NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7895 OF 2004

INTERNATIONAL CONVEYORS LTD. APPELLANT

VERSUS

COMMNR. OF CENTRAL EXCISE & CUSTOMS RESPONDENT

J U D G M E N T

ANIL R. DAVE, J.

1. Being aggrieved by the Order No. A/1426/WZB/2004/CI dated 6th September, 2004 of the Customs, Excise and Service Tax Appellate Tribunal, West Zone Bench at Bombay in Appeal No.C/560/04, the appellant has approached this Court by way of this appeal.

2. In our opinion, this case hardly involves any legal issue but we feel more concerned about the hard luck of the appellant, a manufacturer of PVC Coal Conveyor Belting made from imported Nylon Yarn. We do not propose to go into the circumstances in which the litigation had started but we start from the point which gave rise to some confusion and as a result thereof the appellant was dragged to the present litigation.

3. Upon hearing the learned counsel appearing for the parties and on perusal of the impugned order and other relevant orders, we find that there was some issue with regard to imposition of duty on import of Nylon Yarn. It was held by the Central Excise & Gold (Control) Appellate Tribunal, New Delhi by its order dated 5th April, 1991 that the case put forward by the appellant with regard to the classification of the goods imported by it was correct and the amount which had been demanded by the Revenue, which had been paid by the appellant under protest should

be returned to the appellant upon production of evidence of end use of the imported yarn in the manufacturing of belting to the satisfaction of the concerned Assistant Collector.

4. In pursuance of the above order, the appellant filed a refund claim along with relevant documents, for Rs.17,35,119/-, the amount which was paid by way of duty under protest in respect of the nylon yarn which was imported by the appellant during the period commencing from February, 1987 to February, 1988.

5. As the amount of refund had not been paid in pursuance of the refund claim made by the appellant, the appellant was constrained to file Writ Petition No.5185 of 1993 before the High Court of Bombay praying for a direction that the aforestated amount be refunded along with interest thereon to the appellant. The said petition was allowed and by virtue of an order dated 19th April, 1994, the High Court had directed the Revenue to take

appropriate action for making payment of the refund of Rs.17.35 lacs within three months from the date of the order to the appellant.

6. After the aforestated order was passed by the High Court, the Assistant Collector of Central Excise issued a show cause notice dated 27.04.1994 calling upon the appellant to show cause as to why the application claiming refund should not be rejected on the ground of unjust enrichment as the amount of tax was alleged to have been recovered by the appellant from M/s. Coal India Ltd. and M/s. Singarani Collieries Co. Ltd., to whom the goods had been supplied by the appellant.

7. In pursuance of the aforestated show cause notice, the appellant had given its reply on 9th May, 1994 giving details to the effect that the amount of duty paid had never been recovered from the aforestated two units which were substantially controlled by the Government. Necessary evidence was also adduced and even the aforestated two

units also confirmed the fact that the aforestated amount of duty paid by the appellant had not been collected from them. The said reply was duly considered by the Deputy Collector, Central Excise and Customs, Aurangabad and thereupon he passed a final order dated 5th April, 1995 whereby he had come to the following conclusion, as recorded in his order:

> "I have gone through the records of the case carefully. As regards end use of nylon yarn, the jurisdictional range Supdt. has certified that the raw material i.e. nylon yarn imported under the said B/E has been used in the manufacture of the conveyor belting.
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> As regards unjust enrichment, party submitted that their contracts were fixed price contract and were without any escalation clause and were signed even before the dispute arose about the custom duty. M/s. Singarani Collieries Co. Ltd. and M/s. Coal India Ltd. have also certified that they have not paid any extra price due to increase in custom duty. Thus, it emerges that since duty is paid under protest, therefore, the limitation u/s 27 of C.A. is not applicable to subject refund claim.
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> i) The refund claim is admissible on merit;
> ii) The refund claim is also admissible on the limitation period;
> iii) Also the excess duty incidence has not been passed on by the assessee on their buyers."

The aforestated facts, as recorded by the Deputy Collector, Central Excise and Customs, Aurangabad clearly reveal that the amount of duty claimed by way of refund had not been collected by the appellant from the above named two buyers who had purchased conveyor belting from the appellant.

8. It is, however, strange that the Deputy Collector, Central Excise and Customs, Aurangabad passed the following final order:

> "I hereby sanction the refund u/s 27 of C.A. – 1962 claim for Rs.17,35,119/- with a condition that the party should give an undertaking that they will pay back money to the Government in case Supreme Court decides the SLP No.2332/92 U.O.I. Vs. M/s. Solar Pesticides Pvt. Ltd. in favour of the Department."

9. Apparently, there was no issue of captive consumption in the instant case and yet the appellant was directed to file an undertaking as stated hereinabove in the order. Being in need of money, the appellant filed an undertaking under protest, though, in our opinion, it was not necessary for

the Deputy Collector, Central Excise and Customs, Aurangabad to ask for such an undertaking. Be that as it may, the said order was not challenged by anybody and therefore, it attained finality.

10. Ultimately, this Court decided SLP No.2332/92, Union of India vs. M/s. Solar Pesticides Pvt. Ltd. and the judgment delivered in the said case has been reported at page no.705 of 2000 (2) SCC.

11. In our opinion, the aforestated judgment is not at all relevant so far as the appellant's case is concerned. However, the learned counsel appearing for the respondent had made a feeble effort to correlate the aforestated judgment and the facts of the case of the appellant. We do not agree with the submissions made by the learned counsel for the respondent for the reason that Union of India Vs. M/s. Solar Pesticides Pvt. Ltd. (supra) is a case where incidence of duty had been passed over to the buyer, whereas in the instant case it is an admitted

fact, even as recorded by the Deputy Collector, Central Excise and Customs, Aurangabad that the incidence of duty had not been passed over to the purchaser of the furnished goods. In spite of the aforestated fact, by a show cause notice dated 3rd March, 2003 the appellant was called upon to pay the amount which had been refunded to the appellant in pursuance of the undertaking filed by the appellant as per order dated 5th April, 1995 passed by the Deputy Collector, Central Excise and Customs, Aurangabad. The aforestated show cause notice dated 3rd March, 2003 was replied to by the appellant on 3rd April, 2003 and thereupon by an order dated 14th July, 2003 the said show cause notice had been dropped.

12. The order dated 14th July, 2003, whereby the show cause notice dated 3rd March, 2003 had been dropped, was taken into review and by an order dated 31st March, 2004 the said review was allowed and thereby once again the

appellant was asked to pay the amount which had already been refunded to it.

13. The said order dated 31st March, 2004 was challenged by the appellant before the Tribunal and the Tribunal was pleased to dismiss the said appeal and the impugned order of dismissal dated 6th September, 2004 has been challenged by the appellant in this appeal.

14. Upon hearing the concerned counsel and looking at the facts of the case, it is very clear that it is an admitted fact that the amount of duty paid by the appellant had never been passed over to the purchasers and the said fact has been duly recorded by the Deputy Collector, Central Excise and Customs, Aurangabad in his order dated 5th April, 1995. The said order has attained finality as nobody challenged the said order. An undertaking, though strictly not required to be given, was given by the appellant as demanded under the aforestated order dated 5th April, 1995 and ultimately the amount had been

refunded to the appellant. In our opinion, there is no question of demanding the said amount again, especially when the facts which had been disputed by the Revenue before the Tribunal had already been admitted in the proceedings which had been initiated by the Deputy Collector, Central Excise and Customs, Aurangabad in his order dated 5th April, 1995. We are not in agreement with the findings arrived at by the Tribunal which are contrary to the facts recorded by the Deputy Collector, Central Excise and Customs, Aurangabad. Unfortunately, the said order has not been referred to at all by the Tribunal. Without disturbing the findings arrived at by the Deputy Collector, Central Excise and Customs, Aurangabad in his order dated 5th April, 1995, the Revenue could not have come to an altogether different conclusion on facts. In our opinion, due efforts were made to find out whether the amount of duty had been passed over to the purchasers, who are either government Companies or Corporations

controlled by the Government. It has been clearly stated in the aforestated order dated 5th April, 1995 that even the purchasers had admitted the fact that the amount of duty paid by the appellant had not been passed over to the said purchasers or in other words, the said amount of duty had not been recovered from the said purchasers.

15. We fail to understand as to how the judgment delivered in U.O.I. Vs. M/s. Solar Pesticides Pvt. Ltd. (supra) is applicable to the case of the appellant. Neither this is a case of captive consumption nor is a case of unjust enrichment.

16. For the aforesaid reasons, we quash and set aside the impugned order passed by the Tribunal dated 6th September, 2004. The appeal is allowed with costs. Looking at the hardship suffered by the appellant, in our opinion, it would be just and proper to award an amount of Rs.25,000/- as costs and the said amount shall be paid

to the appellant within three months from the date of this order by the respondent authority.

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(ANIL R. DAVE)

…….....J.

(SHIVA KIRTI SINGH)

New Delhi
February 25 , 2014