

JPP

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

CENTRAL EXCISE APPEAL NO. 90 OF 2009

M/s. Poona Rolling Mills
a partnership firm engaged in the
manufacture and sale of MS round
bars and having its office at Plot No.186,
Chinchwad, Pune – 411 033 ... Petitioner

V/s.

The Commissioner of Central Excise,
Pune I, ICE House, 41 -A, Sassoon Road,
Opposite Wadia College, Pune – 411 001 ... Respondent

Mr. Sriram Sridharan i/b. PDS Legal for the Petitioner
Mr. Swapnil Bangur with Mr. Ram Ochani for the Respondent

***CORAM : NITIN JAMDAR &
ABHAY AHUJA, JJ.***

DATE : 21 MARCH 2023

Oral Judgment (Per Nitin Jamdar, J.) :-

The Appellant, by this Appeal under Section 35G of the Central Excise Act, 1994, read with Section 83 of the Finance Act, 1994, is challenging the order dated 12 December 2008 in Appeal No. E/190/08-Mum, passed by the Customs Excise and Service Tax Appellate Tribunal, Mumbai.

2. The Appellant M/s. Poona Rolling Mills, Pune, was engaged in manufacturing MS round bars falling under Chapter Head No.72 of the First Schedule to the Central Excise Tariff Act, 1985. The Appellant claimed exemption from the payment of Central Excise duty in terms of the notification dated 1 August 2003. The Appellant clearing products manufactured by them without payment of Central Excise duty, the Respondent – Department opined that the Petitioner had wrongfully availed the benefit of the notification, and the show cause notice was issued to the Petitioner on 18 December 1987 demanding the Central Excise duty from the Appellant for clearance made during the period from 9 July 1985 to 10 March 1987. Pursuant to the show cause notice, the Respondent – Department confirmed the demand for Central Excise duty by passing an order on 12 April 1988. The Appellant filed an Appeal along with the application for stay before the Customs, Excise and Service Tax Appellate Tribunal (Appellate Tribunal). The Appellate Tribunal granted a stay by order dated 21 September 1988 upon the Appellant being directed to pre-deposit a sum of Rs.90,000/- in terms of Section 35F of the Act of 1994 as the condition for hearing the Appeal. The Appellant deposited the amount of Rs.90,000/- on 18 October 1988. Thereafter, the Appellate Tribunal heard the Appeal and dismissed the same by order dated 4 November 1987.

3. The Appellant filed an appeal before the Hon'ble Supreme Court of India, challenging the order of the Appellate Tribunal. During the pendency of the Appeal before the Hon'ble Supreme Court, the Appellant deposited an amount of Rs.3,00,000/-. The Hon'ble Supreme Court also directed the Appellant to pay an amount of Rs.2,00,000/- as a condition for hearing the Appeal. The Appellant deposited a sum of Rs.2,00,000/- on 6 August 1999. Thereafter, the Hon'ble Supreme Court disposed of the appeal by order dated 18 November 2003, and the proceedings were remanded to the Appellate Tribunal for passing fresh order. Upon remand, the Appellate Tribunal allowed the Appeal by order dated 6 April 2004.

4. The Appellant filed a refund claim on 24 April 2004 to the Central Excise, Pune, in Section 11B of the Act of 1944, requesting a refund of Rs.5,90,000/-. The Appellant filed this refund claim pursuant to an order dated 6 July 2004 passed by the Appellate Tribunal. The Appellant annexed copies of the challans for deposit of Rs.90,000/-, Rs.3,00,000/- and Rs.2,00,000/- as above.

5. The Assistant Commissioner of Central Excise, Pune, scrutinized the documents submitted by the Appellant and observed that the Appellant had not produced any documents to establish that amount of duty of excise in relation to which refund was claimed was

not passed by the assessee to any other person as envisaged under Section 11B of the Act of 1944. Accordingly, the Commissioner issued a show cause notice to the Appellant for rejection of the refund claimed for non-production and requisite evidence.

6. The Appellant replied to the show cause notice, and *inter-alia* contended that the deposits were in the nature of pre-deposits and Section 11B of the Act of 1944 had no application to the case. The Appellant, in addition, asserted that they had not passed on the disputed amount to any other person nor loaded the same to their production cost. The Appellant submitted a certificate of a Chartered Accountant. The Assistant Commissioner concluded that the amount of Rs.2,72,532/- cannot be refunded to the Appellant as the Appellant has not produced any concrete evidence that this amount has been passed on to any customers. The Appellant filed an Appeal in the office of the Commissioner (Appeals). The Appellant contended that once the Commissioner (Appeals) held that since the amount was deposited as pre-deposit by the Appellant, there was no unjust enrichment and the Appellant was eligible for refund and mere debiting the amount on profit and loss account does not mean that the Appellant had recovered the duty from the buyer. Accordingly, the Commissioner (Appeals) allowed the Appeal by order dated 7 March 2006.

7. The Respondent – Department filed an Appeal No. E/1642/06 in the Appellate Tribunal, and it was remanded back. Upon remand, the Commissioner (Appeals) held that since the principle of unjust enrichment would apply and since the Appellant has not produced cogent evidence and that the presumption would arise that the amount has been transferred to the buyers, the Appellant is not entitled for a refund. The Appellant challenged this order before the Tribunal. The Appellate Tribunal dismissed the Appeal by the impugned order dated 12 December 2008. Thereafter, the Appellant is before us by this Appeal.

8. The Appeal was admitted on 25 November 2009 on the following questions of law:-

“(a) Whether in the facts and circumstances of the case, the Appellate Tribunal was right in applying the bar of unjust enrichment for return of deposit made by the appellants under Section 35F of the Central Excise Act, 1944 ?

“(b) Whether the impugned order of the Appellate Tribunal is passed in violation of principles of natural justice ?”

9. The learned Counsel for the Appellant submitted that the amounts were undoubtedly deposited as the pre-deposit under Section 35F and the concept of unjust enrichment as per Section

11B of the Act of 1944 does not apply. He submitted that this is irrelevant as to how the Appellant has treated the amount in its books of accounts, and no presumption that it has passed on to the consumer can arise. The learned Counsel relied on the decision of the Division Bench of this Court in *Suvidhe Limited v/s. Union of India*¹, *Killick Caribonium v/s Union of India*² and *Commissioner of Central Excise, Pune-1 v/s. Sandvik Asia Ltd.*³ The learned Counsel for the Respondent supported the impugned order.

10. Section 11B of the Central Excise Act pertains to the refund of duty and interest paid on such duty. If a person seeks a refund of excise duty and interest paid, they may apply for the refund, provided that the principle of unjust enrichment does not apply. This means that the person making the refund claim must not have transferred the burden of payment to the buyers and unjustly enriched themselves.

11. Section 35F of the Central Excise Act states that a specific percentage of the duty or penalty must be deposited before filing an appeal. In the case of *Suvidhe*, the Division Bench of this Court observed that the amount deposited under Section 35F is not a duty at all but is the deposit of availing a remedy of appeal, and for this amount, Section 11B is not applicable. The Division Bench

1 1996 (82) ELT 177

2 2002(143) ELT 491

3 2017(52) STR 112(Bom.)

followed the same view in the case of *Killick Caribonium*. In the case of *Sandvik Asia Ltd.*, the Division Bench considered the Appeal filed by the Department. Here the assessee had argued that the amount was deposited by the stay application, and therefore, Section 11B was not attracted. The Department argued that the assessee had termed the amount in his Books of Accounts and from which presumption would arise that the burden has passed on to the consumer. The Division Bench observed that repeatedly the Hon'ble Supreme Court has clarified that Section 11B, which relates to the claim of refund of duty, will not apply where the amount in question is deposited in compliance with the interim order, and no presumption would arise from how the amount is treated in the books of accounts. The Division Bench also relied upon the decision of the Supreme Court in the case of *Commissioner v/s. Finacord Chemicals Pvt. Ltd.*⁴. It was also noted that the Special Leave Petition against the decision of this Court in the case of *Suvidhe* was dismissed by the Hon'ble Supreme Court.

12. The Appellate Tribunal, in the present order, has concluded that in an earlier remand proceeding, the Tribunal had directed the Commissioner (Appeals) to re-examine whether the Appellant had passed on the duty burden or not and since this order was not challenged, the issue cannot be considered. However, when the Commissioner (Appeals) re-examined the question upon

4 2015 (319) ELT 616 S.C.

remand, treated the amount in question as a pre-deposit. The Commissioner's order unequivocally stated that the amounts were towards pre-deposit. Therefore, the factual basis for applying the above mentioned decisions has been established in the present order

13. Once the Commissioner (Appeals) has established that the amount in question was a pre-deposit, the legal principle laid down by this Court, which states that the principle of unjust enrichment and Section 11B does not apply to the return of pre-deposits, becomes applicable. No decision contrary to the view taken above is shown. It needs to be noted that the decision of the Hon'ble Supreme Court in the case of *Finacord Chemicals* and the decision of the Division Bench of this Court in the case of *Sandvick Asia* were pronounced after the impugned order passed by the Tribunal. Since the decisions squarely apply to the facts of the Appellant's case, the question of law (a) termed above will have to be answered in the negative, in favour of the Appellant. With the answer to the substantial question of law (a) as above, the question (b) does not arise for consideration.

14. The Appeal is accordingly allowed. The impugned orders are quashed and set aside. The Respondent will proceed to take the necessary steps accordingly.

ABHAY AHUJA, J.

NITIN JAMDAR, J.