

IN THE HIGH COURT FOR THE STATE OF TELANGANA
AT HYDERABAD

THURSDAY, THE NINETEENTH DAY OF DECEMBER
TWO THOUSAND AND TWENTY FOUR

PRESENT

THE HONOURABLE THE CHIEF JUSTICE ALOK ARADHE
AND
THE HONOURABLE SRI JUSTICE J SREENIVAS RAO

CENTRAL EXCISE APPEALS NO: 38 OF 2008

Appeal filed under Section 35(G)(c) of 1944 against the Order dated 02.08.2007 passed in Appeal No.E/970 of 2005 on the file of the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Branch, FKCC-WTC Buildings, KG Road, Bangalore preferred against the Order dated 29.07.2005 passed in Order-in-Original No.03/2005-Adj.C.Ex. on the file of the Commissioner of Customs & Central Excise, Hyderabad-II Commissionerate, Basheerbagh, Hyderabad.

Between:

M/S. Kamal Industries, Rep. by its Partner Sri Padam Raj Jain, S/o.Sri Bird Raj Jain R/o. D.No.16 and 17, Industrial Estate, Chandulal Baradari, Hyderabad – 500264.
...Petitioner

AND

The Commissioner of Customs and Central Excise, Hyderabad - II
Commissionerate Hyderabad.
...Respondent/Defendant

CEAMP. NO: 25 OF 2008

Petition under Section 151 CPC praying that in the circumstances stated in the affidavit filed in support of the petition, the High Court may be pleased to suspend the impugned order issued by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, FKCCI-WTC Building, KG Road, Bangalore in Appeal No. E/970 of 2005 on dt.06-08-2007.

Counsel for the Appellant : Mr. Chanakya Basa

Counsel for the Respondent : None appeared

The Court delivered the following: Judgment

THE HON'BLE THE CHIEF JUSTICE ALOK ARADHE

AND

THE HON'BLE SRI JUSTICE J.SREENIVAS RAO

CENTRAL EXCISE APPEAL No.38 of 2008

JUDGMENT: *(Per the Hon'ble Sri Justice J. Sreenivas Rao)*

Heard Mr. Chanakya Basa, learned counsel for the appellant. No representation on behalf of the respondent.

2. This appeal under Section 35G of the Central Excise Act, 1944, is directed against the order dated 02.08.2007 in Appeal No.E/970 of 2005 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Bangalore (hereinafter referred to as, "the Appellate Tribunal").

3. The following substantial question of law arises for consideration in this appeal:

"Whether the finding recorded by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Bangalore that assessee is liable to pay penalty suffers from the *vice* of non-application of mind and is perverse?"

4. Facts giving rise to filing of the appeal in nutshell are that the appellant and M/s.Gautam Tincans & Other Metal Works (for short, 'M/s.Gautam Ticans') were engaged in the

manufacture of metal containers. The Officers of the Central Excise, Anti-Evasion Wing, Hyderabad-II Commissionerate visited the factory of the appellant and M/s.Gautam Tincans on 29.01.1998 and they found that the appellant had contravened the provisions of Rules 9(1), 52A, 173G, 173F and 226 of the Central Excise Rules, 1944 (hereinafter referred to as 'the Rules') read with Notification Nos.1/93-CE dated 28.02.1993 and 38/97-CE dated 27.06.1997 and pointed out that the appellant manufactured 15 kg. tins and cleared them without payment of duty and it failed to account for all the 15 kg. tins manufactured and cleared to oil & vanaspathi industries, as required under the Rules.

5. Thereafter, the Commissioner of Customs and Central Excise, Hyderabad-II Commissionerate, Hyderabad, (for short, 'the Commissioner') had issued show cause notice dated 30.03.1999 to the appellant and others, whereunder the appellant is directed to submit explanation as to why an amount of Rs.39,59,368/- towards the Central Excise duty (differential duty as shown in the Annexures II to VI to the show cause notice) payable by the appellant on the 15 kg. tins manufactured and cleared to oil and vanaspathi industries under the invoices of M/s.Gautam should not be demanded

from them under Rule 9(2) of the Rules read with proviso to sub-section (1) of Section 11A of the Central Excise Act, 1944; and penalty equivalent to the Central Excise duty not paid should not be imposed on them under Section 11AC of the Central Excise Act, 1944 and also interest should not be demanded from them under Section 11 AB of the Central Excise Act, 1944.

6. Pursuant to the said show cause notice, the appellant submitted reply dated 08.12.1999. The Commissioner after considering the said reply passed an order on 31.10.2000 in Order-In-Original No.02 of 2000-Adjn. C.Ex. directing the appellant to pay forthwith an amount of Rs.20,46,683/- being the excise duties fraudulently evaded prior to 28.09.2006 and an amount of Rs.19,12,685/- being the excise duties fraudulently evaded on and after 28.09.1996, totalling Rs.39,59,368/- under Section 11A of the Central Excise Act, 1944; imposing penalty of Rs.20,00,000/- on the appellant for the duties amounting to Rs.20,46,683/- fraudulently evaded prior to 28.09.1996 as per Rule 173Q ; imposing penalty of Rs.19,12,685/- on the appellant for the duties amounting to Rs.19,12,685/- fraudulently evaded on and after 28.09.1996 as per Section 11AC of the Central Excise Act, 1944 ; and directing

the appellant to pay interest under Section 11 AB of the Central Excise Act, 1944 at the prescribed rate on duty amount to Rs.19,12,685/- demanded under Section 11A of the Central Excise Act, 1944.

7. The appellant challenged the aforesaid order dated 30.10.2000 before the Appellate Tribunal and the Appellate Tribunal was pleased to pass the final order No.846-849 dated 05.05.2004 remanding the matter to the original authority for re-quantification of the duty amount chargeable from the appellant after giving abatement of duty already paid by M/s.Gautam Tincans from the total duty liability fixed on the appellant for 15 kg. tins manufactured in their factory; re-quantification of penalty imposed on the appellant under Section 11AC of the Central Excise Act, 1944 and also under Rule 173Q of the Rules ; after re-determining the duty liability on the appellant, and interest under Section 11 AB to be demanded on the duty short paid for a period after 28.09.1996.

8. Pursuant to the above said order, the Commissioner after re-considering the contentions of the respective parties and after verification of the records, re-determined the total differential duty liability on the appellant is Rs.10,53,071/- instead of

Rs.39,59,368/- basing on the reduction in the duty liability has taken into consideration as per Rule 9(2) of the Rules read with proviso to sub-section (1) of Section 11A of the Central Excise Act, 1944, and the appellant is liable to pay a duty of Rs.5,95,427/- for a period after 28.09.1996 on which interest as applicable and at the prescribed rate should be paid under Section 11AB of the Central Excise Act, 1944 by its order dated 29.07.2005.

9. Aggrieved by the above said order, the appellant filed appeal No.E/970/2005 before the Appellate Tribunal and the same was dismissed on 02.08.2007 confirming the order of the Commissioner. Thus, the appellant filed the present appeal.

10. Learned counsel for the appellant submitted that the Appellate Tribunal has not considered the material evidence on record and simply rejected the appeal and confirmed the order of the Commissioner. He further submitted that the Commissioner passed order against the appellant solely basing upon the statements, which were recorded at the time of inspection, and the said statements cannot be taken into consideration for the purpose of deciding the issue. The appellant submitted a detailed reply on 08.12.1999 to the show

cause notice by giving reasons and the same was not considered by the Commissioner, while passing orders dated 29.07.2005.

11. In support of his contention, he relied upon the Division Bench judgment of this Court in **Commissioner of Customs and Central Excise, Hyderabad-IV v. M/s.Venkateswara Silk Mills** (Central Excise Appeal No.148 of 2006 dated 22.10.2024).

12. We have considered the submissions made by the learned counsel for the appellant and have perused the record.

13. It reveals from the record that the Officers of the Central Excise, Anti-Evasion Wing, Hyderabad-II Commissionerate, after verification of the records of the appellant and M/s.Gautam Tincans, pointed out certain irregularities, which are mentioned hereunder:

“i) manufactured 15 kg. tins and cleared them without payment of duty.

ii) failed to account for all the 15 kgs. tins manufactured in M/s.Kamal and cleared to oil & vanaspathi industries, as required under Central Excise Rules, 1944.

iii) cleared 15 kg. tins under invoices of M/s.Gautam, with an intention not to include the value of these consignments in the progressive value of M/s.Kamal so as to remain within the limits of SSI exemptions and to avail concessional rates of duty as provided in

Notification No's. 1/93-CE dated 28.02.1993 and 38/97-CE dated 27.06.1997."

14. Thereafter, the Commissioner had issued show cause notice dated 30.03.1999 to the appellant along with M/s.Gautam Tincans and two others directing it submit explanation as to why:

"i) an amount of Rs.39,59,368/- towards the Central Excise duty (differential duty as shown in the Annexure II to VI) payable by M/s.Kamal on the 15 kgs. tins manufactured and cleared to oil and vansapathi industries under the invoices of M/s.Gautam, should not be levied and paid by them under Rule 9(2) of Central Excise Rules, 1944, read with proviso to subsection (1) of Section 11A of Central Excise Act, 1944. (The details are incorporated in the annexure to this notice).

ii) Penalty equivalent to the Central Excise duty not paid should not be imposed on them under Section 11AC of Central Excise Act, 1944 and also interest should not be demanded from them under Section 11 AB of Central Excise Act, 1944.

iii) See amendment dt. 11.05.2000."

15. Pursuant to the said show cause notice, the appellant filed reply on 08.12.1999. The Commissioner after considering the reply, passed order on 31.10.2000 in Order-In-Original

No.02 of 2000-Adjn.C.Ex., which is extracted below for the facility of reference:

- i) Under Section 11A of the Central Excise Act, 1944, I confirm an amount of Rs 20,46,683/- being the excise duties fraudulently evaded prior to 28.09.96 and an amount of Rs.19,12,685/- being the excise duties fraudulently evaded on and after 28.09.96, totally amounting to Rs.39,59,368/- (Rupees thirty nine lakhs fifty nine thousand three hundred and sixty eight only) demanded in the show cause notice from M/s.Kamal Industries, D-16&17 Industrial Estate, Chandulal Baradari, Hyderabad, and direct them to pay the said amounts forthwith.
- ii) Under Rule 173Q of the Central Excise Rules, 1944, I impose a penalty of Rs.20,00,000/- (rupees twenty lakhs only) on M/s.Kamal Industries, Hyderabad for the duties amounting to Rs.20,46,683/- fraudulently evaded prior to 28.09.96.
- iii) Under Section 11AC of the Central Excise Act, 1944, I impose a penalty of Rs.19,12,685/- on M/s.Kamal Industries, Hyderabad for the duties amounting to Rs.19,12,685/- fraudulently evaded on and after 28.09.96.
- iv) Under Rule 200A of the Central Excise Rules, 1944, I impose a penalty of Rs.5,00,000/- (rupees five lakhs only) on M/s.Gautam Tincans and Other Metal Works, Hyderabad.
- v) Under Rule 209A of the Central Excise Rules, 1944, I impose a penalty of Rs.2,00,000/- (rupees two lakhs only) on Shri Padam Raj Jain, partner, M/s.Kamal Industries, Hyderabad.
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vi) Under Rule 209A of the Central Excise Rules, 1944, I impose a penalty of Rs.2,00,000/- (rupees two lakhs only) on Shri Sunil Jain, partner, M/s.Kamal Industries, Hyderabad.

vii) Under Section 11 AB of the Central Excise Act, 1944, I order M/s.Kamal Industries, Hyderabad to pay interest at the prescribed rate on duty amounting to Rs.19,12,685/- demanded at (i) above.”

16. The said order was set aside by the Appellate Tribunal on 05.05.2004 and remanded the matter to the Commissioner on the ground that the penalty was determined only against the appellant and there is no mention of determination of penalty on M/s.Gautam Tincans and issued the following directions to the original authority i.e., the Commissioner.

“i) requantification of the duty amount chargeable from M/s.Kamal after giving abatement of duty already paid by M/s.Gautam from the total duty liability fixed on M/s.Kamal for 15 kg. tins manufactured in their factory;

ii) requantification of penalty imposed on M/s.Kamal under Section 11AC of the Central Excise Act and also under Rule 173Q of the Central Excise Rules, 1944;

iii) interest under Section 11 AB to be demanded on the duty short paid for a period after 28.09.96 after redetermining the duty liability on M/s.Kamal.

Further, the CESTAT has set aside the penalty of Rs.2,00,000/- that was imposed on Shri Padam Raj Jain under Rule 209A.”

17. Thereafter, the Commissioner after hearing the parties and after due verification of the records passed the order on 29.07.2005, which is extracted below for the facility of reference:

“i) Under Rule 9(2) of the Central Excise Rules, 1944, read with proviso to sub-section (1) of Section 11A of the Central Excise Act, 1944, I confirm an amount of Rs.4,57,644/- (Rupees Four Lakhs fifty seven thousand six hundred and forty four only) being the excise duty fraudulently evaded prior to 28.09.1996 and an amount of Rs.5,95,427/- (Five Lakhs Ninety Five Thousand Four Hundred and Twenty Seven only) being the excise duties fraudulently evaded on and after 28.09.1996, totally amount to Rs.10,53,071/- (Rupees Ten lakhs fifty three thousand and Seventy one only). The amount of Rs.10,12,753/- already paid by them is adjusted towards aforesaid duty liability. The balance duty payable by them is Rs.40,318/- (Rupees Forty thousand three hundred and eighteen only).

ii) Under Rule 173Q of Central Excise Rules, 1944, I impose a penalty of Rs.4,50,000/- (Rupees Four Lakhs Fifty Thousands only) on M/s. Kamal Industries, Hyderabad for the excise duties amounting to Rs.4,57,644/- fraudulently evaded prior to 28.09.1996.

iii) Under Section 11AC of Central Excise Act, 1944 and read with the proviso therein, I impose a penalty of Rs.5,95,427/- (Rupees Five Lakhs Ninety Five Thousands Four Hundred and Twenty Seven only) on M/s. Kamal

Industries, Hyderabad for the duties amounting to Rs.5,95,427/- fraudulently evaded on and after 29.09.1996.

iv) Under Rule 209 A of Central Excise Rules, 1944, I impose a penalty of Rs.5,00,000/-(Rupees Five lakhs only) on M/s. Gautam Tin Cans and other metal works, Hyderabad.

v) Under Rule 209 A of Central Excise Rules, 1944, I impose a penalty of Rs.2,00,000/- (Rupees Two lakhs only) on Shri Sunil Jain partner of M/s. Kamal Industries, Hyderabad.

vi) Under Section 11AB of Central Excise Act, 1944, I order M/s. Kamal Industries to pay the interest at the prescribed rate on the duty amounting to Rs.5,95,427/-."

18. The Appellate Tribunal also by giving cogent findings dismissed the appeal and confirmed the order of the Commissioner taking into account the provisions of the Central Excise Act,1944 as well as the Rules.

19. The contention of the learned counsel for the appellant that the Commissioner had passed order basing on the statements recorded during inspection is not tenable under law on the ground that the Commissioner after verification of the records passed the order. The finding recorded by the Commissioner is not based on the statement recorded during the inspection alone, but is based on other material available on

record. The judgment relied on by the learned counsel for the appellant is not applicable to the facts and circumstances of the case.

20. In an appeal under Section 35G of the Central Excise Act, 1944, a finding of fact cannot be interfered with unless and until the same is shown to be perverse. The finding recorded by the authorities under the Act can by no stretch of imagination be termed as perverse.

21. In view of the preceding analysis, the substantial question of law is answered against the assessee in favour revenue.

22. In the result, we do not find any merit in this appeal. Accordingly, the same is fails and is hereby dismissed. No order as to costs.

Miscellaneous applications pending, if any, shall stand closed.

//TRUE COPY//

A.V.S.C.S.M. SARMA
JOINT REGISTRAR

SECTION OFFICER

To,

1. The Customs, Excise & Service Tax Appellate Tribunal, South Zonal Branch, FKCC-WTC Buildings, KG Road, Bangalore.
2. The Commissioner of Customs & Central Excise, Hyderabad-II Commissionerate, Basheerbagh, Hyderabad
3. One CC to Mr. Chanakya Basa, Advocate [OPUC]
4. Two CD Copies

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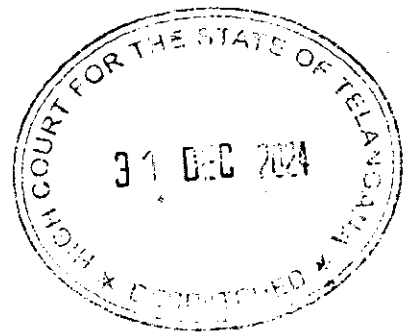
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HIGH COURT

DATED:19/12/2024

JUDGMENT

CEA.No.38 of 2008



DISMISSING THE APPEAL

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27/12/24
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