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Court : Chennai

Decided On : Aug-30-2016

Judge : S. Manikumar & D. Krishnakumar

Appeal No. : Civil Miscellaneous Appeal No. 3397 of 2005

Appellant : M/s. SRF Ltd.

Respondent : Customs, Excise and Service Tax and Another

Judgement :

(Prayer: Appeal filed under Section 35G of Central Excise Act, 1944 against the final order No.558/05 dated 06.04.2005 passed by the 1st respondent and consequentially allow the appeal.)

D . Krishnakumar, J

1. M/s. SRF Limited, represented by its Associate Vice President has filed this Appeal against the final order of Customs, Excise and Service Tax Appellate Tribunal, Chennai dated 06.04.2005 in No.558/2005.

2. The facts of the case as narrated in the appeal, are as follows :-

The appellant SRF Limited is engaged in the manufacture of Nylon Filament Yarn, falling under Chapter 54 of the Central Excise Tariff Act, 1985. During the relevant period, the appellant, manufacturing and clearing Nylon Filament Yarn, with low

tenacity, claimed exemption, under Central Excise Notification No.08/1996 dated 23.07.1996. The assessments were done provisionally, since the testing process had to be carried on. The Exemption Notification No. 08/96 dated 23.07.1996, allowed exemption to Nylon Filament Yarn of 210 denier with 4% variance. In order to ascertain the eligibility for exemption, samples of low tenacity, Nylon Filament Yarn manufactured by the appellant were drawn, on five occasions during the relevant period and that the samples were subjected to test, by the Chemical Examiner, Custom House, Chennai. The following are the details of the test results :-

Sl. No.	Test Memo No.	Date of Drawal of Sample	Batch No.	Examiner's Test Result in Denier
1	1/96-97	07.06.1996	C6P 008-0525	224.8
2	2/96-97	26.07.1996	C6G056-3239	228.6
3	3/96-97	29.08.1996	R6H189-4230	224.1
4	4/96-97	01.10.1996	C6K 001-0137	225
5	5/96-97	31.12.1996	C6M 080-5791	212.1

3. When the test reports revealed that the denier count was above the tolerance limit, re-test was requested and re-test was also done by Chief Chemical Examiner of Central Revenue Customs Laboratory, New Delhi. Subsequently, samples were again tested by the National Test House, Madras, and the Chief Chemical Examiner of CRCL confirmed the findings of the Chemical Examiner, Customs House, Chennai. The National Test House, Madras also reported that the denier

range of the yarn is above the permissible limit, under Notification No.08/96. Therefore, the 2nd respondent issued show cause notices dated 04.02.1997, 03.03.1997 and 25.03.1997, respectively, demanding differential duty, on the ground that all the test reports had shown denierage of yarn, beyond the permissible limit, prescribed under the notification.

4. The appellant has filed reply to all the three show cause notices issued by the 2nd respondent. It is the case of the appellant that without considering the said explanation/ reply, the Assistant Commissioner of Central Excise, passed Order-in-Original No.19/2000 dated 30.03.2000, confirming the demand of Rs.4,13,79,605/- and denied exemption, under Notification No.08/96 dated 23.07.1996, but without imposing any interest or penalty on the appellant. Aggrieved by the said order, the appellant preferred an appeal before the Commissioner of Central Excise (A), Chennai and that the same was confirmed by the Commissioner of Central Excise (A). Hence, the appellant preferred an appeal before CESTAT, Chennai, by raising the following grounds :

i. that in view of the deposition of the Chemical Examiner during the cross examination before the Assistant Commissioner, the test reports cannot be sustained.

ii. The test result of any batch is relevant only for the particular batch.

iii. Modvat credit for Nylon chips cannot be denied.

iv. No duty could be charged in respect of supplies made under deemed exports scheme. v. Re-determination of value of the final product (Nylon Filament Yarn) has to be allowed in the light of decision of Tribunal in Shri Chakra Tyres case and Hon'ble Supreme Court in Maruti Udyog Ltd., case.

vi. It is also pointed out that there is duplication of demand, as demands relating to yet another show cause notice (not part of original proceeding) has been included in the demands confirmed by the Assistant Commissioner in Order-in-Original No.19/00 dated 30.03.2000.

5. The CESTAT, Chennai by its Final Order No.558/2005 dated 06.04.2005, rejected the appeal filed by the appellant. Being aggrieved by the order of CESTAT, the appellant has filed the instant appeal and this Court admitted the appeal, framing the following substantial questions of Law :-

i. Whether the Tribunal was correct in relying on test reports of the samples drawn with reference to one batch for subsequent batches, until the next sample was drawn ?

ii. Whether the Tribunal was right in relying on test reports which only show marginal variation from the tolerance allowed and rejecting the substantive claim for relief, as sought for by the appellants ?

iii. Whether or not the First in and First out method, as accepted by Supreme Court in 1993 Suppl. (1) SCC 361 should have been followed by the Tribunal in the facts and circumstances of this case in granting benefit in respect of supply of excisable goods for deemed export production ?

iv. Whether the Tribunal is correct in considering and confirming differential duty demands which are not part of the impugned proceedings but are subject to a parallel proceedings ?

6. It is the contention of the appellant that the test reports of the samples taken for one particular batch, cannot be applied for the yarn of the next batch, as the process parameters may vary for each batch. Denier of the yarn is controlled by varying parameters, namely,

i. The type of chips which has a bearing on the relative viscosity, directly influences the denierage.

ii. The temperature of extrusion

iii. Metering pump frequency

iv. Draw ratio in draw twisters/SPU system.

7. It is the submission of the appellant that whenever any of the above process parameters are changed, then denierage of the yarn will also be changed. Therefore, the appellant has reiterated that the sample taken from one particular batch, cannot be applied to the next batch. In this regard, learned counsel for the appellant placed reliance on the decision of this Court in the case of Ramalinga Choodambikai Mills Ltd., vs. Government of India, reported in 1984 (15) ELT (407) Mad.

8. Learned counsel for the appellant further contended that the respondent has denied the benefit of export, on the ground that the appellant has not been able to prove that the twine exported is made out of the quantity of yarn produced during the relevant. He, therefore submitted that rejection of the appellant's plea by the Tribunal, without considering the first in and first out method, is incorrect, as per the principles laid down, by the Hon'ble Supreme Court, in the case of TELCO vs. Municipal Commissioner, Thane, reported in (1993) Supl. (1) SCC 361. Therefore, in the light of the above submissions, he prayed that the substantial questions of law framed by this Court, should be answered in favour of the appellant and that the appeal has to be allowed.

9. Per contra, learned counsel for the 2nd respondent would raise preliminary objections with regard to the maintainability of the instant appeal, in view of the bar under Section 35G of Central Excise Act 1944. Learned counsel further submitted that mere perusal of the substantial questions of law, would clearly show that the appellant has raised questions of law pertaining to the claim of exemption, under the Exemption Notification. However, as per Section 35G of the Act, an appeal to High Court shall lie, provided it is not an order relating among other things, to the determination of any question relating to the rate of duty of excise or to the value of goods for purposes of assessment and therefore, instant appeal is not maintainable. In support of the above contention, learned counsel for the 2nd respondent relied on the decision of the Hon'ble Supreme Court, in the case of Naveen Chemicals. Learned counsel also relied on another decision of this Court in the case of the Commissioner of Central Excise vs. Vadapalani Press reported in [2014-TIOL- 2208-HC-MAD-CX].

10. Learned counsel for the 2nd respondent also drew the attention of this Court to a decision in SRF Ltd. and Ors. vs. Commissioner of Customs and Ors., reported in 2015 (318) ELT 607 SC, wherein, the appellant itself agitated the non-grant of benefit of an exemption notification before the Hon'ble Supreme Court, by invoking Section 35L of the Central Excise Act, 1944. In the light of the above said decisions of this Court and the Hon'ble Supreme Court, learned counsel for the 2nd respondent contended that the appeal filed by the appellant, under Section 35G, is not maintainable in this High Court.

11. Without prejudice to the abovesaid preliminary objections, learned counsel for the 2nd respondent would also submit on merits of the case that the tests were repeated, at the request of the appellant, by getting the same tested at CRCL, New Delhi and similarly, at the request of the appellant/ assessee samples were yet again tested at the National Test House, with regard to its tenacity and denier. All the test reports confirmed, the earlier test of the Chemical Examiner of the Custom House. In the above circumstances, test reports cannot be questioned, and what is now contested by the appellant, is that the last of the test reports was on 31.12.1996 i.e., sample was drawn on 31.12.1996 and the report was dated 18.09.1997. The appellant claims that the period between Test No.4 dated 01.10.1996 and Test No.5 dated 31.12.1996, should be considered as the period, where the process of manufacture has been changed, and the Nylon Filament Yarn meets the standard of 210 denier with 4 variance, as the last test report is of the value 212.1 denier. He further contended that it is claimed by the appellant that the period between 4th and 5th test report should be considered, as compliance of the conditions set out in the exemption notification. The 4th test report was dated 01.10.1996, where the tenacity and denier test result was to the effect that denier was 224.8. The 5th report however showed a denierage of 212.1. It is the case of the appellant that in the meanwhile they have changed the process, and that therefore, the tenacity / denierage was reduced well within the limits of the exemption notification. It is further stated by the learned counsel for the 2nd respondent that the appellant had admitted that they had not intimated any process change to the department, whereby such reduction of denierage was recorded, when it is the case of the appellant that denierage is based on various factors, including the inputs used by them. It is the submission of the learned

counsel for the 2nd respondent that the onus rests entirely, on the applicant to have intimated the department and proved that they have changed the process parameters and that the process resulted in lower tenacity/ denierage within the exemption limits. According to him, the appellant has not intimated the department of this change in the process. In the above circumstances, he contended that the assessee has failed to prove that particular inputs were used in the manufacturing process, which resulted in a change of tenacity and denier and that they have to repeat the test done, so as to claim the benefits of the exemption notification.

12. Heard learned counsel for the appellant and the learned Central Government Standing Counsel for the 2nd respondent.

13. At the outset, the preliminary objection raised by the 2nd respondent regarding the maintainability of the appeal, in view of the power under Section 35G of the Central Excise Act, 1944 has to be considered. As per the powers conferred under the proviso to subsection (4) of Section 35G, High Court can frame additional questions of law, at the time when the matter is being heard. On the facts and circumstances of this case and having regard to the rival submissions and on the light of the above cited decisions of both sides and keeping in mind the substantial questions of law framed by this Court, the point that arises for consideration is, what would be the rate of duty payable by the appellant. Therefore, this Court deems it fit to frame the following additional substantial question of law.

Whether the appeal filed by the appellant under Section 35G of the Central Excise Act 1944, is maintainable when the same relates to the rate of duty of excise, as raised in the substantial question of law by the appellant.

14. Section 35G of the Central Excise Act 1944, reads as follows :-

SECTION 35G. Appeal to High Court - (1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.

(2) The Commissioner of Central Excise or the other party aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be

(a) filed within one hundred and eighty days from the date on which the order appealed against is received by the Commissioner of Central Excise or the other party;

(b) accompanied by a fee of two hundred rupees where such appeal is filed by the other party;

(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question : Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which -

(a) has not been determined by the Appellate Tribunal; or

(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in subsection (1).

15. Therefore, Section 35G makes it clear that an appeal to High Court shall lie, provided it not being an order relating, among other things, to the determination of

any question having a relation to the rate of duty of excise or to the value of goods for the purpose of assessment. In the instant appeal, the issue relates to the claim for exemption under the exemption notification, whether applicable to the appellant or not. The conditions in the notification for the tolerance limit of nylon yarn have not been fulfilled by the appellant. Therefore, any dispute relating to rate of duty, cannot be decided under Section 35G of the Act.

16. As stated supra, in the case of the Commissioner of Central Excise vs. Vadapalani Press, reported in [2014-TIOL- 2208-HC-MAD-CX], at paragraph 4, this Court has followed the decision of the Hon'ble Supreme Court in the case of Naveen Chemicals Manufacturing and Trading Co.Ltd. vs. Collector of Customs, MANU/SC/0571/1993 : 1993 (68) ELT 3 (SC), wherein it is held as follows: -

4. At the outset, the learned counsel for the first respondent objected to the maintainability of the appeal before this Court on the above questions of law raised by the department. It is the plea of the learned counsel for the first respondent that Section 35G of the Central Excise Act, 1944 provides that an appeal on the issue relating to rate of duty of excise or value of goods for purposes of assessment would not lie before this Court. He placed strong reliance on the decision of the Supreme Court in Navin Chemicals Manufacturing and Trading Co. Ltd. v. Collector of Customs, 1993 (68) ELT 3 (SC), wherein it is held as under:

11. It will be seen that sub-section (5) uses the said expression determination of any question having a relation to the rate of duty or to the value of goods for the purposes of assessment and the Explanation thereto provides a definition of it for the purposes of this sub-section. The Explanation says that the expression includes the determination of a question relating to the rate of duty; to the valuation of goods for purposes of assessment; to the classification of goods under the Tariff and whether or not they are covered by an exemption notification; and whether the value of goods for purposes of assessment should be enhanced or reduced having regard to certain matters that the said Act provides for. Although this Explanation expressly confines the definition of the said expression to subsection (5) of Section 129-D, it is proper that the said expression used in the other parts of the said Act should be interpreted similarly. The statutory definition

accords with the meaning we have given to the said expression above. Questions relating to the rate of duty and to the value of goods for purposes of assessment are questions that squarely fall within the meaning of the said expression. A dispute as to the classification of goods and as to whether or not they are covered by an exemption notification relates directly and proximately to the rate of duty applicable thereto for purposes of assessment. Whether the value of goods for purposes of assessment is required to be increased or decreased is a question that relates directly and proximately to the value of goods for purposes of assessment. The statutory definition of the said expression indicates that it has to be read to limit its application to cases where, for the purposes of assessment, questions arise directly and proximately as to the rate of duty or the value of the goods.

12. This, then, is the test for the purposes of determining whether or not an appeal should be heard by a Special Bench of CEGAT, whether or not a reference by CEGAT lies to the High Court and whether or not an appeal lies directly to the Supreme Court from a decision of CEGAT: does the question that requires determination have a direct and proximate relation, for the purposes of assessment, to the rate of duty applicable to the goods or to the value of the goods. (emphasis supplied)

5. The present appeal is filed under Section 35G of the Central Excise Act, 1944 and it is apposite to refer to Section 35G(1) of the Central Excise Act, 1944, which reads as under: Section 35G. Appeal to High Court.(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for the purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law. (emphasis supplied)

6. In the present case, the issue that arises for consideration is what will be the rate of duty that is payable by the first respondent, but for the notification in question. Therefore, the objection of the learned counsel for the first respondent is sustained.

7. The above said view of this Court is fortified by a decision of the Gujarat High Court in Commissioner of Central Excise v. JBF Industries Ltd., 2011 (264) ELT 162 (Guj.), wherein it is held as under:

10. In the light of the aforesaid judicial pronouncements, it is apparent that the question as to the applicability of a notification or a circular which has a bearing on the determination of the rate of duty is a question which has a direct and proximate relationship to the rate of duty and to the value of goods for purposes of assessment. In the circumstances, the present appeal which relates to the applicability of the above referred circular, relates directly to the determination of rate of duty for the purpose of assessment and as such, in the light of the provisions of Section 35G read with Section 35L of the Act, this Court has no jurisdiction to entertain the appeal. (emphasis supplied) For the foregoing reasons, we hold that this appeal is not maintainable and accordingly, the same is dismissed. Since the appeal is held not maintainable, we do not propose to go into the merits of the questions of law raised for consideration. No costs.

17. The learned counsel for the appellant submitted that the appeal is within the jurisdiction of the Madras High Court, under Section 35G. It is also his submission that the issue in the instant appeal, is not on Classification of Yarn or valuation of yarn or the rate of duty on yarn or the eligibility of the exemption notification for 210d yarn, but is only a challenge to the error committed by the Customs, Excise and Service Tax Appellate Tribunal in applying the 5th test report, which result, is not the same as that of the previous four test reports. Therefore, according to him, the relief sought for, ought to have been granted, by following the decision of the Hon'ble Supreme Court in the case of Tata Engineering and Locomotive Company Ltd. vs. Municipal Corporation of the City of Thane and Other, reported in 1993 Supp (1) SCC 361. Further, he has also contended that the appeal is pending for more than ten years, and at this distance point of time, the stand taken by the respondent department should not be accepted.

18. However, learned counsel for the respondents drew the attention of this Court to the decision of the Hon'ble Supreme Court, in the case of Naveen Chemicals, cited supra, wherein it is held that as per the provisions of Section 35G read with

Section 35L, this Court has no jurisdiction to entertain the appeal.

19. The second limb of contention of the appellant, as the appeal is pending for a period of 10 years, the same need not be dismissed, for want of jurisdiction now. If we proceed with the merits of the case, having no jurisdiction to entertain an appeal, then the judgment passed by this Court, would amount to nullity. At this juncture, it is useful to refer to the principles of law laid down by this Court and the Hon'ble Supreme Court, in the following decisions :

1. Chandrabhai K. Bhoir and Ors. vs. Krishna Arjun Bhoir and Ors., relying on Chief Justice of A.P vs. L.V.A Dixitulu, reported in (1979) 2 SCC 34.
2. Union of India vs. Pramod Gupta (2005) 12 SCC 1; and 3. National Institute of Technology vs. Niraj Kumar Singh reported in (2007) 2 SCC 481.

In the above judgments, it has been held that an order passed without jurisdiction, is nullity.

20. In the decision of the Hon'ble Supreme Court in the case of State of Haryana v. Kartar Singh reported in (2013) 11 SCC 375, it is observed as follows :-

20. The legal position is no more res integra that an award and decree having become final under the LA Act cannot be amended or altered seeking enhancement of the statutory benefits under the amended provisions brought in by the Amendment Act in the LA Act by filing petitions under Section 151 and Section 152 CPC. In view of this, the award and decree passed by the High Court on 28.04.1989 has to be held to be without jurisdiction and a nullity. It goes without saying that a plea of nullity of a decree can always be set up before the executing court. Any judgment and order which is a nullity never acquires finality and is thus open to challenge in the executing proceedings.

21. Therefore, principles of law has been settled in various decisions, by the Hon'ble Apex Court, as well as this Court that where there is a lack of inherent jurisdiction of the Court, the decree is then said to be a 'nullity'. Hence, we are not inclined to accept the contention of the learned counsel for the appellant that the instant appeal can be entertained, since it is pending before this Court, for a period

of ten years. Further, we are of the view that the substantial questions of law raised by the appellant relates to the rate of duty. In view of the above, the substantial questions of law framed in the instant appeal, with regard to the maintainability of the instant appeal under Section 35G of the Central Excise Act, 1944, is answered against the appellant. Hence, we are not inclined to go into the merits of the case. On the above discussion and decisions, in the light of additional substantial questions of law, we are not inclined to entertain the appeal, on the grounds of lack of jurisdiction, under Section 35G of the Act. Since we have answered the additional substantial questions of law, which is against the assessee, instant appeal filed by the appellant assessee is liable to be dismissed.

22. Therefore, the Civil Miscellaneous Appeal is dismissed.

No order as to costs.

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