Diksha Rane

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 4341 OF 2021

Concast India Ltd.
having its office at 47-48,
Jollymaker Chambers-II,
Nariman Point, Mumbai-400 021. ..Petitioner

vs.

1. Union of India
(Through the Secretary,
Ministry of Law and Justice,
Department of Legal Affairs,
Branch Secretariat, Aaykar Bhavan
Annexe, 2nd floor, New Marine Lines,
Mumbai-20.

2. Commissioner of CGST and
Central Excise, Thane
4th floor, Navprabhat Chambers,
Ranade Road, Dadar West,
Mumbai-400 028.

3. Joint Commissioner of CGST
and Central Excise, Thane
5th Floor, Accel House,
Road No.22, Wagle Industrial
Estate, Thane-400604. ..Respondents

WITH
WRIT PETITION NO. 4342 OF 2021

Primetal Technologies India
Private Limited
having its office at Plot No.D-41.1,
TTC, MIDC Turbhe,
Navi Mumbai-400705. ..Petitioner

vs.

1. Union of India
(Through the Secretary,
Ministry of Law and Justice,
Department of Legal Affairs,
Branch Secretariat, Aaykar
Bhavan Annexe, 2nd floor,
New Marine Lines, Mumbai-20.

2. Commissioner of CGST
and Central Excise, Thane
4th floor, Navprabhat Chambers,
Ranade Road, Dadar West,
Mumbai -400 028.

3. Joint Commissioner of CGST
and Central Excise, Thane
5th Floor, Accel House, Road No.22,
Wagle Industrial Estate,
Thane-400604. ..Respondents

Mr. Vinay Ansurkar i/b. Mr. Kartik R. Vig for petitioners.
Mr. Dhananjay B. Deshmukh for respondents.

CORAM : DIPANKAR DATTA, CJ &
M. S. KARNIK, J.

DATE : DECEMBER 14, 2021

P.C. :

1. Taking exception to the adjudication Order-In-Original dated June 16, 2021, passed by the respondent no.3, Joint Commissioner of CGST and Central Excise, Thane Commissionarate, the petitioners have approached this Court under Article 226 of the Constitution of India. These

petitions are disposed of by a common order as the Order-in-original is common in respect of the petitioners.

2. These petitions came up for admission on September 7, 2021 when the following order came to be passed:

> "1. A common order-in-original dated June 16, 2021 (Exhibit 'A') is under challenge in these writ petitions. Although appellate remedy is available to them, the petitioners have invoked the writ jurisdiction of this Court claiming that no appeal under section 35F of the Central Excise Act, 1944 would be entertained by the Appellate Authority, unless the petitioners pre-deposit 7.5% of the penalty imposed by the impugned order. Relying on grounds (A) & (B) of the writ petitions, learned counsel for the petitioners submits that penalty could not have exceeded the due liability of the petitioners (Rs.43 lakh and odd) and, therefore, to make a pre-deposit @ 7.5% of the imposed penalty (in excess of Rs.1 crore), apart from being an onerous condition for the petitioners to satisfy to have its appeal entertained by the Appellate Authority, such imposition is without jurisdiction.
>
> 2. We call upon the respondents to file a short reply to oppose the prayers of the petitioners for admission of the writ petitions and grant of interim relief. Such affidavits be filed by September 21, 2021; rejoinder thereto, if any, may be filed by 5 days thereafter.
>
> 3. List the writ petitions on **September 28, 2021**."

3. An affidavit-in-reply on behalf of the respondents came to be filed on December 1, 2021.

4. We refer to the facts in Writ Petition No.4341 of 2021. The petitioners are private limited companies engaged in the sale of casting equipment for steel plants and steel rolling mills. Intelligence was received by the respondents that one M/s. Mathbros Engineering Pvt. Ltd. ('MEPL' for short) was engaged in manufacturing and fabrication on job

work basis for the petitioners. During the manufacturing process for the petitioners, MEPL used self-procured items/inputs as well as items/inputs received “free of cost” from the petitioners to manufacture excisable goods. Upon payment of duty on the value contracted between the petitioners and MEPL, such manufactured goods were directly being consigned to the buyers of the petitioners in alleged violation of Rule 10A of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 (hereinafter referred to as ‘the Valuation Rules’ for short). Upon searching the factory premises of MEPL, the respondents allege that MEPL was manufacturing excisable goods on job work basis for the petitioners and discharging duty liability as per the contracted price between it and the petitioners, however, the petitioners were issuing commercial invoices to the ultimate customers for the same excisable goods at a higher price as compared to the contracted price. It was also found that apart from the petitioners, MEPL was following a similar procedure for other principal manufacturer namely “Danieli India Limited”. The statements of various representatives of the petitioners, MEPL and “Danieli India Limited” came to be recorded on different dates. On 2/4/2017, based on the allegation that MEPL is continuing to follow a similar procedure of assessment and clearance, the factory premises of MEPL was once again searched. Pursuant to the search, two trucks containing excisable goods worth

Rs.55.67 lakhs came to be seized under panchanama dated April 3, 2017. The statements of both the truck drivers came to be recorded. The said trucks were released upon furnishing a bond and cash security of Rs.50,000/- per truck.

5. Based on the allegations that MEPL cleared goods valued at Rs.25,32,07,114/- in contravention of Section 4 of the Central Excise Act, 1944 (hereinafter referred to as 'the said Act' for short), Rules 4, 6 and 8 of the Central Excise Rules, 2002 (hereinafter referred to as 'the Rules' for short) and Rule 10A of the Valuation Rules with an intent to evade excise duty and that Mr. Raju Mathew (Managing Director, MEPL) colluded with the petitioners and Danieli India Limited, a show cause notice dated August 3, 2017 came to be issued for the period July 2012 and March 2017, on the petitioners and Danieli India Limited under Section 11A (4) for duty demand under the said Act, confiscation under Rule 25 (1) of the Rules, imposition of the penalty under Section 11AA of the said Act read with Rule 25 and 27 of the Rules read with Rule 15 of the Cenvat Credit Rules, 2002 and penalty under Rule 26 of the Rules.

6. The petitioners replied to the show cause notice vide letters dated January 15, 2018 and attended personal hearings before the respondent no.3, Adjudicating Authority on January 16, 2018, February 15, 2021 and May 19, 2021. By an Order-in-Original dated June 16, 2021, the respondent no.3 confirmed the duty demand, ordered

confiscation, also imposed penalty and interest. The gist of the operative order is thus:

> "A. Confirmed duty demand Rs.1,53,03,329/- and held it to be recoverable from MEPL under Section 11 A (4) of the Act.
>
> B. Order imposition and recovery of interest on the confirmed duty amount of Rs.1,53,03,329/- under Section 11AA of the Act.
>
> C. Held goods valued at Rs.25,32,07,114/- to be liable for confiscation under Rule 25(1) of the Rules and imposed redemption fine of Rs.5,06,41,423/-.
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> D. Imposed penalty of Rs.1,53,03,329/- on MEPL under Section 11AC of the Act read with Rule 25 and 27 of the Rules.
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> E. Imposed penalty of Rs.1,53,03,329/- on Mr. Raju Mathew of MEPL under Rule 26 of the Rules.
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> F. Imposed penalty of Rs.1,53,03,329/- on the petitioner under Rule 26 of the Rules.
>
> G. Imposed penalty of Rs.1,53,03,329/- Primetals Technologies Private Limited under Rule 26 of the Rules.
>
> H. Imposed penalty of Rs.1,53,03,329/- Danieli India Limited under Rule 26 of the Rules."

7. Learned counsel for the respondents raised a preliminary objection that against the impugned order passed by the Adjudicating Authority, the statutory remedy by way of an appeal with the Commissioner (Appeals) is available. Learned counsel submitted that the remedy of appeal is efficacious and hence, the present petitions should not be entertained by this Court.

8. In response to the preliminary objection raised on behalf of the respondents, learned counsel for the petitioners submitted that the impugned order passed by

the 3rd respondent virtually deprives the petitioners from filing an appeal under Section 35F of the said Act against the impugned order, which requires it to deposit 7.5% of the penalty amount, which is a task impossible to perform for the petitioners, as the petitioners have merely issued invoices for goods in respect of which duty of Rs. 45,29,528/- is demandable from MEPL, and thus, the petitioners' right to file an appeal against the impugned order has been prejudiced. Relying on grounds (A) and (B) of the petition, learned counsel for the petitioners submits that penalty could not have exceeded the duty liability of the petitioners (Rs. 45,29,528/-) and, therefore, to make a pre-deposit at 7.5% of the imposed penalty (Rs.1,53,03,329), apart from being an onerous condition for the petitioners to satisfy to have its appeal entertained by the Appellate Authority, such imposition is without jurisdiction. The entire thrust of learned counsel for the petitioners is on Rule 26 of the Rules 2002 stipulating the quantum of penalty as not exceeding the duty liability.

9. It is the petitioners' case that they have supplied goods having duty liability of Rs. 45,29,528/-, despite which the impugned order imposed penalty on petitioners exceeding the maximum limit stipulated under Rule 26 of the Rules 2002. Learned counsel for the petitioners was at pains to point out that the respondent no.3 should have restricted itself to the extent of the duty amount of Rs.45,29,528/- instead of imposition of penalty amount of

Rs.1,53,03,329/-, which according to him is unwarranted in law and beyond jurisdiction.

10. Apart from the preliminary objection, learned counsel for the respondents, on the other hand, invited our attention to the detailed findings recorded by the respondent no.3 to support his submissions that the petitioners want this Court in the exercise of its jurisdiction under Article 226 of the Constitution of India to embark upon a fact finding exercise, which is not permissible.

11. Heard learned counsel for the parties. We have perused the petitions, the annexures, the impugned Order-in-Original and the reply filed by the respondents.

12. The petitioners were getting the job of manufacturing/ fabrication of steel done on job work basis from MEPL. MEPL would use self-procured items/inputs as well as items/inputs received "free of cost" from the petitioners to manufacture excisable goods. It is alleged that MEPL was manufacturing excisable goods on job work basis for the petitioners and discharging duty liability as per the contracted price between it and the petitioners, however, the petitioners were issuing commercial invoices to their ultimate costumers for the same excisable goods at higher price as compared to the contracted price. On the plea that the petitioners had merely issued invoices for the goods in respect of which duty demand is Rs.45,29,528/-, it is contended that the penalty amount demanded is

disproportionate.

13. It is material to refer to paragraph 65 of the impugned order, where the respondent no.3 observed thus:-

> "65. I find that the noticee were manufacturing the excisable goods for the above-mentioned three principal manufacturers who were actually shown as the 'Buyer' on the invoices issued by the noticee and respective actual customers such as M/s. JSW Steel Ltd. and/or M/s. MCL Global, etc. shown as the 'Consignee'. This fact has come on record in the course of the investigation and it shows that the goods were purchased by the concerned principal manufacturers from the noticee and further sold to their customers at the final value (market value or selling price) of the goods. I find that the goods being purchased by the said principals and further re-sold by them to their ultimate customers (end-users) makes them liable for penal provisions of sub-rule (1) of rule 26 of Central Excise Rules, 2002."

14. We have gone through the reply dated January 16, 2018 filed by the petitioners to the show cause notice. The reply primarily proceeds on the footing that the petitioners have not exercised any financial and administrative control over MEPL and that as the goods have been sold by MEPL to the noticee, MEPL cannot be regarded as a job worker. Effectively it is the stand of the petitioners, in response to the show cause notice that the transaction was one of sale by MEPL and purchase by the noticee and therefore, the petitioners do not fall within the ambit of Rule 10A of the Valuation Rules. It is then the stand of the petitioners that there is a grave error in quantification of the demand for duty from MEPL. Relying on Annexure-'A' attached to the show cause notice, at Serial No.40 (page 145 of the writ petitions), it is the petitioners' case that the corresponding

invoice value is taken as Rs.3,06,75,000/- instead of Rs.30,67,500/-. It is the petitioners stand that the value on which MEPL had paid duty was Rs.14,84,959/-, thus, the differential duty demandable was Rs.15,82,541/- whereas the department has demanded duty of Rs.2,91,90,041/-. In our opinion, the petitioners are attempting to bring to our notice factual errors in the impugned order. For us to accept the petitioners' contention that they supplied goods having duty liability of Rs.45,29,528/-, essentially entails a fact finding exercise. There is nothing on record to indicate that the duty liability of Rs.45,29,528/- claimed by the petitioners is accepted by the respondents. The petitioners proceed on the footing that the petitioners supplied goods having duty liability as claimed by them and therefore, penalty is excessive. To arrive at the conclusion that the petitioners supplied goods having the duty liability as contended by them obviously necessitates a fact finding exercise.

15. It is always open for the petitioners to raise grievance regarding errors of fact in the impugned order in appeal. What the petitioners want us to do is to sit in appeal over the factual findings recorded by the respondent no.3 upon re-appreciating the evidence on record. Resort to jurisdiction under Article 226 of the Constitution of India is not intended as an alternate remedy for relief which may be obtained by way of a statutory appeal prescribed. By entertaining these petitions under Article 226 of the

Constitution of India, we would virtually be permitting the machinery created by the said Act to be by-passed.

16. The Apex Court in **Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and others**[1] has held that alternate remedy will not operate as a bar in the contingencies, namely, where the Writ Petition has been filed for the enforcement of any of the Fundamental rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. In our opinion, none of the tests laid down by Their Lordships in **Whirlpool Corporation** (supra) are satisfied in the present case. The petitioners want to by-pass the remedy of an appeal on the plea that the condition of pre-deposit in exercise of statutory remedy by way of an appeal is onerous and hence, the remedy of an appeal is not efficacious. It is not possible for us to accept this contention. As recently as on November 11, 2021, the Apex Court in **Newtech Promoters and Developers Pvt.Ltd. vs. State of UP and others**[2] in paragraph 137 observed thus:

> "137. It is indeed the right of appeal which is a creature of the statute, without a statutory provision, creating such a right the person aggrieved is not entitled to file the appeal. It is neither an absolute right nor an ingredient of natural justice, the principles of which must be followed in all judicial and quasi-judicial litigations and it is always be circumscribed with the conditions of grant. At the given time, it is open for the legislature in its wisdom to enact a law that no appeal shall lie or it may lie on fulfilment of precondition, if any, against the

1 (1998) 8 SCC 1
2 2021 SCC OnLine SC 1044

order passed by the Authority in question."

17. The requirement for 7.5% pre-deposit of the penalty demanded cannot be said to be exorbitant or onerous, more so when it is well settled that when a statute confers a right of appeal, while granting the right, the legislature can impose conditions for the exercise of such right, so long as the conditions are not so onerous as to amount to unreasonable restrictions.

18. The Division Bench of this Court in **Kim Steel Strips Pvt. Ltd. & anr. vs. The Commissioner of Central Excise and Customs, Belapur Commissionerate**[3] while considering the provisions regarding mandatory pre-deposit before filing the appeal under the said Act, in paragraph 9 held thus:

> "9. A plain reading of this provision makes it clear that the deposit of certain percentage of duty or penalty is a pre-requisite for filing the appeal. The provision does not confer any powers on the appellate authority to waive or reduce the mandatory pre-requisite. Furthermore, the amounts which is required to be deposited, is 7.5% per cent of the duty demanded or fine imposed, which cannot stated to be exorbitant. The decision of the Apex Court in Government of Andhra Pradesh & Ors. V. Smt. P. Laxmi Devi 2008(2) RCR Civil, 561 (Supra) would not be applicable in the facts of the present case. Similarly, the decision of Jindal Drugs Pvt. Ltd. V. Union of India 2016(340) ELT 67 of Panjab and Haryana High Court is of no assistance as the Petitioners have no where alleged contravention of any provisions of Excise Act. As stated earlier, the only ground for invoking the writ jurisdiction or seeking waiver of pre-deposit, is that the Petitioners are not in a financial condition to deposit the amount. In our considered view, this cannot be considered as an exceptional circumstance to invoke the writ jurisdiction or

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3 Writ Petition No.5654 of 2017, judgment dtd.3/8/2017.

> to waive the pre-deposit, particularly when the amount required to be deposited is 7.5 per cent of the duty demanded. ”

This decision supports the view we take.

19. In this view of the matter, we see no reason to entertain the present writ petitions in view of the availability of the alternative statutory remedy of appeal. We make it clear that it is open for the petitioners to avail of the remedy of appeal under the said Act against the impugned order. It is further made clear that we have not expressed any opinion on the merits of the rival contentions.

20. Keeping this liberty of the petitioners open, the writ petitions are dismissed with no order as to costs.

(M. S. KARNIK, J.) **(CHIEF JUSTICE)**