IN THE HIGH COURT OF BOMBAY AT GOA

CUSTOM APPEAL NO.3 OF 2011

Commissioner of Customs & Central Excise
Goa Commissionerate,
Ice House, Patto Plaza,
Panaji Goa. … Appellant

Versus

M/s Twenty First Century Wire Rods Ltd.,
Plot No.D-9/1,
Madkaim Industrial Estate,
Madkaim Goa. … Respondent

WITH
CUSTOM APPEAL NO. 4 OF 2011

Commissioner of Customs & Central Excise
Goa Commissionerate,
Ice House, Patto Plaza,
Panaji Goa. … Appellant

Versus

M/s Twenty First Century Wire Rods Ltd.,
Plot No.D-9/1,
Madkaim Industrial Estate,
Madkaim Goa. … Respondent

WITH
EXCISE APPEAL NO.5 OF 2011

Commissioner of Customs & Central Excise
Goa Commissionerate,
Ice House, Patto Plaza,
Panaji Goa. … Appellant

Versus

M/s Twenty First Century Wire Rods Ltd.,
Plot No.D-9/1,
Madkaim Industrial Estate,
Madkaim Goa. … Respondent

WITH
EXCISE APPEAL NO. 6 OF 2011

Commissioner of Customs & Central Excise
Goa Commissionerate,
Ice House, Patto Plaza,
Panaji Goa. … Appellant

Versus

M/s Twenty First Century Wire Rods Ltd.,
Plot No.D-9/1,
Madkaim Industrial Estate,
Madkaim Goa. … Respondent

WITH
EXCISE APPEAL NO. 7 OF 2011

Commissioner of Customs & Central Excise
Goa Commissionerate,
Ice House, Patto Plaza,
Panaji Goa. … Appellant

Versus

M/s Twenty First Century Wire Rods Ltd.,
Plot No.D-9/1,
Madkaim Industrial Estate,
Madkaim Goa. … Respondent

Ms. Asha Desai, Senior Standing Counsel for the Appellant.
None for the Respondent.

WITH
CUSTOM APPEAL NO.1 OF 2011

M/s. Twenty First Century Wire Rods Ltd.,
Plot No.D/9-1, Madkaim Industrial Estate,
Madkaim Goa. … Appellant

Versus

1. Union of India,
   represented by Joint Secretary,
   Ministry of Law and Justice,
   North Block,
   New Delhi
2. Customs, Excise & Service Tax
   Appellate Tribunal, West Zonal Bench,34,
   Jai Centre, P. D'Mello Road,
   Mumbai – 400 009.
3. The Commissioner of Customs
   ICE House, EDC Complex,
   Patto Plaza, Panaji Goa. 403 001. …Respondents

WITH
CUSTOM APPEAL NO. 2 OF 2011

M/s. Twenty First Century Wire Rods Ltd.,
Plot No.D/9-1, Madkaim Industrial Estate,
Madkaim Goa. … Appellant

Versus

1. Union of India,
   represented by Joint Secretary,
   Ministry of Law and Justice,
   North Block,
   New Delhi - 110002

2. Customs, Excise & Service Tax
   Appellate Tribunal, West Zonal Bench,34,
   Jai Centre, P. D'Mello Road,
   Mumbai – 400 009.
3. The Commissioner of Customs
   ICE House, EDC Complex,
   Patto Plaza, Panaji Goa. 403 001. …Respondents

WITH
EXCISE APPEAL NO.2 OF 2011

M/s. Twenty First Century Wire Rods Ltd.,
Plot No.D/9-1, Madkaim Industrial Estate,
Madkaim Goa. …Appellant

Versus

1. Union of India,
   represented by Secretary,
   Ministry of Law and Justice,
   North Block,
   New Delhi
2. Customs, Excise & Service Tax
   Appellate Tribunal, West Zonal Bench,34,
   Jai Centre, P. D'Mello Road,
   Mumbai – 400 009.
3. The Commissioner of Central Excise,
   ICE House, EDC Complex,
   Patto Plaza, Panaji Goa. 403 001. …Respondents

WITH
EXCISE APPEAL NO. 3 OF 2011

M/s. Twenty First Century Wire Rods Ltd.,
Plot No.D/9-1, Madkaim Industrial Estate,
Madkaim Goa. …Appellant

Versus

1. Union of India,
   represented by Secretary,
   Ministry of Law and Justice,
   North Block,
   New Delhi
2. Customs, Excise & Service Tax
   Appellate Tribunal, West Zonal Bench,34,
   Jai Centre, P. D'Mello Road,
   Mumbai – 400 009.
3. The Commissioner of Central Excise,
   ICE House, EDC Complex,
   Patto Plaza, Panaji Goa. 403 001. …Respondents

WITH

EXCISE APPEAL NO. 4 OF 2011

M/s. Twenty First Century Wire Rods Ltd.,
Plot No.D/9-1, Madkaim Industrial Estate,
Madkaim Goa. …Appellant

Versus

1. Union of India,
   represented by Joint Secretary,
   Ministry of Law and Justice,
   North Block,
   New Delhi - 110002
2. Customs, Excise & Service Tax
   Appellate Tribunal, West Zonal Bench,34,
   Jai Centre, P. D'Mello Road,
   Mumbai – 400 009.
3. The Commissioner of Central Excise,
   ICE House, EDC Complex,
   Patto Plaza, Panaji Goa. 403 001. …Respondents

WITH
EXCISE APPEAL NO. 3 OF 2013

M/s. Twenty First Century Wire Rods Ltd.,
Plot No.D/9-1, Madkaim Industrial Estate,
Madkaim Goa. ...Appellant

Versus

The Commissioner of Central Excise,
ICE House, EDC Complex,
Patto Plaza, Panaji Goa. 403 001. ...Respondent

None for the Appellant.
Ms. Asha Desai, Senior Standing Counsel for the Respondents/Commissioner of Customs & Central Excise.

Coram : M.S. Sonak &
Nutan D. Sardessai, JJ.

Date : 22nd August, 2019

__Oral Judgment__ (Per M. S. Sonak, J)

Heard Ms. Asha Desai, learned Senior Standing Counsel for the Commissioner of Customs & Central Excise in all these matters. On behalf of Twenty First Century Wire Rods Ltd., there is no appearance despite of notices as well as grant of opportunities. Accordingly, we proceed to dispose of this batch of matters finally.

2. The Custom Appeal Nos. 3 of 2011, 4 of 2011 and Excise Appeal Nos. 5 of 2011, 6 of 2011 and 7 of 2011 have been instituted by the Commissioner of Customs and Central Excise (collectively referred to as 'the Commissioner') to impugn the common judgment and

order dated 30th November, 2010 made by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) in the appeals instituted *inter alia* by Twenty First Century Wire Rods Ltd., (Assessee) to question the orders made by the Adjudicating Authority under the provisions of the Customs Act, 1962 and the Central Excise Act, 1944. It is the contention of the Commissioner that the CESTAT was not justified in observing that there was failure of natural justice before the Adjudicating Authority and on that ground remanding the matter to the Adjudicating Authority.

3. The Custom Appeal Nos.1 of 2011, 2 of 2011 and Excise Appeal Nos.2 of 2011, 3 of 2011, 3 of 2013 and 4 of 2011 have been instituted by the Assessee again, to question the common Judgment and Order dated 30th November, 2010 made by the CESTAT to the extent this common Judgment and Order whilst setting aside the order of the Adjudicating Authority and remanding the matter to the Adjudicating Authority for fresh consideration, directs retention of pre-deposit amount with the CESTAT.

4. Accordingly, it is only appropriate that both these set of appeals, which in any case were tagged together, are taken up for consideration and disposed of by a common judgment and order.

5. The record reveals that in these appeals, the Assessee had

initially appeared through Advocates. The Advocates have since withdrawn their appearance by issuing notices to the Assessee. This Court also adjourned the matters from time to time with a view to offer opportunity to the Assessee to appear in these matters. Such orders were made as late as on 12th June, 2019 as well. Despite all this, the Assessee, has chosen not to appear in these matters. Since, the matters relate to the years 2011 to 2013, it is not possible for us to keep on adjourning these matters any further.

6. Ms. Desai, learned Standing counsel for the Commissioner submits that in this case there was absolutely no violation of principles of natural justice or fair play warranting any interference with the orders made by the Adjudicating Authority and consequent remand to the Adjudicating Authority. She points out that the CESTAT in its impugned judgment and order has in fact acknowledged that the Adjudicating Authority had made extensive examination and further, the Assessees were only interested in delaying the adjudication proceedings. She submits that CESTAT after making adverse observations regard the conduct of the Assessee, clearly exceeded jurisdiction in ordering the remand on specious plea that in one of the matters, on one occasion, an adjournment was incorrectly denied. She submits that even the issue of credit entries allegedly not tallying in RG 23 register, is held by the CESTAT itself as some minor deviation. Therefore, no remand was at all warranted in the facts and circumstances of the present case. She relies

on the decision in ***Dharampal Satyapal Ltd. V/s Deputy Commissioner of Central Excise, Gauhati and others,***[1]***.*** She also relies on the ***State Bank of Patiala and others Vs S. K. Sharma***[2]***,*** and ***Natwar Singh Vs Director of Enforcement and Another,***[3] to submit that there is nothing like technical infringement of rules of natural justice and the party has to plead and establish the prejudice. For all these reasons, Ms. Desai submits that the appeals instituted by the Commissioner are liable to be allowed and the matter be remanded to the CESTAT for fresh adjudication, since, the CESTAT has not at all adverted to the merits of the rival contentions before it.

7. Since, as noted earlier the Assessees are not present, we have, ourselves examined the challenges raised by the Assessees in the appeals instituted by them. The only challenge raised by the Assessees is that once the CESTAT set aside the orders of the Adjudicating Authority on the ground of failure of natural justice and remands the matter to the Adjudicating Authority for fresh consideration, the CESTAT, ceased to have any jurisdiction to direct the retention of the pre-deposit amount. The Assessees contend that in such a situation, the CESTAT had no option but to order the refund of the pre-deposit amount. The Assessees, therefore, contend that the part of the impugned judgment and order of the CESTAT directing the retention of the pre-deposit amount is in

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1 2015 LawSuit (SC) 518

2 (1996) 3 SCC 364

3(2010)13 SCC 255

excess of jurisdiction and therefore, warrants interference.

8. The appeals instituted by the Commissioner were admitted on the following substantial questions of law :-

> *A) When the Tribunal arrived at the conclusion that the Respondent had been granted hearing before passing the Order by the Commissioner, whether any direction for remand could have been made ?*
>
> *B) When the Tribunal notes that the adjudication order does not expressly refer to the credit entry in RG 23 register and tallying of the same with the amounts figuring in the related invoices on the basis of which Central Excise demand have been made, is specifically held by CESTAT to be a minor deviation the adjudication order. Whether this could form a ground for refund ?*
>
> *C) When the Tribunal has consistently come to the conclusion that attempts were made to derail the adjudication proceedings by various modus operandi and having recorded findings by the Tribunal that the Respondent have not come out with clean hands, whether any indulgence could have been shown to the Respondent and others ?*
>
> *D) Whether remand can be directed without any justifiable and legally tangible reasons ?*
>
> *E) Whether the direction of remand is illegal and perverse?*

9. Further, most of the appeals instituted by the Assessees, were admitted by order dated 9th August, 2011 on the following substantial questions of law :-

> *A) Whether the Tribunal erred in ordering predeposit under Section 129E of the Customs Act, 1962 when the Appeal*

itself was allowed by remanding the matter to the original adjudicating authority.

B) Whether the Tribunal erred in directing predeposit under Section 129E of the Customs Act 1962 after being satisfied that the order suffers from violation of principles of natural justice and consequently liable to be set aside and as such demand confirmed against the Appellant did not survive.

C) Whether the findings of the Tribunal recorded in para 19 of its order that there was no argument by any of the parties against the findings of the Adjudicating Commissioner pertaining to Customs duty exemption is 'perverse' without considering any one of the Grounds in the Customs Appeal filed by the Appellants before the Tribunal.

D) Whether the Tribunal order is 'perverse' and without application of mind for recording a finding that Appellants followed dilatory tactics to avoid consequences of adjudication.

E) Whether the Tribunal erred in limiting the scope of remand for granting a mere hearing to the Appellants as the Appellants had also pleaded violation of natural justice on the ground of denial of permission for cross examination of various witnesses.

10. According to us, the first substantial question of law which arises in these appeals is whether in the facts and circumstances of the present case, the CESTAT, was justified in concluding that there was any failure of natural justice so as to warrant setting aside of the orders of Adjudicating Authority and consequent remand to the Adjudicating Authority for fresh adjudication ?

11. If the aforesaid substantial question of law is to be answered against the Commissioner, only then the second substantial question of law which would arise in the appeals instituted by the Assessees would be whether the CESTAT had jurisdiction and in any case was justified in ordering the retention of the pre-deposit amount after setting aside the order of the Adjudicating Authority and remanding the matter to the Adjudicating Authority for fresh decision ?

12. On the first issue, we find that the CESTAT in paragraph 14 of its impugned judgment and order has recorded that the order of the Adjudicating Authority demonstrate that it has made an extensive examination of the case in hand and examined every material fact with the evidence gathered as well as the statements recorded in the course of investigation. The CESTAT has further recorded that the Adjudicating Authority after granting fair opportunity of hearing to the parties, came to the conclusion that not only there was violation of the provisions of the Customs Act, 1962 but further there was violation of the Central Excise Act, 1944.

13. The CESTAT, in paragraph 15 of the common impugned judgment and order further noted that some allegations of bias were made by the Assessees against the Adjudicating Authority however, such allegations were examined and found to be baseless. The CESTAT has noted that even the Assessees did not pursue these allegations of bias any

further. The CESTAT has even made observation as regards the conduct of the Assessees and the consequent loss of revenue to the Customs and Excise Authorities. After all this, however, the CESTAT has chosen to set aside the orders of the Adjudicating Authority and remand the matter for fresh adjudication.

14. The entire discussion on the issue of remand is contained in paragraph 19 of the common judgment and order and therefore, we deem it appropriate to reproduce the relevant portion from the same :

> "*19. On the aforesaid backdrop, we have carefully examined the rival contentions. The case involves fraudulent use of the customs duty exemption by diverting the impugned goods imported availing concessional rate of duty which have not been put to the required use. There is no argument against this finding of the adjudicating Commissioner by any of the parties. In such a case, even if the case required to be remanded for consideration by the adjudicating authority, there is ample justification to put the appellants to some amount of pre-deposit since a huge amount of public revenue has been lost and there is already a delay in finalising the case.* ***Shri Rawal, learned Senior Advocate, in respect of whose clients we find lapse on the part of the adjudicating Commissioner not granting adjournment and fresh date of hearing, has been fair to offer pre-deposit of about Rs.8 lakhs in addition to the deposit of Rs.12 lakhs already made to protect interest of Revenue. In respect of other appellants represented by other advocates, we find that they have been granted hearing before passing the impugned order. But the adjudication order does not expressly refer to the credit entries in the RG 23 register and tallying of the same with the amounts figuring in the related invoices on the***

> ***basis of which Central Excise duty demand have been made. This requires to be cured by the adjudicating authority. But such minor deviation in the adjudication order does not make that fatal nor require full waiver of the pre-deposit amount on the face of fraudulent transactions leading to loss of customs duty and wrong availment of CENVAT credit which have not been disputed.*** *Thus, while we are inclined to remand the appeals for fresh decision by the adjudicating Commissioner, we are of the view that some amount of pre-deposit should be insisted upon to secure the government revenue and also to ensure cooperation of all the appellants to ensure fresh adjudication at an early date. Our view for directing partial pre-deposit find support from the decision of the Hon'ble Punjab & Haryana High Court in the case of Shiv Sewa Sadan Vs. CESTAT, Delhi, 2010(254) ELT 249 (P&H) which reads as under : ...."*
>
> *(Emphasis supplied)*

15. From the aforesaid, it is apparent that the CESTAT has chosen to set aside the orders of the Adjudicating Authority and order a remand to the Adjudicating Authority for fresh consideration, on the following two grounds :-

> *(a) that clients to whom Shri Rawal, learned Senior Advocate who was appearing in the matter, was not granted adjournment and fresh date of hearing;*
> *(b) that various orders do not expressly refer to the credit entries in RG 23 register and tally the same with the amounts figuring in the related invoices on the basis of which demand came to be made.*

16. Apart from the aforesaid two grounds, at least we do not find any other ground in the common judgment and order which

prompted the CESTAT to set aside the orders of the Adjudicating Authority and order remand for fresh consideration.

17. According to us, both the aforesaid grounds were by no means good or sufficient grounds to set aside the orders of the Adjudicating Authority and order remand for fresh adjudication. The remand orders are not to be made in such a casual or perfunctory manner as has been done in the present case. Besides, it is settled position in law that the grounds relating to breach of principles of natural justice and fair play have to be precise and further, there is a requirement that the parties plead and demonstrate the consequent prejudice. All these aspects have escaped by the CESTAT while ordering the remand.

18. There is no clarity in the impugned judgment and order as to the date on which the adjournment was applied for and the same was declined to Mr. Rawal's clients. There is no clarity as to whether this issue of adjournment applied to all the appeals before the CESTAT. Ms. Desai, learned counsel for the Commissioner submits that such a ground clearly did not apply to all the appeals pending before the CESTAT. In any case, mere refusal of an adjournment in proceedings, which were spread over several dates, according to us, will not amount to breach of principles of natural justice and fair play, particularly, when the party concerned has failed to plead and establish any prejudice. Besides, the

CESTAT has even made observation with regard to the conduct of the Assessees and observed that they were bent upon delaying the adjudication proceedings. The CESTAT has observed that in other cases proper hearing was given. Construed from this context, we are satisfied that the ground of failure of natural justice was really not made out by the Assessees and the CESTAT was not justified in interfering with the orders of the Adjudicating Authority on the ground of failure of natural justice and thereafter remanding the matter to the Adjudicating Authority for fresh consideration.

19. In ***Dharampal Satyapal Ltd***. (supra), the Hon'ble Apex Court has held that the principles of natural justice cannot be applied in a straight jacket formula. Further, it is for the party which complains of failure of justice to demonstrate the consequent prejudice. This decision also holds that where the Court/Tribunal came to the conclusion that non supply of the inquiry report in disciplinary proceedings would have made no difference to the ultimate findings and the punishment given, the Court/Tribunal should not interfere with the order of punishment or mechanically set aside the order of punishment on the ground that the report was not furnished.

20. In ***State Bank of Patiala*** (supra), the Hon'ble Apex Court has held that while applying the rule of *audi alteram partem,* the Court/Tribunal/Authority should always bear in mind the ultimate and

overriding objective underlying the said rule, viz., to ensure a fair hearing and to ensure that there is no failure of justice. This objective which should guide them in applying the rule to varying situations which arise before them. There may be situations where the interests of State or public interest may call for a curtailing of the rule of *audi alteram partem*. In such situations, the Court may have to balance public/State interest with the requirement of natural justice and arrive at an appropriate decision. The Apex Court has further observed that in case of violation of a procedural provision generally meant for affording a reasonable and adequate opportunity to the parties, it cannot be said that any and every violation vitiates enquiry held or orders passed. The Apex Court has made distinction between cases to cases where no notices were served or no opportunity was granted and cases where no adequate notice or adequate opportunity came to be granted to the parties complaining about failure of natural justice. In the later cases, the Hon'ble Apex Court has held that the party has to plead and establish the consequent prejudice.

21. In ***Natwar Singh*** (supra), the Hon'ble Apex Court has held that there is no such thing as a mere technical infringement of natural justice. The party complaining of failure of natural justice has to plead and establish the consequent prejudice.

22. According to us, the CESTAT, has not followed the

aforesaid principles which were clearly attracted to the facts and circumstances of the present case. Therefore, setting aside the orders of the Adjudicating Authority and consequent remand on the first ground that in one of the matters, on one of the dates, no adjournment was granted to one of the parties, is in our opinion, is not at all a good ground to set aside the orders of the Adjudicating Authority and to remand the matter for fresh consideration.

23. The second ground relates to credit entries in RG 23 register and its tallying with the amounts figuring in the related invoices. In this regard the CESTAT has itself observed that this is a minor deviation in the adjudication order which does not render that order fatal or even require full waiver of the pre-deposit amount on the face of fraudulent transactions leading to loss of customs duty and wrong availment of CENVAT credit which have not been disputed. If the CESTAT has itself recorded a finding that non tallying of entries, is at the highest, only some minor deviation which does not affect the validity of the orders of the Adjudicating Authority, then obviously, there was no reason to set aside the orders of the Adjudicating Authority and order a remand for fresh consideration. The remand cannot be ordered in such a casual manner, particularly, in a matter in which the CESTAT itself records that the Adjudicating Authority has made extensive examination and after granting fair opportunity of hearing to the parties came to the conclusion that there was violation of provisions of the Customs Act,

1962 and Central Excise Act, 1944.

24. Accordingly, even the second reason/ground cited by the CESTAT according to us is quite unsustainable.

25. Since, the order of remand was based upon only the aforesaid two grounds and since, we have found that both these grounds were not at all germane or even sufficient for ordering a remand, we set aside the impugned judgment and order of the CESTAT and restore the appeals instituted by the Assessees to the CESTAT for fresh evaluation in accordance with law and on their own merits. This course is necessary, because the CESTAT has not at all examined the appeals on merits.

26. Since, we answer the first substantial question of law in the appeals instituted by the Commissioner, in favour of the Commissioner, and against the Assessees, there is really no necessity to decide the second substantial question of law which arises in the appeals instituted by the Assessees.

27. However, we may note that the CESTAT, in support of its direction for retention of pre-deposit amount had placed reliance upon a decision of the Punjab and Haryana High Court in ***Shiv Sewa Sadan Vs CESTAT New Delhi***,[4]. This decision, has been subsequently approved and followed by the Allahabad High Court in the case of ***Vah***

4 2010(254) ELT 249

Auto Pvt. Ltd. Vs Commissioner of Central Excise & Service Tax,[5] the Gujarat High Court in ***Avaya Global Connect Ltd. Now AGC Networks Ltd., and others Vs Union of India and others***,[6] and ***Waghbakriwala Rayons Vs Union of India***,[7]. Thus, even otherwise there was really no case made out by the Assessees to interfere with the direction of the CESTAT ordering retention of the pre-deposit amount in the peculiar facts and circumstances of the present case.

28. Accordingly, for the aforesaid reasons, we allow the Custom Appeal Nos.3 and 4 of 2011 and Excise Appeal Nos.5, 6 and 7 of 2011 instituted by the Commissioner, set aside the impugned common judgment and order dated 30th November, 2010 made by the CESTAT and restore the appeals instituted by the Assessees before the CESTAT for fresh consideration in accordance with law and on their own merits, adverting to no doubt to the observations in this common judgment and order. The contentions of all the parties on merits of the adjudication orders are expressly kept open for evaluation by the CESTAT. We request the CESTAT to dispose of all these appeals as expeditiously as possible and in any case within a period of six months from the date on which the parties file authenticated copy of this judgment and order.

29. Ms. Desai, learned Standing Counsel for the Commissioner

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5 2014 LawSuit (All) 318

6 2013 LawSuit (Guj) 705

7 2016 LawSuit (Guj) 1734.

states that the authenticated copy of this judgment and order will be placed before the CESTAT latest by 16th September, 2019.

30. In so far as the Custom Appeal Nos. 1 of 2011, 2 of 2011 and Excise Appeal Nos.2 of 2011, 3 of 2011, 4 of 2011 and 3 of 2013 instituted by the Assessees are concerned, the same are dismissed.

31. In the peculiar facts and circumstances of the present case, there shall be no order as to costs.

32. All concerned to act on the basis of the authenticated copy of this judgment and order.

Nutan D. Sardessai, J **M.S. Sonak, J**

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