98,78,418/-, held payable under the Order-in-Original dated 27.02.2004, but in the meanwhile the Tribunal set aside the said order, the company filed W.P.No.6610 of 2005 seeking refund of the said sum of Rs.44,95,629/- along with interest. It also sought return of its bank guarantees, aggregating to Rs.49.80 lakhs, which had been furnished to the customs authorities. The writ petition and the two appeals were disposed of by a Division Bench of this Court, *vide* common order dated 05.10.2005. Therein, the Division Bench took note of the fact that the assessee company had filed three bills of entry for import of 4,978.714 metric tonnes of edible grade crude palmolein, having executed provisional duty bonds under Section 18 of the Act of 1962, undertaking to pay the differential duty between the finally assessed and provisionally assessed duty and thereafter, the company filed documents for clearance of the oil and claimed benefit under Notification No.45/2002-Customs dated 22.04.2002, by producing DEPB scrips. The Bench noted that the oil was cleared upon part-payment of the customs duty through the scrips after provisional assessment of the bills of entry but subsequent investigation revealed that the scrips were not valid. The Bench also noted that the company had furnished bank guarantees for a sum of Rs.39.80 lakhs (and not Rs.49.80 lakhs) as security for the bond executed under Section 59(1) of the Act of 1962 towards duties and interest payable on the oil and these guarantees were required to be kept alive. The

Bench noted the contention of the authorities that the company had not only used forged DEPB scrips towards the customs duty of Rs.1,98,78,418/- payable by it but had also obtained 14 more such scrips from the same vendor and had used them for discharging duty payable on 1,786.053 metric tonnes of edible crude palmolein oil, involving duty of Rs.2,55,88,969/-. The authorities contended before the Bench that for provisional assessment under Section 18 of the Act of 1962, the importer was required to furnish a provisional duty bond with bank guarantees to cover the differential duty and the FDRs appropriated by the authorities became the cash security for the provisional assessment till it was finalized in the *de novo* proceedings. The company contended before the Bench that there was no provisional assessment as contemplated under Section 18 of the Act of 1962 as an order of provisional assessment can only be passed by way of a speaking order. It further contended that in the case on hand, there was no provisional assessment as contemplated by law and execution of the bond was itself an unnecessary formality. Though the company disputed the claim of the authorities that it had admitted the factum of the DEPB scrips being forged, the Bench opined that no specific denial in this regard was forthcoming from the correspondence of the company but declined to examine the aspect further on the ground that the Tribunal had not finally determined the rights of the parties and had only remanded the matter for consideration afresh. The Bench made it clear that it was open to the Commissioner to take up the matter for *de novo* consideration without awaiting completion of the investigation by the Central Bureau of Investigation (CBI). The appeals filed by the authorities were accordingly dismissed holding that when the case was built up on the basis of the statements recorded from the customs officials, an opportunity was required to be given to the company and its

Executive Director to cross-examine them. As regards refund of the amount covered by the FDRs and the return of the bank guarantees of Rs.39.80 lakhs pending the *de novo* consideration by the Commissioner, the Bench took note of the submission made on behalf of the authorities that a provisional assessment order had already been passed and as the company had accepted the same and cleared the goods on payment of customs duty pursuant thereto, it could not contend that the said provisional assessment order, passed as long back as on 16.12.2002, was not a provisional assessment in the eye of law. The Bench also took note of the fact that Section 59(1) of the Act of 1962 requires the importer of any goods, which have been warehoused and assessed to duty under Sections 17 and 18 thereof, to execute a bond binding himself for a sum equal to twice the amount of duty assessed on such goods and to pay on or before a date specified in the notice of demand all duties, interest, etc. Opining that such a bond was the security for payment of customs duty, the Bench rejected the prayer of the company for return of the bank guarantees. As regards refund of the sum covered by the FDRs, the Bench opined that as the provisional assessment order dated 16.12.2002 had not been questioned for more than two years, it was not open to the company to challenge the same collaterally in the writ petition. Further, the Bench opined that having cleared the goods on payment of customs duty, albeit under the DEPB scrips which were under a cloud of suspicion as to their genuineness, it was not open to the company to contend that in the absence of a speaking order, there was no provisional assessment in the eye of law and as the assessee company had, in effect, paid only Rs.44,95,629/- against the customs duty of Rs.1,98,78,418/- covered by the DEPB scrips, a further sum of Rs.1,53,82,789 was still payable by it and concluded that no reason was made out, on facts, to

exercise discretion in favour of the company and grant the relief of refund of the sum covered by the encashed FDRs.

Pursuant to the remand of the case, the Commissioner of Central Excise and Customs, Visakhapatnam-2 Commissionerate, considered the matter afresh and passed Adjudication Order No.33/2008 dated 30.05.2008. Therein, he opined that there were two aspects to the matter - one, being the DEPB scrips being forged and the other, the role of the company and its Executive Director therein. The Commissioner took note of the fact that the CBI had filed a charge-sheet in relation to the forged DEPB scrips on 31.03.2006 before the Special Judge for CBI Cases, Visakhapatnam. The Commissioner furnished copies of the documents sought by the assessee company which were available and were relevant and called upon them to attend a personal hearing on 06.11.2007 so that the matter could be disposed of without further delay. However, the assessee company and its Executive Director, *vide* letter dated 30.10.2007, sought an adjournment on the ground that unless all the requisite documents were supplied and cross-examination of the witnesses was allowed, it would not be proper for them to attend the hearing. The Commissioner again addressed letter dated 06.12.2007 informing them that they had been provided with all the documents relied upon and requested them to give the specific list of officers to be cross-examined. By letter dated 20.12.2007, the company sought time up to 10.01.2008 for providing the list of persons to be cross-examined but subsequently took an about-turn and informed the authorities, *vide* letter dated 22.01.2008, that they would be providing the list of persons to be cross-examined only after the remaining documents sought were supplied. A third adjournment was allowed and the hearing was fixed on 23.05.2008, but the company and its Executive Director did not attend. As a list of witnesses

to be cross-examined had not been furnished, the Commissioner opined that the company and its Executive Director were seeking adjournments on one pretext or the other so as to prolong the case and accordingly proceeded with the adjudication based on the evidence available. He found that the company and its Executive Director had never claimed that the DEPB scrips furnished were either genuine or were legally valid documents but asserted that they had *bonafide* acquired them upon payment through cheques. He further found that the CBI investigation proved beyond doubt that the DEPB scrips and TRAs were forged. Applying the principle of *caveat emptor* (buyer beware), the Commissioner opined that the use of these forged DEPBs and TRAs would not discharge the company and its Executive Director from the liability of paying the customs duty to the extent covered by these forged documents. He held that as bogus DEPB scrips were furnished for discharge of duty, it was a case of non-payment of duty and accordingly held the assessee company liable to pay interest on the duty of Rs.1,98,78,418/- payable by it. On the issue of penalty, the Commissioner opined that the company and its Executive Director had not taken necessary precautions in acquiring the DEPB scrips and the fact that the TRAs were also fabricated/ forged did not rule out their involvement in the scheme which ultimately led to clearance of imported goods without proper payment of duty. He accordingly held both the company and its Executive Director liable to pay penalty. In effect, he confirmed the demand of differential customs duty of Rs.1,98,78,418/- payable by the company under the *proviso* to Section 28(1) of the Act of 1962; payment of interest by the company on the said amount under Section 28AB of the Act of 1961; payment of penalty of Rs.1,98,78,418/- by the company, equivalent to the duty demanded, under

Section 114A of the Act of 1962; and payment of penalty of Rs.10,00,000/- by the Executive Director under Section 112(a) of the Act of 1962.

Aggrieved by this order, the company and its Executive Director again filed separate appeals before the Regional Bench of the Tribunal at Hyderabad. Before the Tribunal, the appellants contended that despite the directions of the Tribunal in its earlier order dated 02.11.2004, the customs authorities had neither provided the requested documents nor permitted cross-examination of the department officials. Their further contention was that the customs authorities could not claim that the DEPB scrips were forged and that the CBI investigation had not implicated them in the fabrication/forgery of such scrips or the TRAs. That apart, the appellants, for the first time, contended before the Tribunal that the final assessment in their case was done only on 19.03.2004 and therefore, issuance of a show-cause notice on 11.12.2003 under Section 28 of the Act of 1962 was not sustainable. On the other hand, the authorities contended before the Tribunal that sufficient opportunity had been given to the appellants to attend the hearings and to undertake cross-examination of the customs officials by duly naming them, but despite the same, the appellants took repeated adjournments and did not avail the opportunity given to them. Thereupon, the Tribunal recorded the finding that the DEPB scrips and TRAs were forged but opined that as the appellants had no role to play in such fabrication/forgery, there was no ground for imposition of penalty on either of them. As regards the duty liability of Rs.1,98,78,418/- pinned upon the company, the Tribunal opined that the company had benefited to that extent and such benefit was not permissible in law as the forged DEPB scrips, which had been offered by the company towards part payment of the duty, were forged and were, hence, void *ab initio*. As regards the plea of the company

that issuance of a show-cause notice before finalization of the assessment vitiated the demand, the Tribunal held that it was a case of duty not-paid/ short-paid on account of the forged DEPB scrips and there could be no estoppel, bar or impediment which precluded the effort to demand and recover, at the earliest, the wrongful benefit which accrued to the company on account of the forged documents. The Tribunal accordingly confirmed the levy of customs duty upon the company to the tune of Rs.1,98,78,418/- along with interest thereon but set aside the penalties imposed, both on the company as well as its Executive Director.

It appears that the company applied for 'rectification of mistake' in the final order dated 14.07.2016 in November, 2016. It claimed that it had raised the issue of the final assessment being done only on 19.03.2004 while the show-cause notice was given on 11.12.2003 itself and therefore, the adjudication order was not sustainable on the strength thereof, but no finding with regard to this aspect had been given in the final order dated 14.07.2016. It further claimed that it had raised the issue of limitation on the ground that the show-cause notice dated 11.12.2003 was issued after the normal period prescribed in the Act of 1962 and as there was no willful suppression or misstatement with intent to evade payment duty, the question of extended period of limitation would not arise. It pointed out that no findings were rendered on both these aspects. These were the 'mistakes' it wanted rectified. However, as the said application was kept pending for want of quorum and as the authorities had filed an appeal against the final order dated 14.07.2016, in so far as it set aside the penalties imposed by the Commissioner, the appellants thought it fit to withdraw the 'rectification of mistake' application, reserving liberty to prefer an appeal before this Court. On 21.06.2017, the Tribunal dismissed the application as withdrawn.

The Commissioner, Customs Preventive Commissionerate, Vijayawada, filed a counter on behalf of the Commissioner of Customs and Central Excise, Visakhapatnam-II Commissionerate. Therein, after reiterating the factual aspects set out *supra*, she stated that the customs authorities had filed C.E.A.No.28 of 2017, aggrieved by the very same order dated 14.07.2016, presently under appeal, to the extent it set aside the penalties imposed on the company and its Executive Director. She further stated that payment of customs duty through forged DEPB scrips would not amount to valid payment of duty in the eye of law and therefore, it constituted clearance of goods without payment of duty at all. She accordingly justified levy of the duty along with interest thereon. As regards issuance of the show-cause notice on 11.12.2003 prior to the final assessment, she stated that there was no bar for issuance of a show-cause notice for recovery of duty short-paid/not-paid even before finalization of the provisional assessment. She adverted to case law in this regard. She also referred to the order dated 21.10.2003 passed by this Court in W.P.No.20753 of 2003 filed by the company, requiring the initial demand dated 01.09.2003 to be treated as a notice and permitting the company to file an appropriate explanation thereto. She stated that even if the CBI investigation did not indict the company or its Executive Director for the fabrication/forgery of the DEPB scrips or TRAs, it would not absolve them of paying the duty covered thereby. She denied the allegation that the show-cause notice was beyond time and was hit by the law of limitation. She referred to the fact that the company had not submitted the list of officers that it wished to cross-examine and that it chose not to attend the personal hearings fixed on 06.11.2007, 30.01.2008, 29.04.2008 and 23.05.2008 and asserted that it could not complain of violation of the principles of natural justice. She

accordingly justified the order requiring the appellants to pay the duty along with interest thereon and prayed for dismissal of the appeal.

Sri T.Ramesh, learned counsel for the appellants, would point out that the provisional assessment under Section 18 of the Act of 1962, in relation to the three bills of entry, was on 14.12.2002, 24.12.2002 and 17.01.2003, while the final assessment in relation thereto was on 19.03.2004 and contend that issuance of a notice under Section 28(1) of the Act of 1962 on 11.12.2003 could not have been prior to the finalization of the assessment. He would contend that the very initiation of the proceedings under such a show-cause notice stood vitiated and would rely on a catena of case law in support of his contention. On the issue of limitation, he would point out that the bills of entry related to import of oil in December 2002 and January 2003 and therefore, issuance of a show-cause notice in December 2003 was time-barred as the period of limitation is six months under Section 28(1)(b) of the Act of 1962. Section 28, to the extent relevant, reads as under:

'28. Notice for payment of duties, interest, etc.—(1) 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,—

- (a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year;
 - (b) in any other case, within six months,
- from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words "one year" and "six months", the words "five years" were substituted:

.....'

Sri T.Ramesh, learned counsel, would assert that as there was no allegation of collusion or willful misstatement or suppression of facts by the importer, the question of extending the period of limitation under Section 28 of the Act of 1962 would not arise.

On the other hand, Sri M.V.J.K.Kumar, learned counsel for the authorities, would contend that the show-cause notice dated 11.12.2003 was a consequence of the directions of this Court in W.P.No.20753 of 2003 on 21.10.2003, requiring the authorities to furnish all the necessary details to the company so that a proper reply could be filed by it. The show-cause notice dated 11.12.2003 specifically referred to this direction and proceeded to set out the details, warranting issuance of the demand for payment of duty. Learned counsel would further contend that in terms of the case law cited by him, the appellants are not entitled to relief. He would press into service NEPTUNE TRADE LINKS PVT. LTD. V/ s. COMMISSIONER OF CUS., COCHIN¹, wherein the Kerala High Court relied upon the findings of the Calcutta High Court in ICI INDIA LTD. V/ s. COMMISSIONER OF CUSTOMS (PORT), CALCUTTA² to the effect that where a party produced forged DEPB credit, it would automatically lead to demand of duty and interest and held that the appellant's transaction of purchase of DEPB credit from another company had nothing to do with the customs department which could not be held liable for the fraud, if any, committed upon the appellant and whatever be the recourse and remedy available to the appellant would be against its seller and not against the customs department. It was further observed that the only mistake committed by the Customs was that before verifying the genuineness of the TRA produced on the DEPB credit, they allowed adjustment of duty credit against the duty

¹ 2012 (284) E.L.T. 29 (Ker.)

² 2005 (184) E.L.T. 339 (Cal.)

payable by the appellant for the imported goods released to it, but such a mistake could not be encashed by the appellant by avoiding statutory interest which is mandatory and payable at the prescribed rate for delay in payment of customs duty.

In *ICI INDIA LIMITED*², a Division Bench of the Calcutta High Court had observed that if the DEPB scrip is forged, then it is *non est* and there is no valid DEPB whereby any credit could be derived thereunder. Even if one defends his case by saying that he is not liable for collusion or fraud in relation thereto, he would still be liable to pay duty and interest apart from other statutory consequences which cannot be avoided. This judgment was confirmed by the Supreme Court in *ICI INDIA LTD. V/ s. COMMISSIONER*³. Similar was the finding of the Punjab and Haryana High Court in *MUNJAL SHOWA LTD. V/ s. COMMR. OF CUS. & C. EX. (DELHI -IV)*, *FARIDABAD*⁴ and *FRIENDS TRADING CO. V/ s. UNION OF INDIA*⁵. The judgment in *FRIENDS TRADING CO.*⁵ was upheld by the Supreme Court in *FRIENDS TRADING CO. V/ s. UNION OF INDIA*⁶.

Though Sri T.Ramesh, learned counsel, relied upon an abundance of case law in support of his contentions relating to the first three questions of law raised, i.e., with regard to issuance of a show-cause notice after the provisional assessment, but before finalization of the assessment, and as to the applicability of the extended period of limitation under Section 28 of the Act of 1962, we are of the opinion that none of these issues can be permitted to be raised now. It may be noted that this is not the first round of litigation in relation to the subject issue. After issuance of the demand under letter dated 01.09.2003, the company filed W.P.No.20753 of 2003 before this

³ 2005 (187) E.L.T. A31 (S.C.)

⁴ 2009 (246) E.L.T. 18 (P & H)

⁵ 2010 (254) E.L.T. 652 (P & H)

⁶ 2010 (258) E.L.T. A72 (S.C.)

Court assailing the same and in the light of the directions passed by this Court, *vide* order dated 21.10.2003, the show-cause notice dated 11.12.2003 came to be issued. Significantly, when this Court directed that the demand dated 01.09.2003 should be treated as a notice for all purposes, the company mutely accepted the same. As this Court required the authorities to furnish all the necessary details which were in their possession so that the company could file a proper reply, they deemed it appropriate to issue the show-cause notice dated 11.12.2003. Aggrieved by the first Adjudication Order dated 27.02.2004 based thereon, the company and its Executive Director preferred appeals before the Tribunal at Bangalore. By the final order dated 02.11.2004 passed therein, the Tribunal set aside the Adjudication Order and remanded the matter to the Commissioner for *de novo* consideration. This order was the subject matter of appeals before this Court in C.E.A.Nos.42 and 74 of 2005 at the behest of the customs authorities. At the same time, the company sought refund of the amount which had already been appropriated, on the ground that the Adjudication Order dated 27.02.2004 had been set aside. Significantly, at that stage, the contention of the company before this Court was that there was no provisional assessment at all in the eye of law. No ground was urged by the company or its Executive Director then that the show-cause notice dated 11.12.2003 ought not to have been issued as there was only a provisional assessment on that date and no final assessment had taken place. The company and its Executive Director also did not choose to raise the issue of applicability of the extended period of limitation in the context of Section 28(1) of the Act of 1962. The order of remand dated 02.11.2004 passed by the Tribunal merely required the Commissioner to undertake *de novo* consideration in the context of the company and its Executive Director being

supplied with all the documents relied upon by the customs authorities and to give them an opportunity to cross-examine the customs officials, whose statements were the basis for the case. The scope of enquiry by the Commissioner upon such remand therefore stood circumscribed. If the company and its Executive Director were desirous of an examination being undertaken in the context of the validity of the show-cause notice dated 11.12.2003 and applicability of the extended period of limitation, that was the stage when they should have raised it. Having silently suffered the said order and having contended to the contrary before this Court earlier to the effect that there was no provisional assessment at all in the eye of law, it is not open to the company and its Executive Director to change their stand altogether at this stage and come up with a new case. A litigant cannot be permitted to approbate and reprobate to suit his convenience. It is significant to note that the Adjudication Order dated 30.05.2008 clearly records their failure to co-operate and their delaying tactics to buy time and procrastinate. Except for that, the company and its Executive Director did not choose to participate at all in the proceedings. Having suffered the said order, it was for the first time that they raised the issue of validity of the show-cause notice before the Tribunal in the last and final appeal. They also claimed to have raised the issue of the extended period of limitation, but the Tribunal did not record a finding thereon. However, as already stated *supra*, when the Adjudication Order dated 30.05.2008 under appeal before the Tribunal was passed as a consequence of a remand order and when the company and its Executive Director never raised any issue either with regard to the validity of the show-cause notice and applicability of the extended period of limitation in any of the earlier rounds of litigation, it is too late in the day for them now to come up with a new ground. We are therefore not

inclined to examine this aspect of the matter and the case law cited by Sri T.Ramesh, learned counsel, in this regard is eschewed from consideration. The first, second and third questions of law therefore fail on this ground.

As regards the last question of law, the Adjudication Order dated 30.05.2008 clearly sets out the number of occasions the Commissioner afforded opportunities to the company and its Executive Director to name the witnesses that they wished to cross-examine. Further, the Commissioner also recorded that all the documents relied upon by the customs authorities were duly provided to them and that their request for additional documents, which were not even in the zone of consideration, could not be accepted. The stubborn insistence by the company and its Executive Director to furnish more documents as a condition precedent to giving the list of witnesses that they wished to cross-examine merely demonstrated their delaying tactics, as rightly found by the Commissioner. We therefore see no violation of the principles of natural justice. It is not open to a party to willfully negate the right of hearing given to it by not participating therein and then turn around and complain of violation of the principles of natural justice.

On the aforestated analysis, the Question 4 is answered against the appellants while Questions 1 to 3 do not arise for consideration, for the reasons already set out *supra*. The appeal therefore fails and is accordingly dismissed. Pending miscellaneous petitions shall also stand dismissed. No order as to costs.

SANJAY KUMAR, J

T.AMARNATH GOUD, J

26th JULY, 2018

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