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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CUSTOMS APPEAL NO. 38 OF 2019
along with
CUSTOMS APPEAL NO. 39 OF 2019

Ramanlal Jagannath and Sons … Appellant

V/s.

Commissioner of Customs(Import-II) ... Respondent

Mr. Sriram Sridharan a/w. Akhilesh Kangsia for the Appellant
Mr. J.B. Mishra for the Respondent

CORAM : NITIN JAMDAR &
M.S. KARNIK, JJ.

DATE : 16 JANUARY 2020.

P.C. **:-**

Heard learned Counsel for the parties.

2. The Appellant has challenged the common order passed by the Customs, Excise & Service Tax Appellate Tribunal (CESTAT) in Appeal Nos. 446 and 447 of 2012 dated 7 March 2019. By the impugned order the Tribunal has remanded the matters to the Commissioner (Appeals) with certain observations.

3. The Appellant has framed the following questions as substantial questions of law :-

> *"(i) Whether in the facts and circumstances of the case, the Final Order dated 07.03.2019 passed by the Appellate Tribunal is correct and proper in law ?*
>
> *(ii) Whether in the facts and circumstances of the case, the Appellate Tribunal in Final Order dated 07.03.2019 has erred by not allowing the appeal of the Appellant, in toto, instead of remanding it, in spite of holding that the Commissioner (Appeals) has travelled beyond the scope of the demand notice dated 21.12.2010 and adjudication order dated 14.07.2017?"*

4. The proceedings against the Appellant commenced by an issuance of a show cause notice (Commissioner of Customs, Nhava-Sheva) on 21 December 2010. It was stated that it appears that the customs duty amounting to Rs. (482364+478475+459379+477841)=18,68,062+Interest till date of payment, which was short levied in respect of the consignment in question. Reasons for short levy was given that goods imported-Kapok, other vegetable fibers, should have been assessed under Entry 53.05 when the Appellant had claimed same assessment under 52.01 which was not correct and therefore Section 28 of Customs Act was invoked. An order came to be passed by the Assistant Commissioner of Customs declaring the classification to be under 53.05 and not under 52.01 as claimed by the Appellant and the demand raised by the show cause notice was confirmed.

5. The Appellant filed the Appeals before the Commissioner of Customs (Appeals). The Commissioner of Customs (Appeals) recorded a finding that Kapok has not undergone any treatment indicating that their use as textile material and cannot be classified under heading 53.05. The Commissioner (Appeals) also did not accept the contention of the Appellant that the same would fall under heading 52.0.1 Instead the Commissioner (Appeals) found that the goods in question should have been under Entry 14.04 and passed an order on 29.02.2012.

6. The Appellant therefore filed the Appeals before the CESTAT. The Appellant also submitted the written submissions. The Tribunal, by the impugned order, held that the Commissioner (Appeals) was required to ascertain as to whether Kapok was used primarily for manufacturing of textile before rendering any finding. The Tribunal accepted the contention of the Appellant that the Commissioner (Appeals) should have confined the case for determination of issue before it outlined in the show cause, remanded the proceedings to the Commissioner (Appeals).

7. The learned Counsel for the Appellant submitted that having rendered a finding that the Commissioner (Appeals) had travelled beyond the show cause notice, the show cause notice has itself come to an end and the proceedings ought not to have been remanded to the Commissioner (Appeals). It was contended that

there is no finding by the Tribunal on the observations of the Commissioner (Appeals) that the goods could not be classified under heading 53.05 neither any appeal is filed by the Respondents against this observation. The learned Counsel has submitted that even assuming that the Commissioner (Appeals) could look into the third entry i.e. 14.04 under the Second proviso to Section 128A of the Customs Act, such exercise ought to have been preceded by a notice and that too which is specified under Section 28 of the Act. The learned Counsel for the Respondents on the other hand submitted that the order is only of remand. There is no finding against the Appellant in this order and all the contentions that the Appellant wishes to raise in these Appeals can be urged before the Commissioner (Appeals).

8. Firstly there is no finding in the order of the Tribunal as to whether the observations of the Commissioner (Appeals) that Kapok could not be classified under heading 53.05, are correct or not. No appeal was filed by the Respondents on this count. The question would now remain whether the Kapok could be classified under heading 14.04. The argument that the Commissioner (Appeals) in the appeal can never look into a different entry is belied by the proviso to Section 128A of the Act. However, a procedure is laid down in the said proviso. A prior notice and time limit is contemplated. The contention of the Appellant that such a notice,

even if it is issued, was beyond time even on the date the Commissioner passed the order can be made by the Appellant before the Commissioner (Appeals) in the remanded proceedings. Therefore, the learned Counsel for the Respondent is right in contending that a question of law as proposed does not arise from the impugned order.

9. The Appeals are disposed of.

M.S. KARNIK, J. **NITIN JAMDAR, J.**

Jyoti P. Pawar

Digitally signed by Jyoti P. Pawar
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