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***IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 28th January, 2020

+ CEAC 19/2019

BALAJI METALS

..... Petitioner

Through: Mr. Vakul Vardhan Gautam and Ms.
Vijay Lakshmi, Advs.

versus

COMMISSIONER OF GST (EAST) DELHI. ... Respondent

Through: Mr. Amit Bansal, SSC with Mr. Aman
Rewaria and Ms. Vipasha Mishra,
Advs.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGEMENT

28.01.2020

D.N. PATEL, CHIEF JUSTICE (ORAL)

CEAC No. 19/2019

1. This appeal has been preferred under section 35G of Central Excise Act, 1944 (hereinafter “the Act”) by the Appellant – M/s. Balaji Metals through its proprietor, Shri Naresh Kumar Gupta against the judgement and final order dated 26th October 2018 passed by the Customs, Excise & Service Tax Appellate Tribunal, Principal Bench, New Delhi (hereinafter referred to as “CESTAT”) in Central Excise Appeal No. E-51133/2017 (DB), whereby

CESTAT has dismissed the appeal of the Appellant against the Order-in-Original No.38/SS/CE/D-11/2016-17 dated 31st March 2017 passed by the Commissioner of Central Excise, Delhi-II which was issued in pursuance of a Show Cause Notice on 4th April, 2013 to the Appellant on clandestine removal of copper wires.

2. Being aggrieved and dissatisfied by the judgment and order of CESTAT, New Delhi, this Central Excise Appeal Case has been preferred.

3. The Appellant has averred the following substantial questions of law:

“(i) Whether the purported searches conducted at the factory premises of the Appellant and the residential premises of the proprietor of the Appellant conducted in violation of provisions of section 18 of Central Excise Act, 1944 read with section 100 (4) of Cr.P.C, as these were conducted in the absence of Panchas, are legal and valid?

(ii) Whether the documents purportedly shown to have been recovered at the time of vexatious searches conducted in the absence of Panchas and in violation of provisions of Section 18 of Central Excise Act read with Section 100 of Cr.P.C., be relied upon against the Appellant for confirming the demand of Central Excise Duty?

(iii) Whether the demand of Central Excise Duty can be confirmed against the Appellant, merely relying upon the statement dated 08.08.2011 of the proprietor of the Appellant recorded under section 14 of the Central Excise Act, 1944, which was dictated statement by the officers of Central Excise and written by his brother, when the proprietor of the Appellant was unconscious and was not in position to respond to the questions of the officers of Central Excise, which was not his voluntary statement and was recorded under threat and coercion, which was retracted by the Appellant on first available opportunity?

(iv) Whether the reliance can be placed upon a chart, for confirming the demand of Central Excise duty of Rs.4,46,93,175/- and imposition of penalty of equal amount against the Appellant, in the impugned Order-in-Original dated 31.03.2017, which was fraudulently placed in the impugned Show-Cause-Notice by the revenue, as what was shown to the Appellant at the time of recording his statement on 14.11.2011 was a different chart containing 7 to 8 columns, which is evident from:

- (a) The contents of impugned Show-Cause-Notice placed at page Nos.527 of the paper-book of the instant appeal;
- (b) Statement dated 14.11.2011 of the proprietor of the Appellant recorded by Shri Rajbir Singh, Superintendent of Central Excise, placed in the paper-book of the instant appeal;
- (c) Record of cross examination of Superintendent of Central Excise Shri Rajbir Singli Gahlot (who recorded the statement of Proprietor of the Appellant on 14.11.2011) dated 31.01.2017 before the Ld. Respondent placed in the instant appeal;
- (d) The statement dated 14.11.2011 of the proprietor of the Appellant, which reveals that all the pages of, 7 to 8 columns chart, were signed by the proprietor of the Appellant after recording the statement during the course of investigation, whereas what has been relied in the impugned Show-Cause-Notice as Annexure-I, is chart containing 15 columns having 111 pages and none of the pages contained signature of the proprietor of the Appellant, in the light of ratio laid down by the Hon'ble Supreme Court of India in case of Meghmala &Ors. Vs. G. Narsimha Reddy (2010) 8 SCC 383, wherein, the Hon'ble Supreme Court of India has held that wherever an order is obtained by playing fraud before the competent authority such order cannot be sustained in the eyes of law, fraud avoids all judicial acts?
- (v) Whether the demand of Central Excise duty against the Appellant can be confirmed merely relying upon a retracted statement of the proprietor of the Appellant which was recorded under threat of arrest and coercion, in the absence of evidences such as, whether the Appellant has capacity to manufacture alleged quantity, proof of purchase of inputs, proof of transportation of inputs upto the factory premises of the Appellant, proof of payment of consideration to the alleged supplier of inputs, proof of manufacturing of alleged goods, proof of removal and transportation of alleged goods from the factory premises of the Appellant to the alleged buyer, proof of payment of consideration amount by the alleged buyer to the Appellant and corroboration by the alleged supplier of inputs and buyer of finished goods, contrary to the settled law?
- (vi) Whether the Ld. Tribunal has committed an error in upholding the demand of Rs.4,46,93,175/- confirmed by the Ld. Commissioner, relying upon seizure of finished goods valued at Rs.51,500/- and raw material valued at Rs.3,27,960/- at the premises of a third person i.e. M/s Reliance Cable Industries, the documents recovered from the third person's premises and statement of its proprietor were not confronted with the proprietor of the Appellant at the time of investigation?

(vii) Whether the demand of Central Excise Duty can be confirmed against the Appellant and penalty be imposed upon the Appellant, relying upon the documents allegedly recovered during the course of vexatious search conducted and where the revenue could not produce the purported Panchas and department officers, for cross examination before the Adjudicating Authority i.e. the Respondent that too, when the Adjudicating Authority i.e. Respondent himself has made observation during the course of proceedings of personal hearing on 04.01.2017, that *“if department officers and Panch witnesses does not turn on the next date, the evidences given by them, will be stuck off the record?”*

4. At this juncture a brief narration of facts is necessary.

Factual matrix

5. The Appellant Firm is a sole proprietorship, situated at CN.841 (25/25), Gali No. 16, Vishwas Nagar, Shahdara, Delhi-32, wherein Shri Naresh Kumar is the sole proprietor of the firm. The Appellant firm is engaged in the manufacturing of Bare Copper Wire by reducing the thickness of copper wire/rods and coating the bare copper wire with chemical, viz., Cu-56 and rolling or reeling them.

6. On 8th November 2011, on receipt of intelligence that the Appellant firm was engaged in the clandestine removal of bare copper wire to M/s. Reliance Cable Industries, 519/1, Plot No.33, Sansar Compound, GT Road, Shahdara, New Delhi and others, without payment of Central Excise duty, pursuant to a search warrant issued by the Additional Commissioner (Anti-Evasion), Central Excise, Delhi-II, a search on the factory and residential premises of the Appellant firm and its proprietor respectively was conducted by the officers of Central Excise, Anti-Evasion Branch, Delhi-II.

7. Search was also conducted on the factory and residential premises of Reliance Cable Industries and its proprietor, Sh. Lalit Jain respectively on 8th November 2011.

8. During the search, the officers, on the reasonable belief that the goods were not purchased on proper bills and due to the inability of the proprietor of the Appellant firm to show the proper accounts for goods lying unaccounted in the factory premises of the Appellant firm, seized finished goods, worth Rs. 9,27,180/- and detained raw materials worth Rs. 21,26,780/- from the factory premises. Along with the goods, the officers recovered documents in the form of Kachi Parchis, gutkhas/books evidencing the purchase of raw materials, production, clearance and sale of goods, from the both factory premises and the residential premises of the Appellant Firm and the proprietor of the said firm respectively.

9. The searches conducted at factory and residential premises of M/s. Reliance Cable Industries and its proprietor, led to the seizure of finished goods worth Rs. 51,500 and raw materials valued at Rs. 3,27,960/- and the recovery of certain documents which were incriminatory in nature.

10. The statement of proprietor of the Appellant firm was recorded on 8th November 2011, 14th November 2011, 30th May 2012, 5th December 2012 and 12th March 2013 under Section 14 of the Act.

11. Based on the investigation conducted and statements of various witnesses including the proprietor of the Appellant firm, a Show Cause Notice (SCN) dated 4th April 2013 was issued by the Commissioner, Central

Excise, wherein, a demand of Rs. 4,46,93,75 under Section 11-A of the Central Excise Act, 1944 along with interest under Section 11AA of the Act and proportionate penalty under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC of the Act was raised.

12. The Appellant, thereafter, allegedly preferred multiple requests for documents relied on by the authorities from July 2013 to March 2014. The documents were supplied to the Appellant on 25th June 2014 based on which the Appellant filed an interim reply on 29th August 2014.

13. The request of the Appellant for cross examination of the four panch witnesses, departmental officers who had conducted the search of the factory and residential premises of the Appellant, and Sh. Ashok Aggarwal of M/s. Surya Transport was rejected by the Commissioner, Central Excise, Delhi-II on 15th October 2014.

14. The Appellant, thereafter, filed Writ Petition No. 854/2014 in the High Court of Delhi which was disposed of on 15th February 2016 wherein the Appellant was directed to file its final reply to the Show Cause Notice within a period of four weeks of the passing of the Order and in any event not later than 14th March 2016. Moreover, the Appellant was directed to file the list of witnesses it seeks to cross-examine, upon which the adjudicating authority would consider the request and as per law fix a time bound schedule for cross examination.

15. Pursuant to the aforementioned order, the Appellant filed the written reply on 14th March 2016. Moreover, based on the directions passed, the

Commissioner fixed cross examination of four panchnama witnesses, departmental officers and Mr. Ashok Aggarwal, Surya Transport on 05th December 2016. Since some of the panch witnesses and departmental officers failed to turn up on the days on which the cross examination was fixed, the Commissioner gave the last opportunity to departmental officers and panch witnesses on 11th January 2017 failing which their evidence would be struck from the record.

16. Although the cross examination of one of the Panch witnesses was conducted, the other three Panchnama witnesses failed to appear despite several letters dated 22th November 2016, 6th December 2016 & 4th January 2017. At this point, considering the admissions made by the proprietor of the Appellant firm, the Commissioner, Central Excise, Delhi-II with the approval of the Counsel for the Appellant proceeded with the case without waiting for the cross examination of the other three Panch witnesses.

17. The Commissioner, Central Excise, Delhi- II in its Order in Original dated 31st March 2017, noting the following:

- a. based on the unaccounted material along with the documents evidenced clandestine removal of the goods recovered during the search,
- b. the statements made by the Proprietor of the Appellant firm under Section 14 of the Act,
- c. unaccounted material recovered from M/s Reliance Cable Industries along with the statement of its proprietor dated 10th

August 2011 admitted the purchase of unaccounted goods from the Appellant firm,

d. and evidence of transportation of goods through M/s Surya Transport,

confirmed the demand made under SCN with the modification that the Rs. 15,00,000 deposited by the Appellant be considered to be appropriated towards the duty to be paid.

18. The Appellant challenged the same, before the CESTAT, on the grounds that the Commissioner had erroneously relied on the documents recovered during the search conducted on 8th November 2011 as the same had been conducted without the presence of the Panch witnesses and thus in sheer violation of Section 18 of the Central Excise Act, 1944 read with Section 100 of the Criminal Procedure Code, 1973. Moreover, it was contended that due to the rejection of the cross examination of the Panch witnesses along with the other departmental witness, their evidences should have been struck from the record as per Order passed by the Commissioner, Central Excise, Delhi-II.

19. The CESTAT, while dismissing the appeal, noted that the Appellant had in its statement dated 8th November 2011 admitted the recovery of the documents from the factory as well as residential premises. The retraction of the same *vide* letter 9th November 2011 was only seen as an afterthought since in the later statements, the Appellant had made similar admissions with only minor retractions. Moreover, it is pertinent to note that in the statement dated 8th November 2011, the Appellant has also admitted that the search was conducted in his presence and in the presence of the Pancha witnesses. I

20. Paragraphs 7 and 8 of the judgement of the CESTAT merits reproduction, as under,

“7. After hearing both the parties and perusing the entire record, we are of the opinion as follows:-

From the panchnama dated 08.08.2011 as prepared during the search of the factory as well as residential premises of the present Appellant, it appears that the various records in the form of loose kacha parchi, gutkas, books etc. were recovered. Admittedly, all these documents were showing clearance of bare copper wire. The plea of proprietor of Appellant as apparent from his statement that due to stiff market competition pucca record/invoices were not raised is not at all sustainable. The persons whose names were shown in the said recovered record were also being investigated. All of them including M/s Reliance Cable Industries acknowledged receiving the bare copper wire from the Appellants that too on kacchi parchies. It is also an admission as apparent from the statement of Shri Lalit Jain, proprietor of M/s Reliance Cable Industries that the transactions for such purchases even for the purchase of raw material were made in cash only. The Department is observed to have been meticulous in examining the records even of the transporters, i.e. the locally available tempos/ rickshaws and even the private vehicles to M/s Reliance Cable Industries and the other customers of the Appellant and have concluded the corroboration of alleged clandestine removal of bare copper wire by the Appellants. Even the records recovered during search in the premises of M/s Reliance Cable Industries there was apparent corroboration to the values at which the finished goods as well as the raw material was sold by the Appellant to them. Not only this, there is the admission in the statement of Shri Lalit Jain that he had been purchasing both accounted and unaccounted bare copper wire from the Appellants.

8. Though the Appellant has emphasised upon the documents as that of discharge of his VAT liability but the said documents will corroborate only the accounted removal and those documents are also absolutely insufficient for rebutting aforesaid admission of Shri Lalit Jain and admission even of the Appellant himself. There is the admission on part of the Appellant to the extent of admitting the recovery of the entire said document from his factory as well as residential premises with the acknowledgment that the documents are reflecting the sales proceeds of the bare copper wire. Though the Appellant had retracted these admissions but in the absence of any appropriate remedy of protest sought by the Appellant, the retraction cannot be ruled out to be an afterthought. The statement of the proprietor of the noticee has not been recorded once or twice but has been recorded 5 times. Even if the statement as recorded on the date of seizure, i.e. 08.08.2011 is considered to be under threat and pressure. Firstly, there is no evidence by the Appellant to that effect

secondly, there is no reason for the similar admission of the Appellant in his subsequent four statements, though with minor retractions.”

21. CESTAT dismissed the Appeal and upheld the demand of Revenue against the Appellant by relying on the kachi parchis recovered from the factory as well as the residential premises, and mainly on the statements by the proprietor of the Appellant Firm and the corroboration of the clandestine removal of goods with the records of M/s Reliance Cable Industries, transportation firm M/s Surya Transport and statements and admissions of the proprietor of Reliance Cable Industries wherein the fact of purchase of unaccounted goods from the Appellant had been admitted.

22. Moreover, on the plea of the Appellant that Commissioner had declined the opportunity to cross examine witnesses, the CESTAT noted that numerous opportunities were given to the witnesses to present themselves for cross examination and letters were issued for the same and on non-appearance, the Counsel for the Appellant had himself agreed to proceed without the cross examination, thus, it is not a case of rejection of the opportunity to cross examine. Paragraph 9 of the judgement of the CESTAT merits reproduction, as under:

“9. As far as the plea about no opportunity for cross examination of the witnesses as have been relied upon by the Department for confirming the impugned demand against the Appellant, it is observed from the record that the Appellant requested for the cross examination of three panch witnesses only. The Adjudicating Authority below served letters thrice calling three of them to appear for being cross examined but the letters either were returned undelivered and in case were delivered, the concerned the person did not turn up for the cross examination. In the said circumstances, the Counsel of Appellant himself had agreed to proceed with the case without waiting further for cross examination of these Panchas. Even before us, it is not the grievance of the Appellant that Adjudicating Authority despite the presence of the witnesses to be cross examined declined the opportunity to the Appellant. In the given circumstances, we do not find any infirmity in the order under challenge.”

Arguments canvassed

23. We have heard learned counsel, Mr. Vakul Vardhan Gautam for the Appellant and Mr. Amit Bansal, Senior Standing Counsel for the Respondent, at length.

24. The Ld. Counsel for the Appellant argued that the searches conducted at the factory and residential premises of the Appellant and proprietor of the Appellant firm were conducted in violation of Section 18 read with Section 100 of the Code of Criminal Procedure since the same were conducted in absence of Pancha witnesses which violates the statutory mandate. The Counsel, further pressed that the documents recovered from these illegal searches could not have been relied upon by the Commissioner, Central Excise to confirm the demand against the Appellant.

25. It was also contended that the statements of Pancha witnesses should have been discarded from the record of the adjudication proceedings since the Revenue had failed to bring the Pancha witnesses for cross examination. Similarly, the statements made by Mr. Ashok Aggarwal, proprietor of M/s Surya Transport were erroneously relied upon by the Commissioner in confirming the demand against the Appellant.

26. Moreover, the validity of the Statement made on 8th November 2011 was challenged as the same was contended to be dictated by the officers of the Central Excise to the brother of the Appellant when the proprietor of the Appellant firm was unconscious. The statement was alleged to be

involuntary and it was further pressed that in presence of the retraction the next day by the proprietor of the Appellant, the same could not have been relied upon in confirming the demand of the Appellant.

27. The Counsel assailed the validity of the charts relied upon by the Commissioner showing the clandestine removal of the goods since the charts shown to the Appellant during the recording of the Section 14 statements were allegedly different from the ones relied upon in the Show Cause Notice. Moreover, it was contended that the statements and evidence recovered at the third party – M/s Reliance Cable Industries should not have been relied upon since the Appellant had not been confronted with the same at the time of investigation and recording of the statements under Section 14 of the Act. Consequently, it was contended that CESTAT confirmed the demand against the Appellant based on insufficient evidence.

28. The learned counsel for the Respondent, Mr. Amit Bansal, has made a succinct two pointed submission, firstly, that the Counsel of Appellant himself had agreed to proceed with the case without waiting further for cross examination of these Panchas, as recorded in paragraph 9 of the CESTAT order and second, arising from the search and seizure conducted concurrently with the search and seizure on the premises of the Appellant, this Honourable Court in the appeal preferred by Reliance Cable Industries, had refused to interfere in the findings of the CESTAT, which was *mutatis mutandis* to the present CESTAT judgement in this appeal.

Reasons

29. The CESTAT in its order has already noted that there existed no evidence of threat or coercion on the proprietor of the Appellant firm in recording of the statement of 8th November 2011. Since, no cogent ground for the same has been adduced before us to buttress the same, a mere allegation of the same at this same is ill-conceived. Moreover, the proprietor in the subsequent statements has reiterated the same with minor retractions, and thus it would be far-fetched to hold that there had been gross duress on the proprietor of the Appellant at every instance of tendering his statements on various dates.

30. Furthermore, the counsel of Appellant before the appropriate forum, himself had agreed to proceed with the case without waiting further for cross examination of Panchas, and thus, once the adjudicatory authority had proceeded to adjudicate on such a premise, the Appellant, before us cannot invoke the ground of not cross examining the Panchas at such an appellate stage merely because the adjudication did not result in his favour.

31. In light of the observations by CESTAT, the question as to whether the searches conducted on 8th November 2011 are illegal is purely a question of fact which has been sufficiently dealt with by the CESTAT. Thus the consequent question of whether the documents recovered during the searches can be relied upon to come to a conclusion, does not present itself.

32. Moreover, in the matter of ***Reliance Cable Industries v. Commissioner of GST (East), Delhi***¹, which arises from the search and seizure conducted concurrently with search and seizure on premises of the

¹ 2019 (365) ELT 788 (Del.)

Appellant therein, this court dismissed the Appeal filed, noting that the question of law raised by the Appellant were purely factual and no interreference was merited by this court. Paragraph 10 of the judgement as reproduced as under:

“10. In the facts of this case, this Court is of the opinion that upon a total analysis of the circumstances, especially having regard to the statements made by the various parties including the third parties i.e. the sellers of the raw material, the inference drawn by the Commissioner could not have been faulted. The questions of law urged by the Appellant are purely factual. On this ground the appeals are dismissed”

33. The Appellant in the present case, has merely assailed the judgement and final order of CESTAT on facts. In view of the aforesaid facts, reasons and judicial pronouncements, since the substantial question of law being purely factual, we see no reason to entertain this appeal, and hence we find there exists no substantial question of law in this appeal.

CM Appl. No. 35317/2019 (stay)

In view of the order passed in the appeal, this application is disposed of.

CHIEF JUSTICE

C.HARI SHANKAR, J.

JANUARY 28, 2020

r.bararia __.