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IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (CUSTOMS)
ORIGINAL SIDE

CUSTA/20/2022
IA NO. GA/1/2022, GA/2/2022
COMMISSIONER OF CUSTOMS PORT
Versus
SHRI RAHUL JHAJHARIA PROPRIETOR OF M/S JJR ASSOCIATES

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Dated : NOVEMBER 18, 2022.

Appearance:
Mr. Kaushik Dey, Adv.
Mr. Tapan Bhanja, Adv.
...for appellant
Mr. Arijit Chakraborty, Adv.
Mr. Lalit Baid, Adv.
Mr. Prabir Bera, Adv.
Mr. Tamoghna Saha, Adv.
...for respondent No. 1

GA/1/2022

The Court :- We have heard Mr. Kaushik Dey, learned standing Counsel along with Mr. Tapan Bhanja for the appellant and Mr. Arijit Chakraborty, learned Counsel duly assisted by Mr. Lalit Baid, learned Advocate for the respondent.

It appears that there is a delay of 47 days in filing the appeal.

However, we are satisfied with the reasons assigned in the affidavit filed in support of the application/petition and accordingly, the delay in filing the appeal is condoned.

CUSTA/20/2022

This appeal filed by the revenue under Section 130 of the Customs Act, 1962 (the Act) is directed against the order dated 5th January, 2022 passed by the Customs, Excise & Service Tax Appellate Tribunal, Kolkata (Tribunal) in Customs Appeal No.75072 of 2020.

The revenue has raised the following substantial questions of law for consideration :

i) Whether the Learned Tribunal is right and justified in remanding the matter to the adjudicating authority for cross examination of Chemical Examiner when the Chemical Expert(s) whose reports were relied upon were not a witness to the proceedings and no statement were recorded by the department from such officers either prior to issuance of show cause notice or thereafter and the report submitted by the chemical examiners is in effect discharging a statutory duty ?

ii) Whether non consideration of the respondent's prayer for cross examination of Chemical Examiner will amount to violation of natural justice when the Chemical Examiner(s) whose reports were relied upon were not a witness to the proceedings and no statement were recorded by the department from such officers ?

iii) Whether the order passed by the Learned Tribunal is perverse and in violation of natural justice in as much as the Learned Tribunal before remanding the matter to the adjudicating authority failed to appreciate the observation of the Adjudicating Authority and decisions relied upon for non-granting the opportunity of cross examination to the respondent ?

iv) Whether the Learned Tribunal's observation that *"there is an ambiguity in the rest reports"* is perverse and contrary to records in as much as the Learned Tribunal failed to appreciate that both the test report (CRCL, Kolkata and New Delhi) has specified 'nil' ash content in the samples which indicates that the impugned goods appears to be base oil and the test report of CSIR, IIP, Dehradun which indicates that "the nil ash content in an oil sample indicates that 'sample under investigation does not contain additives so it can be considered as base oil'?

On going through the order passed by the learned Tribunal we find that the order of remand whereby the learned Tribunal has remanded the matter back to the Tribunal with a direction to allow cross-examination of all the experts whose reports were relied upon and after giving reasonable opportunity of being heard to pass an order. At the first blush it would appear that the direction issued by the Tribunal was well justified, as it was the case of the respondent/assessee that they had no opportunity to cross-examine those expert witnesses. However, the issue involved in the instant case permits us to take a slightly different view. The issue is with regard to the classification of the products which were imported by the appellant as to whether those were 'base oil' or 'machinery oil'. The Central Revenue Control Laboratory, Calcutta and the Central Revenue Control Laboratory, New Delhi had given test reports as regards the nature of the products which were imported. The Tribunal has not rendered a finding as to whether the test reports would support the case of the revenue nor there is a finding that the test reports support the classification adopted by the respondent/assessee. The experts of the laboratory are Government Officials, who discharge their statutory obligation, cast upon them and there was nothing personal in exercising their powers. That apart, the experts who had examined the sample of the products imported are not party to the proceedings. Therefore, the question of directing cross-examination of those officials/experts does not arise. Thus the Tribunal is left with only one task that is the examine the experts' report and then come to a conclusion as to whether the case as projected by the respondent/importer was acceptable and justified. Since the learned Tribunal is last fact finding authority it is fully empowered to re-appreciate the evidence which is on record and this is required to be done by the learned Tribunal which was the issue before it with regard to classification of the products so imported. Therefore, we are of the view that the question of examination of the experts does not arise and is impermissible and the learned Tribunal should decide the matter on merits with the available materials i.e test reports.

Mr. Arijit Chakraborty, learned Advocate for the respondent submitted that the learned Advocate may be directed to take up the case at the earliest possible time. We do not propose to issue any such direction as we are unaware about the determination which is before the learned Tribunal. However, we give liberty to the learned Advocate for the respondent to mention before the learned Tribunal for expeditious hearing of the appeal.

For such reason alone, we are inclined to interfere with the order passed by the Learned Tribunal.

Accordingly, the appeal is allowed. The order passed by the learned Tribunal is set aside. The matter is remanded back to the learned Tribunal for fresh consideration to give a decision on merits and in accordance with law on the available materials.

However, it is placed on records this Court has not made any observation with regard to the merits of the matter and it would be open to both parties to canvass all points and the learned Tribunal shall take a decision uninfluenced by any observation made in this order.

Accordingly, the appeal stands disposed of.

Consequently, the stay application also disposed of.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

Pkd/GH.