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

CENTRAL EXCISE APPEAL NO. 204 OF 2019

The Principal Commissioner of Central
GST & C. Ex., Daman Commissionerate,
2nd Floor, Hani's Landmark, Vapi-Daman
Road, Chala, Vapi, Gujarat - Pin 396191. ... Appellant

Vs.

Filatex India Ltd.
Survey No.274, Demni Road, Dadra,
Silvasa, D & NH, Pin-396193. ... Respondent

Ms. Maya Majumdar for Appellant.
Mr. Prakash Shah with Mr. Jas Sanghavi i/by PDS Legal for Respondent.

CORAM: DHIRAJ SINGH THAKUR AND
ABHAY AHUJA, JJ.

RESERVED ON : 24th JUNE, 2022

PRONOUNCED ON : 8th SEPTEMBER, 2022

JUDGMENT : (PER ABHAY AHUJA, J.)

1. By this Appeal, filed under Section 35G of the Central Excise Act, 1944, the Appellant - Principal Commissioner of Central GST & C. Ex., is impugning order No.A/10670-10673/2019 dated

11th April, 2019 passed in Appeal No.E/1227/2011 by the CESTAT, West Zonal Bench, Ahmedabad.

2. The Respondent, viz., M/s. Filatex India Ltd., is a company engaged in the manufacture of polyester yarn of different descriptions falling under Chapter 54 of the Central Excise Tariff Act, 1985 and is holder of Central Excise Registration.

3. It is the case of the Appellant-Revenue that during the inquiry conducted by officers of the Central Excise, Surat -I Commissionerate, it was observed that there was a clandestine removal of goods by the manufacturer without payment of central excise duty. It is submitted that during the period 1st April, 2004 to 6th July 2004, Respondent-Company had cleared 1687585.511 kilograms of yarn manufactured at their factory without payment of the duty as well as without any payment to the six job workers for manufacture of grey fabrics and its clearance was from their premises. It is submitted that further investigation revealed that out of six job workers, one job worker, viz., M/s. A A Textiles, Sachin, Surat was not in existence, two job workers, viz., M/s. Rama Filaments Pvt. Ltd., Jolwa, Surat and M/s. Geena Synthetics Pvt.

Ltd., Karanj, Surat were not having any machinery to manufacture grey fabrics and their claim that they had got job work manufacture done could not be established from records as well as from statements of the transporters who claimed to have transported the fabrics from their premises to buyers of the fabrics. It is submitted that one job worker M/s. Mansa Synthetics Pvt. Ltd., Surat failed to produce any documents in support of manufacture of fabrics and its transportation to the customers of Respondent-Company and two job workers M/s. Micro Polyester Pvt. Ltd. and M/s. Goodluck Synthetics Pvt. Ltd. had stated that their records had been destroyed in floods in 2006. It is submitted that summons issued to the buyers of the grey fabrics were returned undelivered except one buyer who denied having purchased any fabrics or having made any transaction with the Respondent-Company.

4. It is submitted that during the inquiry, it was found that in most of the cases the exact amount for which the cheques were issued to Respondent-Company were deposited in cash or by transfer into the bank account of the so called buyers to facilitate the clearance of cheques. That the accounts of the so called buyers of fabrics were opened to regularize the fictitious transaction of sale

of fabrics by the Respondent-Company as the element of profit of trading was not reflected in the account as is seen in the normal course of such business.

5. It is submitted that based on the above, a show-cause notice dated 8th June, 2009 was issued by the Commissioner, Central Excise, Vapi, raising a demand of duty of Rs.3,11,76,080/- under Section 11A(1) of the Central Excise Act, 1944 alongwith interest and also a proposal to confiscate goods valued at Rs.10,93,00,281/- with penalty under Section 11AC of the Central Excise Act, 1944 and under Rule 25 of the Central Excise Rules, 2002 with penalty upon Shri Madhav Bhageria, the Joint Managing Director and various officers of Respondent-Company as well as the Director of M/s. Rama Filaments under Rule 26 of the Central Excise Rules, 2002.

6. The show-cause notice was adjudicated and the Order-in-Original No.14/MP/VAPI/2011 dated 22nd June, 2011/7th July, 2011 confirming demand of duty amounting to Rs.3,11,76,080/- alongwith interest and penalty equal to duty demanded under Section 11AC of the Central Excise Act, 1944 came to be passed.

Penalties were also imposed on the Joint Managing Director and other officers of the Respondent-Company. The Adjudicating Authority dropped the proceedings to confiscate the goods as well as to impose penalty upon the Respondent-Company under Rule 25 of the Central Excise Rules, 2002.

7. Aggrieved by the Order-in-Original, Appeal was filed by the Respondent-Company as well as the officers before the CESTAT, WZB, Ahmedabad. By order dated 11th April, 2019 the CESTAT has allowed the Respondent-Company's Appeal. Paragraphs 15 and 16 of the said order are set forth hereunder :-

> *"15. We find that only on the basis of above allegations, it cannot be said that the Appellant did not get manufactured the fabrics and instead diverted the yarn in the market. No single evidence has been adduced by the Revenue to show that the Appellant had cleared yarn from their factory for sale as such and thereby evaded central excise duty. Not a single buyer of yarn has been identified by the Revenue nor there are any statements of the employee, authorized signatory or the director of the Company that the Appellant had cleared any yarn clandestinely and it is coupled with the fact that no consideration has shown to have been received by the Appellant. There are no evidences of transportation of yarn from the Appellant's factory or its diversion. It is a settled law that the allegation of clandestine*

removal should be based upon clinching evidences whereas in the present case, not a single evidence of clearance and sale of Yarn by way of any evidence in the form of clearance of yarn, identification of buyers, receipt of consideration and any single paper supporting the allegation of the revenue has been found. In case of CCE, Rajkot Vs. Kalyan Glaze Tiles 2008 (222) ELT 417 (TRI) the Tribunal held as under :

> *"2. The appellants' main contention is that the name given in the loading slips does not tally with their names in as much as in most of the slips had mentioned as "Kalyan Ceramics" and "Kalyan Tiles", whereas the name of their unit is "Kalyan Glazed Tiles". Further, it has been contended that the entire case of Revenue is based on the loading slips recovered from the transporter's premises and the statement of the partner. As regards the recovery of the slips, it is seen that the transporter has not been made a party to the proceedings. He has placed an affidavit on record during the course of adjudication, to the effect that the chits are prepared to keep notes of requirements given by the clients over phone and it is not always that the trucks are booked and actually used by such persons. The transportation does not get executed due to various practical problems. It has further been mentioned in the affidavit that the trucks booked for the minimum quantity due to freight reason which does not mean that the quantity mentioned in chit is also the loaded quantity. We find that the said affidavit of the transporter has not been considered by the Commissioner (Appeals). Admittedly, the party has number of group*

companies under the main name of "Kalyan", manufacturing the identical goods and in absence of correct co-relation of the company with the appellant, such transport chits cannot be made the basis for arriving at finding of clandestine removal, especially in the light of the affidavit given by the transporter.

3. It is not understood as to when the names of the buyers was also mentioned in the said transport slip, what prevented Revenue officers to take the investigation up to the buyers' end and place on record more evidences to substantiate the allegation of clandestine removal. Since these have not been done by Revenue, the benefit of doubt has to be extended to the appellant in the absence of any corroborative evidence and on the face of the doubtful nature of transport slip. It is well established that the charges of clandestine removal cannot be confirmed on the basis of surmises and conjectures and require positive and tangible evidence. In the absence of such evidence in the present case, we find no merits in the findings of the authorities below. We may note here that the Revenue's reliance on the statement of the partner is also not justified in as much as apart from the fact that there is no corroboration to the said statement, it is seen that the partner has deposed in the said statement that anything showing clandestine removal if found, they will pay the duty. The language used does not inspire confidence to the effect that the partner has admitted the clandestine removal.

> *16. Further the judgments cited by the Appellant are on the same ground that charges of clandestine removal are not sustainable without corroborative evidence. The revenue could not produce any evidence or removal and sale of POY and hence the demand on alleged removal of same does not sustain. Thus as per our above findings and observations, we are of the view that the demand against the Appellant concern is not sustainable. We thus set aside the impugned order and allow the appeal filed by the Appellant concern with consequential reliefs, if any. The appeals filed by co- appellants are also allowed for the same reasoning."*

8. Aggrieved by the aforesaid order of the CESTAT, the Appellant-Revenue is in Appeal proposing the following substantial question of law :-

> *"Whether the Hon'ble CESTAT had erred in not considering the outcome of the investigation that :*
> *(i) no grey fabrics were manufactured from the yarn cleared without payment of duty by M/s. Filatex under Rule 12B of Central Excise Rules, 2002 to their job workers;*
> *(ii) the yarns had been diverted and sold elsewhere and records & payment transactions had been manipulated for such fictitious sale of fabrics,*
> *(iii) POY has been diverted without payment of duty under the garb of its clearance under the Rule 12B of Central Excise Rules, 2002."*

9. Ms. Maya Majumdar, learned Standing Counsel of Appellant-Revenue submits that the Tribunal has completely erred in ignoring the outcome of the investigation that no grey fabrics were manufactured from the yarn cleared without payment of duty by Respondent-Company, that the yarns had been diverted and sold elsewhere and records and payment transactions have been manipulated for such fictitious sale of fabrics, that the polyester yarn had been diverted without payment of duty under the garb of its clearance and under Rule 12B of the Central Excise Rules, 2002. Learned Standing Counsel draws the attention of this Court to Paragraphs 7.3, 7.4, 8.1, 8.2, 13, 14 and 15 of the Order-in-Original in support of her contentions. She submits that no fabrics were received by the job workers nor any payments were made to them. She submits that in some cases they had shown vehicle numbers in the challans through which material was sent to job workers for conversion but no details of transportation through which the grey fabrics were transported back from job workers has been shown. Some of the so called job workers did not even have weaving machines. She would submit that the investigation reveals that the job workers did not know M/s. Rama Filaments Pvt. Ltd., that they had never received yarn nor done any job work for M/s. Rama

Filaments Pvt. Ltd. She would submit that the statement of Shri Madhav Bhageria, Joint Managing Director of the Respondent-Company was recorded and he had agreed with the authority's findings. The summons issued to certain buyers also were returned undelivered and the statements were recorded denying purchase of any grey fabrics from the Respondent-Company or having made any transactions with them.

10. Learned Standing Counsel submits that therefore the findings of the Tribunal in Paragraphs 12 to 15 are contrary to the record and deserve to be set aside.

11. Learned Standing Counsel has sought to rely upon the judgment in the case of **Collector of Customs, Madras & Others Vs. D. Bhoormull, 1983 E.L.T. 1546 (S.C.)** and draws our attention to Paragraphs 30 and 31 thereof in support of her contentions :-

> *"30. It cannot be disputed that in proceeding for imposing penalties under clause (8) of Section 167, to which Section 178-A does not apply, the burden of proving that the goods are smuggled goods, is on the Department. This is a fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the contrary. But in appreciating its scope and the nature of the onus cast by it, we must pay due*

> *regard to other kindred principles, no less fundamental, of universal application. One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth, and as Prof. Brett felicitously puts it - "all exactness is a fake". El Dorado of absolute Proof being unattainable, the law, accepts for it, probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus legal proof is not necessarily perfect proof often it is nothing more than a prudent man's estimate as to the probabilities of the case.*
>
> *31. The other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered to use the words of Lord Mansfield in Batch v. Archer (1774) 1 Cowp 63 at p. 65 "According to the Proof which it was in the power of one side to prove and in the power of the other to have contradicted". Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden."*

12. Appellant-Revenue has in the circumstances, prayed that the question framed is a substantial question of law and as such the Appeal be admitted.

13. Mr. Jas Sanghavi, learned Counsel for Respondent-Company vehemently opposes the submissions made on behalf of the Appellant-Revenue and refers to Paragraph 12 of the order of the Tribunal. He points out that the Tribunal has clearly found that Respondent-Company before sending the goods for job work filed intimation with the Department as required under the Central Excise Rules, 2002, that copies of the said intimations have been furnished and that it is undisputed that the Department was in knowledge of the job work activities. He submits that while sending the goods, the challans were prepared and the yarn was acknowledged by the job workers of having been received; that job work charges were paid to job workers and TDS was also deducted on such payments as evidenced from the Form-16A issued to the six job workers. He submits that during the investigation, the statements of the employees and Director of the Respondent-Company were recorded and all had stated that the goods have been sent to the job work, that none of the statements from the job workers recorded by the investigation deny the fact that they had undertaken job work activity on behalf of Respondent-Company. Learned Counsel would submit that these are findings of facts by the Tribunal and cannot be faulted. He submits that the question

framed is a question of fact and not of law and therefore the Appeal deserves to be dismissed.

14. We have heard Ms. Maya Majumdar, learned Standing Counsel for the Appellant-Revenue and Mr. Jas Sanghavi, learned Counsel for the Respondent.

15. Before proceeding further, it would be useful to refer to Section 35G of the Central Excise Act, 1944 which is quoted as under :-

> *"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.
(2A) The High Court may admit an appeal after the expiry of the period of one hundred and eighty days referred to in clause (a) of sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period.
(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 sub-Section (1).
(7) When an appeal has been filed before the High Court, it shall be heard by a bench of not less than two Judges of the High Court, and shall be decided in accordance with the opinion of such Judges or of the majority, if any, of such Judges.
(8) Where there is no such majority, the Judges shall state the point of law upon which they differ and the case shall, then, be heard upon that point only by one or more of the other Judges of the

> *High Court and such point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.*
> *(9) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this Section." (Emphasis supplied)*

16. It is clear from the above Section that an appeal shall lie against the order of the Appellate Tribunal if the High Court is satisfied that the case involves a substantial question of law.

17. The Revenue appears to be agitating factual aspects in the matter. A perusal of the Tribunal order indicates that the Tribunal after having heard both sides and after having perused the case records has given a fact finding on the issues raised on behalf of the Appellant-Revenue. It has found that in the present case the fabric was shown to have been manufactured from six job workers, viz., M/s. Rama Filament Pvt. Ltd., M/s. Geena Synthetics Pvt. Ltd., M/s. A. P. Textiles Ltd., M/s. Mansa Synthetics Pvt. Ltd., M/s. Micro Polyester Pvt. Ltd. and M/s. Good Luck Synthetics Ltd.

18. Further, it has been found by the Tribunal that Respondent-Company before sending the goods for job work filed intimation with the Department as required under the Central Excise Rules, 2002 and that the copies of the said intimation had been annexed to the Appeal before the Tribunal. The Tribunal has given a finding that it is undisputed that the Department was in knowledge of the job work activities, that while sending goods, the challans were prepared and the yarn was acknowledged by the job workers of having been received. Respondent-Company has paid job work charges to the said job workers and also deducted TDS on such payments as found by the Tribunal from Form-16A issued to all six job workers. It is also recorded by the Tribunal that during investigation, the statements of the Joint Managing Director, Director and employees of Respondent-Company were recorded and all of them has stated that the goods were sent for job work. The Tribunal also records that in respect of M/s Geena Synthetics, M/s. Rama Filaments, M/s. Mansa Synthetics, M/s. Micro Polyester and M/s. Good Luck Synthetics were existing at the time of investigation. It is further recorded that none of the statements from the job workers recorded by the investigation deny the fact that they had undertaken job work activity on behalf of

Respondent-Company.

19. The Tribunal has in Paragraph 13 of its order given a finding that M/s. A. A. Textiles was a registered unit and that the Respondent-Company has shown the acknowledgment receipt of goods by the said M/s. A. A. Textiles and job work payment. The Tribunal has found that the remaining five job workers in their statements have clearly stated that they had undertaken job work of manufacturing of fabrics on account of the Respondent-Company. We agree with the Tribunal that only on the ground that some job workers could not be found or that some of them refused to have done job work, it cannot be concluded that no activity of job work manufacturing of fabrics was undertaken. The statement of few transporters that they did not transport the fabric cannot be a ground to hold that no fabric was manufactured as the main job workers have accepted the manufacture of fabric on job work. Even the clearance/sale of fabric and duty payment thereupon is not under dispute. There are no evidences that job work charges paid by the Appellant to the job workers flowed back to them. True it is that even if some of the buyers of the fabrics could not be found, it cannot lead to the conclusion that the Appellant did not sell the fabrics to

such parties. The Tribunal has found that majority of job workers, i.e. 5 job workers out of 6 investigated, have accepted the job work manufacturing of the fabrics from the Yarn supplied by the Appellant and that no evidence has been adduced to the effect that the Respondent-Company had clandestinely removed the yarn from their factory for sale by evading central excise duty. On these factual findings, the Tribunal has dismissed the Appeal.

20. In our view, all the factual aspects raised on behalf of the Revenue, appear to have been answered by the Tribunal. Before us, the Revenue has not been able to controvert any of these findings nor is there any material shown to us that demonstrates anything to the contrary.

21. The decision in the case of **Collector of Customs, Madras & Others (supra)** relied upon by the learned Counsel for the Revenue, in our view, would therefore not assist the case of the Appellant-Revenue.

22. These are all findings of fact by the final fact finding Authority viz. the CESTAT which cannot be faulted with. Besides, even the question as framed does not propose a question of law but is a question of fact which cannot be gone into by this Court. There is also no perversity demonstrated. In the circumstances, neither the Appeal nor the question as framed raises any substantial question of law.

23. There is therefore no merit in this Appeal. The Appeal stands dismissed. No costs.

(ABHAY AHUJA, J.) **(DHIRAJ SINGH THAKUR, J.)**