IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CUSTOM APPEAL NO.14 OF 2021

Gateway Terminals Pvt. Ltd. .. Appellant
v/s.
Commissioner of Customs, Nhava Sheva-II .. Respondent

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Mr. Rafique Dada, Senior Advocate, a/w. Mr. Jitendra Motwani, Ms. Alifya Vora and Ms. Rinky Jassuja, i/b. Economic Laws Practice, for the Appellant.

Ms. Neeta Masurkar, a/w. Mr. Ruju Thakker, for the Respondent.

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CORAM: G.S. KULKARNI &
JITENDRA JAIN, JJ.

DATE : 4th JULY 2023

P.C.:

This appeal is filed under Section 130 of the Customs Act, 1962.

2. The substantial questions of law, which arises from the Tribunal's order dated 24th October 2019 on which the appeal was admitted reads as under:-

"A. Whether in the facts and circumstances of the case the Tribunal was right in passing the Impugned Order

without considering vital documents which were on record before it more particularly in the form of Order dated 13.11.2007 passed by the Board of Approval (Pg No. 181 of the appeal memorandum) and Order of EPCG Committee dated 27.10.2014 (Pg 190 No. of the appeal memorandum)?

B. Whether the Tribunal was correct in passing the Impugned Order dated 24.10.2019 without dealing with the submissions made by the Appellant in the appeal memorandum, miscellaneous application for introduction of additional grounds as well as during the personal hearing?

C. Whether the Tribunal was correct in passing the Impugned Order dated 24.10.2019 by reproducing the extracts of certain decisions and not discussing the applicability of the same to the facts of the Appellant's, an act being completely contrary to law laid by the Hon'ble Supreme Court in the case of CCE V. Srikumar Agencies reported as 2008 (232) ELT 577 and this Hon'ble Court in CCE V. Technocraft Industries (I) Ltd. reported as 2015 (40) STR 637 (Bom)?"

3. Brief facts are as under:-

In 2005-2006, the Appellant was granted five EPCG licences. On 29th March 2006, the Appellant's EOU application was also accepted. During the period March 2006 to September 2006, the Appellant filed 33 Bills of Entry for import of various capital goods, without payment of Customs Duty under the EOU scheme. In

November 2006, an issue was raised that since the Appellant is not eligible to function as 100% EOU, the Appellant would not be entitled to import any capital goods without payment of duty. In November 2006-January 2007, three show cause-cum-demand notices were issued challenging the EOU permission on the ground that the Appellant was engaged in export of services and not of physical goods and, therefore, foreign exchange cannot be counted for EOU purposes and a demand was raised for Customs duty on all goods imported as an EOU. On 12th April 2007, a show cause notice was issued by the Development Commissioner, for cancellation of EOU permission. On 18th February 2008, the EOU status of the Appellant was revoked *ab initio*. However, in the meeting of Board of Approval it was recorded that a lenient view should be taken in respect of levy of fine, interest and penalty. On 21st June 2013, the Appellant filed a representation before the Development Commissioner, requesting him to allow the goods imported under the EOU scheme to be cleared under the EPCG licences issued in 2005. On 19th September 2014, the Appellant was allowed to treat the imports made under the 100% EOU as imports under the EPCG scheme. On 27th October 2014, a communication was received from Director General of Foreign Trade (DGFT) *inter alia* stating that concessional rate of duty prevalent on the date of import may be charged without interest (as a special case) by treating the import as imports made in EPCG Scheme. On 6th April 2015, an Order-in-Original was passed by the Respondent, upholding the demand and levying interest under Section 28AB and 28AA of the Customs Act, 1962. On 16th July 2015, the Respondent informed the Appellant that interest was recoverable on whole of the duty confirmed, including the duty allowed to be debited from EPCG licences.

Against the Order-in-Original, an appeal was filed by the Appellant before the Tribunal. On 24th October 2019, the Tribunal passed the impugned order, rejecting the appeal filed by the Appellant. On the issue of demand of interest, by referring to the decision of the Bombay High Court, in the case of *Union of India vs. Valecha Engineering Limited*[1], the contention of the Appellant that the demand of interest should be limited to the amounts debited in cash and not in respect of the amounts to be debited from EPCG licences was rejected. The Tribunal also held that SFIS benefit cannot be allowed to the Appellant. Against the said order of the Tribunal, a rectification application was filed by the Appellant, which came to be rejected on 3rd November 2020.

Aggrieved by the order of the Tribunal dated 24th October 2019, the Appellant has preferred the present appeal under Section 130 of the Customs Act, 1962.

4. Mr. Dada, learned Senior Counsel for the Appellant, has

1 2010 (249) E.L.T. 167 (Bom.).

taken us through the proceedings starting from 2005-2006 upto the date of the Tribunal's order. The primary contention of the Appellant is that with respect to the order confirming the interest under Sections 28AA and 28AB of the Customs Act is concerned, the Tribunal has not considered the submissions made by the Appellant and has also not examined the relevant facts of the present Appellant and the documents on record and given findings. The Tribunal has merely reproduced the Order-in-Original and has further reproduced the extracts from the decision in the case of *Valecha Engineering Ltd.* (supra), without examining the applicability of this decision to the facts of the Appellant. The Appellant also relied upon the decision in the case of *Commissioner of Central Excise, Bangalore vs. Srikumar Agencies*[2] and *Commissioner of Central Excise, Thane-I vs. Technocraft Industries (I) Ltd.*[3] and contended that the order of the Tribunal do not furnish adequate reasons and, therefore, the proceedings are required to be reconsidered on an order of remand passed by this Court on the present proceedings. It is, thus, submitted that the Tribunal ought to have a fresh consideration on the issues of interest under Section 28AA/28AB of the Customs Act, 1962. The Appellant has contended that it does not wish to contest the order of the Tribunal in sofar as issue of SFIS benefit is concerned.

5. The learned Counsel for the Respondent/Revenue

2 2008 (232) E.L.T. 577 (S.C.).
3 2015 (40) STR 637 (Bom).

supported the Order-in-Original and the order passed by the Tribunal and contended that since the EOU application has been rejected *ab initio*, the Appellant is liable to pay interest from the date of the import and, therefore, no fault can be found in the order of the Tribunal and the Order-in-Original. The Respondent also stated that the Tribunal has considered this issue and has passed a detailed order and, therefore, the prayer made for remanding the same to the Tribunal by the Appellant, should not be accepted.

6. We have heard learned Counsel for the parties. With their assistance, we have perused the record of the present appeal.

7. We find much substance in the contentions as urged on behalf of the Appellant, from the reading of the impugned order. We are of the view that the Tribunal has not examined various facts of the Appellant, which we have noted hereinabove. The Tribunal was required to examine the facts and documents so as to form an opinion as to whether in the facts of the Appellant's case, the decision of *Valecha Engineering* Ltd. (supra) was at all attracted. The Tribunal in passing the impugned order has merely reproduced the Order-in-Original and various paragraphs of *Valecha Engineering*, without examining its applicability to the facts of the Appellant and assigning any reasons thereof. The Tribunal in para 3.2 of the impugned order has reproduced the submissions of the Appellant with respect to levy of

interest to the effect that the Appellant had contended that levy of interest is against the doctrine of promissory estoppel and further that the interest in alternative can be only in respect of the duty required to be paid by them in cash and not on the component of duty allowed to be debited by them from the EPCG licences. The impugned order also records that the Appellant also contended that the Appellant had acted bonafide and, therefore, the demand of interest could not be raised, as at the relevant time of import of the goods, they could have debited the duty payable from the EPCG licences, instead of availing the benefit applicable to EOU. The Tribunal's finding starts in para 4.1. In para 4.2, the Tribunal has reproduced paras 27 to 31 of the Order-in-Original. In para 4.3, the Tribunal has recorded the finding of the Commissioner in Order-in-Original. In para 4.4, the Tribunal has extracted paras 22, 22.2 to 32 of *Valecha Engineering Ltd.* The Tribunal, thereafter, concluded that there is no estoppel against the operation of law and reproduced extracts from various decisions and, thereafter, in para 4.7 has confirmed the levy of interest. The Tribunal has not recorded any finding on the plea of the Appellant that demand of interest if at all can only be in respect of the duty paid by them in cash and not on the duty, which was debited from the EPCG licences. The Tribunal ought to have examined the effect of the communication received from DGFT dated 27th October 2014, on the issue of imposing interest. The Tribunal has also not recorded any finding on the submissions made by the Appellant that interest if at all ought to have been levied only on cash demand confirmed amounting to Rs.10.94 crores and not on the duty paid under EPCG licences. In our view, the Tribunal ought to have accorded reasons after examining the facts of the Appellant before deciding the issue of interest. The Appellant is justified in relying upon the decision of the Supreme Court in the case *Srikumar Agencies* (supra) and, more particularly, paragraph 6 of the said decision, which is reproduced hereinbelow:

> *"6. Since the factual position has not been analysed in detail, disposal of appeals by mere reference to decisions, was not the proper way to deal with the appeals. The CEGAT also does not appear to have dealt with the relevance and applicability of ITC's case (supra) on which strong reliance has been placed by learned Solicitor General. The CEGAT ought to have examined the cases individually and the articles involved. By clubbing all the cases together and without analyzing the special features of each case disposing of the appeals in the manner done was not proper. In the circumstances, we set aside the impugned judgment in each case and remit the matter to CEGAT presently known as Customs, Excise & Service Tax Appellate Tribunal (in short 'CESTAT') to be dealt with by the appropriate Bench. In view of the aforesaid order there is no need to answer the reference made."*

8. A Division Bench of this Court, to which one of us (G.S. Kulkarni,J.) was a member, in the case of *Technocraft Industries*, reiterated and commented upon the non-speaking and cryptic order passed by the Tribunal.

9. In the light of above, we allow the appeal of the Appellant on questions of law referred to hereinabove by setting aside the order

of the Tribunal dated 24th October 2019, only on the issue of interest under Sections 28AA and 28AB of the Customs Act and direct the Tribunal to pass a speaking order after examining the facts of the Appellant and after giving opportunity of hearing to both the parties and by speaking order. The Tribunal is requested to dispose of the appeal as expeditiously as possible and, in any case, within a period of four months from today.

10. Appeal allowed in terms of above order. No order as to costs.

(JITENDRA JAIN, J.) **(G.S. KULKARNI, J.)**