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

CENTRAL EXCISE APPEAL NO. 104 OF 2008

The Commissioner of Central Excise
Thane - II Commissionerate,
Navprabhat Chambers,
Ranade Road, Dadar (West)
Mumbai - 400 028.

.. Appellant

Vs.

1. Kamal Singhania,
Director of M/s.Usha Fashions Pvt. Ltd...Respondent No.1

2. M/s.Usha Fashions Pvt. Ltd.
Plot No.E-42, M.I.D.C. Industrial Area,
Tarapur, Boisar, District Thane ..Respondent No.2

3. M/s.S.P Thakkar Transport Company,
174, Gaiwadi, Caval Cross Lane,
7th Galli, Kalbadevi, Mumbai 400 002. .. Respondent No.3

Mr.Swapnil Bangur a/w Mr.Siddharth Chandrashekhar i/b
Mr.Siddharth Chandrashekhar for Appellant.
Mr.Darius Shroff, Senior Advocate a/w Mr.Jas Sanghavi i/b
PDS Legal, for Respondents No. 1 & 2

**CORAM : K.R.SHRIRAM, J.
M. S. KARNIK, J.**

DATE: 17th SEPTEMBER 2021

ORAL JUDGMENT (PER K.R.SHRIRAM, J.) :

1. This is an Appeal preferred by the Commissioner of Central Excise, Thane-II under the provisions of Section 35G of the Central Excise Act, 1944 impugning the order dated 22/09/2006 passed by the Central Excise and Service Tax Appellate Tribunal, WZB, Mumbai allowing a bunch of Appeals preferred by respondent nos.1 & 2.

2. The Appeal came to be admitted on 24/09/2008 and the following questions of law were framed.

1. Whether CESTAT is right in law in setting aside penalties of Rs. 5,00,000/- imposed on Kamal K. Singhania under Rule 26 of the Central Excise Rules, 2002 as also Rs. 1,00,000/- imposed under Rule 26 of the Central Excise (No.2) Rules, 2001/Central Excise Rules, 2002 read with Rule 209A of the Central Excise Rules, 1944.

2. Whether CESTAT is right in law in

i) setting aside central excise duties of Rs.4,16,73,971/- and Rs.2,17,005/- levied under section 11A(2) of the Central Excise Act, 1944 on account of clandestine removal of processed fabrics.

ii) reducing equal penalty imposed under section 11AC of the Central Excise Act, 1944 from Rs. 4,30,85,195/- to Rs. 3,00,000/- inspite of confirming / sustaining central excise duty of Rs. 11,94,219=20.

iii) setting aside find/penalty of Rs. 4,28,68,190/- imposed under section 34 of the Central Excise Act, 1944 and Rule 25(1) of the Central Excise (No.2) Rules, 2001 / Central

Excise Rules, 2002 read with Rule 173Q(1) of the Central Excise Rules, 1944.

iv) setting aside fines of Rs. 8,00,000/- and Rs. 90,000/- imposed under section 34 of the Central Excise Act, 1944 being an option given to pay fine in lieu of confiscation.

v) setting aside interest levied under section 11AB of the Central Excise Act, 1944.

vi) setting aside penalty of Rs. 3,00,000/- imposed under Rule 25 of the Central Excise rules, 2002.

3. Whether the order of CESTAT setting aside central excise duties, interest, penalties, confiscation as also reducing penalty under section 11AC of the Central Excise Act, 1944 was based on no evidence or partly relevant or partly irrelevant evidence and is otherwise perverse, arbitrary and vitiated in law ?

4. Whether CESTAT is right in law in setting aside penalty of Rs. 35,000/- imposed on S.P. Thakkar Transport Company under Rule 26 of the Central Excise Rules, 2002 as also Rs. 40,00,000/- imposed under Rule 26 of the Central Excise (No.2) Rules 2001 / Central Excise Rules 2002 read with Rule 209A of the Central Excise Rules, 1944 ?"

3. This Appeal was to be heard along with Central Excise Appeal No. 261 of 2007.

4. The facts in brief are that respondent no.2 who was earlier called Indo Green Textiles Pvt. Ltd. was engaged in the processing of Man Made Fabrics classifiable under Sections 54 and 55 of the First Schedule of the Central Excise

Tariff Act, 1985. Its factory premises was put to search on 21/05/2002 which resulted in seizure of documents/records/computer floppies etc. Proceedings relating to physical stock inventory of grey fabrics resulted in shortages of processed fabrics totally valued at Rs.74.63 lakhs (approximately). Another quantity of processed Man Made fabrics totally valued at Rs.31.80 lakhs (approximately) were found to be excess than the recorded balance which was seized. Similarly search was conducted in the office premises of the appellant resulting in seizure of documents/ records. It is alleged that one of the directors of the Company, Shri Kamal Singhania, respondent no.1, accepted the shortages and excess and also deposited an amount of Rs. 10 lakhs towards duty.

5. Apart from searches conducted at factory and office premises of respondent no.2, searches were conducted at the office premises of respondent no.3 - M/s.S.P. Thakkar Transport Company (hereinafter referred to as 'Thakkar'), the transporter, situated at Bhiwandi and Kalbadevi. The records maintained by Thakkar were taken into custody.

Simultaneous searches were also made in the residential premises of the director of respondent no.2 as also in the factories of merchant manufacturers. The statements of many persons were recorded.

6. Based on the above, proceedings were initiated against the respondents by issuing show cause notices. Show cause notice dated 15/11/2002 proposed confiscation of the seized goods and show cause notice dated 30/03/2004 proposed confirmation of demand of duty of Rs. 4,30,85,194.84 along with imposition of personal penalty. The following demands were raised in the show cause notice dated 30/03/2004.

"(i) processed fabrics found short in the factory during stock verification carried out on 21/22-05-2002 (involving duty of Rs.11,94,219.20)

(ii) processed fabrics seized from the premises of Merchant Manufacturers and transporter (involving duty of Rs.2,17,004.64), and

(iii) processed fabrics detailed in Annexure 'B' to the show cause notice as clandestinely cleared by M/s.Indo Green (involving duty of Rs.4,16,73,971.00)"

7. After due adjudication proceedings, the demand stood confirmed and various penalties were imposed. All

those aggrieved by the order passed by adjudicating authority filed Appeal before the Customs Excise and Service Tax Appellate Tribunal (CESTAT). At the stage of Appeal, the respondents did not contest the demand mentioned at serial no. (i) above in the show cause notice dated 30/03/2004 on account of the small amount involved. As regards the demand against serial no.(ii), the same was stated to be included in serial no.(i). Hence, that also was not contested. What was contested was the demand at serial no.(iii), i.e. 'processed fabrics detailed in Annexure 'B' to the show cause notice as clandestinely cleared by respondent no.1 involving duty of Rs.4,16,73,971.00'. After hearing the counsel for the parties, the Member (Judicial) set aside this demand of Rs. 4,16,73,971.00 on the ground that there was no positive evidence on record. The Member (Technical), however, upheld the demand and confirmed the order passed by the adjudicating authority.

8. In view of this difference of opinion between the two Members who presided over the matter, the matter was

referred to a third Member for her opinion on the following question :-

" Whether the demand of duty to Rs.4,30,85,192/- is required to be set aside on the ground of insufficient evidence to establish the clandestine removal as held by the Ld.Member (Judicial) or the same is required to be confirmed in terms of the order of Member (Technical).

Whether the confiscation of the goods found in appellants premises in excess of the recorded balance in RG1 register is required to be set aside as held by Member (Judicial) or confiscation is to be upheld in terms of the order of Member (Technical).

Whether penalty is to be set aside on the Director of the firm Shri Kamal K.Singhanian as held by Member (Judicial) or the same is required to be imposed as opined by Member (Technical)"

9. The third Member after hearing the parties concurred with the view expressed by Member (Judicial) and held that duty of demand of Rs. 4,16,73,971/- can not be sustained.

10. In view of the majority view, the duty of Rs.4,16,73,971/- came to be set aside. The duty of Rs.11,94,219.20 was upheld because it was not contested by respondent no.1. The penalty imposed on respondent no.1,

respondent no.3, respondent no.2 etc. were all set aside. Aggrieved by this majority view, appellant has approached this court and the questions of law as noted in para (2) above came to be framed.

11. We have perused the orders passed by all the three Members of CESTAT with the assistance of the learned counsel for the appellant. The entire basis for making this demand on respondent no.1 and for imposing penalty on respondent no.3 is the statement of Thakkar indicating that one 'S One Tex/Dying' relates or belongs to respondent no.2. Before the adjudicating authority, counsel for respondent nos. 1 and 2 had sought leave to cross examine Thakkar which was denied by the Commissioner on the ground that the same amounts to delaying tactics on the part of respondent nos. 1 and 2. The majority view has concluded that as the entire case of the Revenue is based upon the statement of Thakkar, refusal of his cross examination was detrimental to the case of respondent nos. 1 and 2 and therefore Thakkar's statement cannot be taken into consideration. We also feel

that if the statement of Thakkar is taken out of records, there is no other evidence to show that the said code number 'S One Tex/Dying' belongs to respondent no.2. The statement of Thakkar being in the nature of statement of co-accused cannot be made a sole basis for confirming the charge of clandestine removal against respondent no.2 and its director in the absence of any other corroborative evidence. Though statements of the other directors have been recorded, all those persons have retracted their statements. In the majority view, the Members have also gone into the other facts, i.e., considered records which were confiscated from Thakkar and observed that there are some other code names mentioned which have not been investigated into and no statement of the transporter in respect of other persons is recorded.

12. Mr.Bangur submitted, relying on the findings of the Member (Technical), i.e., the minority view, that even respondent no.1 - director of respondent no.2 had accepted the shortages and excess and also deposited an amount of Rs.

10 lakhs towards duty. Even for a moment, if we accept that that should be enough to substantiate appellant's case, that would still relate to only processed fabrics found short in the factory during the stock verification involving duty of Rs.11,94,219.20, which as recorded in the order of the Member (Judicial) was not contested on account of small amount. This fact of respondent no.1 depositing Rs. 10 lakhs towards duty cannot by any stretch of imagination justify that the account maintained by Thakker for 'S One Tex/Dying' belongs to respondent no.2. This is because it is only the statement of Thakkar which explains that 'S One Tex/Dying' is the code name of respondent no.2, and request to cross examine Thakkar was not granted by the adjudicating authority.

13. The Apex Court in ¹**Andaman Timber Industries Vs. Commissioner of C.EX., Kolkata-II** held that not allowing a party to cross examine witnesses of the Adjudicating Authority whose statement was the basis of the show cause notice to demand duty is a serious flaw in as much as it

1 2015(324) E.L.T.641(S.C.)

amounted to violation of principles of natural justice. We have to note that the Commissioner refused permission to cross examine Thakkar notwithstanding the request made by respondent nos.1 and 2. In our view, permission to cross examine Thakkar should have been granted mainly in view of the fact that appellant was relying on the statement of Thakkar and documents which were seized from Thakkar.

Paragraphs 3 and 6 to 8 of this judgment read as under :

"3. Insofar as the plea of the appellant that it was not allowed to cross-examine the dealers whose statements were relied upon by the Adjudicating Authority in passing the orders, the Tribunal [2006 (205) E.L.T. 831 (Tribunal)] rejected its plea in the following manner :-

"6. The plea of no cross-examination granted to the various dealers would not help the appellant case since the examination of the dealers would not bring out any material which would not be in the possession of the appellant themselves to explain as to why their ex-factory prices remain static. Since we are not upholding and applying the ex-factory prices, as we find them contravened and not normal price as envisaged under section 4(1), we find no reason to disturb the Commissioners orders."

6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed

by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17-3-2005 [2005 (187) E.L.T. A33 (S.C.)], was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

8. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the show cause notice."

14. A Division Bench of this Court (Goa Bench) in the case of ²**Ciabro Alemao Vs. Commissioner of Customs,**

² 2018 (362) E.L.T.465 (Bom.)

Goa has held that a statement, like all testimony, must be subjected to the rigours of cross-examination and the fact that a statement is made and recorded may be relevant but does not mean it is proved. The Division Bench held that the statement on which a party relied upon cannot be said to have been proved unless that witness was made available for cross examination.

15. We therefore agree with the majority view that rejection of the request for cross examination of Thakkar would mean that Thakkar's statement cannot be relied upon.

16. As regards question no.4, nobody represented respondent no.3 and infact no submissions were also made by appellant. In any event, we have to note that the Member (Judicial) has held without discussion that there is also no justification for imposition of penalty of Rs. 40 lakhs on Thakkar. The Member (Technical) has held that the penalty on Thakkar will also depend on the ultimate determination of penalty on respondent nos. 1 and 2. Penalty on Thakkar was

not the subject matter of reference to the third member. In view of the above, we would answer question no.4 also in the affirmative.

17. In the circumstances, all questions of law framed, as quoted above, are answered in the affirmative. Appeal dismissed.

(M.S. KARNIK, J.)

(K.R.SHRIRAM, J.)