IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.10.2023

CORAM:

THE HONOURABLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

Crl.O.P.No.9849 of 2018
and
Crl.M.P.No.5068 of 2018

M/s.Visaka Industries Limited,
Represented by its Managing Director,
Saroja Vivekananda
Manickanatham Village
Paramathy Post,
Namakkal District – 637 207. .... Petitioner

Vs

The Assistant Commissioner of Central Excise
Salem II Division,
No.21, Theerthamalai Arcade,
New Bus Stand West,
Salem 636 004. .... Respondent

Prayer: Criminal Original petition filed under Section 482 of Code of Criminal Procedure, to call for the records in C.C.No.18 of 2016 pursuant to the private complaint dated 04.10.2016 lodged by the respondent herein on the file of the learned Chief Judicial Magistrate, Namakkal and quash the same.

For Petitioner	: Mrs. D.Dakshayani Reddy Senior Counsel for Mrs.S.Suneetha
For Respondent	: Mr.V.Sundareswaran Standing Counsel

ORDER

This Criminal Original Petition has been filed to quash the proceedings in C.C.No.18 of 2016 on the file of the Chief Judicial Magistrate, Namakkal.

2. The petitioner is the first accused in the complaint lodged by the respondent for the offence punishable under Section 190(1)(a) read with Section 200 of Cr.P.C read with Section 120 of IPC and Sections 9 and 9AA of Central Excise Act, 1944. The petitioner holds Central Excise Registration Certificate. They are manufacturers of Asbestos Cement Sheet classifiable under Central Excise Tariff beading No.6811 of the schedule to Central Excise Tariff Act,1985 using raw materials viz., Cement, fly ash, cotton pulp, etc. They were availing exemption under Notification 6/2002 CE dated 01.03.2002. The said exemption was available to goods falling under Chapter 86, in which not less than 25% by weight of fly ash or phosphor gypsum or both had been used with a condition that the manufacturer maintains proper account in such form and in such manner as the Commissioner of Central Excise having jurisdiction may specify in this behalf and shall file a monthly

return in the form and manner as may be specified by Commissioner of Central Excise with the jurisdictional Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise.

3. The bogus accounting of fly ash receipt in the name of M/s.Natesan Engineering Contractors was proved through the letter of authorization provided by the accused. The said contractor have been authorized to lift fly ash on behalf of the accused. They also entered into the TNEB as well as in their purchase order with condition that the quantity of fly ash lifted from Mettur and it should be sent directly to Paramathy. Whereas, the accused through M/s.Natesan Engineers & Contractors, Mettur, unloaded the fly ash illegally in violation of conditions prescribed by TNEB at Sankari, who has issued the consignment notes, which is the basis of receipt of fly ash have been prepared just for recording the receipt of fly ash into the factory premises. The consignment notes prepared by the said Contractor just for recording the receipt of fly ash as if it was received from Mettur Thermal Power Station. They also recorded the usage of fly ash above the minimum stipulated limit of 25%. They prepared faulty bogus

consignment notes and raised them towards dispatch of fly ash over and above the actual quantity of fly ash lifted from MTPS.

4. Therefore, the accused, with fraudulent intention to evade payment of Central Excise duty, extended time limit under Section 11A of the Central Excise Act, 1944 was invoked to demand duty. Accordingly, the accused was served with a show cause notice proposing to demand the Central Excise duty to the tune of Rs.15,37,57,177/- along with interest. Thereafter, a final order has been passed by the Commissioner, Salem, with an amount of Rs.13,23,85,374/- towards the Central Excise duty liability on Asbestos Cement Sheets cleared by them during the year 2003-04 & 2004-05 under Section 11A(2) of the Central Excise Act, 1944 from the accused in as much as they are not eligible to avail the exemption under the said notification. A penalty of Rs.13,23,85,374/- was imposed under Section 11AC of the Central Excise Act, 1944 and Rule 25 of Central Excise Rules, 2002 on the accused. Therefore, they are liable to be prosecuted for the offence under Section 9(1) of Central Excise Act for evasion of payment of any duty payable under the Central Excise Act, for removal of any excisable goods in contravention of any of provisions of the Act or any Rules.

5. The Senior Counsel appearing for the petitioner submitted that, without considering the documents and explanations submitted by the petitioner, a final order has been passed in Original Order No.4 of 2009 dated 06.05.2009 demanding payment of a sum of Rs.13,23,85,374/- towards the Central Excise Duty liability for the years 2003-04 and 2004-05 under Section 11A(2) of the Central Excise Act, 1947 along with penalty of identical amount. The Original Order is an appealable one before the Customs Excise and Service Tax Appellate Tribunal (herein after referred as CESTAT). Accordingly, the petitioner challenged the said order while filing the appeal, the petitioner should make a pre-deposit of Rs.4,50,00,000/-. Accordingly, the petitioner deposited the said amount, while filing the appeal. She further submitted that the petitioner is a Company, represented by its Managing Director viz., Saroja Vivekananda, filed a private complaint in C.C.No.18 of 2016. It was challenged by her in Crl.O.P.No.15 of 2017 and the same was allowed by this Court on the ground that the petitioner was not holding the said post Managing Director at the time of commission of the alleged offence by an order dated 21.12.2007. The appeal filed by the petitioner before the CESTAT, the same was allowed by an order dated

06.02.2018, by setting aside the Original Order dated 06.05.2009 and remanded the matter before the adjudicating authority to decide afresh. Aggrieved by the said order, it was challenged by the respondent before this Court in CMA Nos.279 & 280 of 2018 and the same was also dismissed by this Court, by an order dated 30.11.2018. However, once again the adjudicating authority reconfirmed the earlier order passed by the adjudicating authority by an order dated 31.03.2021 thereby confirming the order of demand of Rs.13,23,85,374/- towards Central Excise Duty liability for the years 2003-04 and 2004-05 under Section 11AC of the Central Excise Act, 1944 and Rule 25 of Central Excise Rules. Further penalty of Rs.19,00,000/- was imposed on M/s.Natesan Engineers and Contractors under Rule 26 of Central Excise Rules, 2002. Aggrieved by the same, the petitioner filed an appeal before the CESTAT and it is pending. The criminal prosecution cannot be initiated against the petitioner since, the appeal is pending before the CESTAT. In fact now the arguments are over and the case is reserved for orders.

6. In support of his contention, he relied upon the Judgment reported in ***(2011) 3 SCC 581*** in the case of ***Radheshyam Kejriwal Vs.***

State of West bengal and another, in which the Hon'ble Supreme Court of India held that exoneration in related adjudication proceeds of civil nature under the relevant statute. In a case of exoneration on merits in such adjudication proceedings, where the allegations are found to be not sustainable at all and person concerned is held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, underlying, principle being the higher standard of proof in criminal cases.

7. In the case on hand, after remanding back before the adjudicating authority by CESTAT, once again by an order dated 31.03.2021, the adjudicating authority, viz, the respondent, reconfirmed the original order, which is as follows :

> “(i) I confirm and demand an amount of Rs.13,23,85,374/- (Rupees Thirteen Crores Twenty Three Lakhs Eighty Five Thousand and Seventy Four only) (BED Rs.13,12,20,280/- & Education Cess Rs.11,65,094/-) towards the Central Excise duty liability on Asbestos Cement Sheets cleared by them during the years 2003-04 & 2004-05 under Section 11A(2) of the Central Excise Act, 1944, from m/s.Visaka Industries Ltd.,

(ii) I demand appropriate interest under Section 11AB of the Central Excise Act, 1944 on the amount demanded at Sl.No (i) above.

(iii) I impose a penalty of Rs.13,23,85,374/- (Rupees Thirteen Crores Twenty Three Lakhs Eighty Five Thousand Three Hundred and Seventy Four only) under Section 11AC of the Central Excise Act, 1944 and Rule 25 of Central Excise Rules 2002 on M/s.Visaka Industries Ltd., and

(iv) I impose a penalty of Rs.19,00,000/- (Rupees Nineteen Lakhs only) on M/s.Natesan Engineers and Contractors under Rule 26 of the Central Excise Rules, 2002."

8. Therefore, now the order of demand has been reconfirmed by the adjudicating authority, viz., the respondent. Though the appeal is pending before the CESTAT, it would not amount to exonerating the petitioner from all the demand. In fact, the petitioner, on precondition, had deposited a sum of Rs.4,50,00,000/- before the Appellate Tribunal. Therefore the initiation of criminal prosecution for the contravention under the Excise Act cannot be barred. Though the order of the adjudicating authority is under challenge in appeal, the criminal prosecution is not required to follow the adjudication and can be launched either during pendency of latter or simultaneously or precede it.

9. In the case of Radheshaym Kejriwal reported in 2011 (266) E.LT, 294 (S.C), the Hon'ble Supreme Court of India held that the adjudication proceeding and criminal prosecution can be launched simultaneously; Decision in adjudication proceeding is not necessary before initiating criminal prosecution ; The adjudication proceeding and criminal proceeding are independent in nature to each other. Further the finding against the person facing prosecution in the adjudication proceeding is not binding on the proceeding for criminal prosecution. Therefore, the grounds raised by the learned Senior Counsel cannot be considered and this Court is not inclined to quash the proceedings.

10. In view of the above, this Criminal Original Petition stands dismissed. Consequently, connected miscellaneous petition is closed.

18.10.2023

Internet: Yes
Index : Yes/No
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G.K.ILANTHIRAIYAN. J,

Lpp

To

1. The Chief Judicial Magistrate,
Namakkal.

2. The Assistant Commissioner of Central Excise
Salem II Division,
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