'REPORTABLE'

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 1633-1638 OF 2004

COMMISSIONER OF CUSTOMS (IMPORT), RAIGAD ... Appellant

VERSUS

M/S. FINACORD CHEMICALS (P) LTD. & ORS. ... Respondents

WITH

CIVIL APPEAL NO. 6541 OF 2010

CIVIL APPEAL NO. 3410 OF 2006

J U D G M E N T

A. K. SIKRI, J.

CIVIL APPEAL NOS. 1633-1638 OF 2004

In August, 1991, respondent nos. 1 and 2 herein imported 2 and 3 containers respectively of alcohol under the description "Undenatured Ethyl Alcohol' (Malt Spirit plus or minus 59.3% Vol.) from an intermediary, M/s. Ravco International Ltd., England (hereinafter referred to as 'RIL' for short). As per the Department, these imports were under invoiced at pound 1.40 per litre whereas the actual price of the said goods was pound 3.78 per litre. This led to issuance of a show cause notice dated 28.09.1992 upon the importers/respondents herein. It was alleged that the correct transaction value of the imported goods was pound

3.78 per bulk litre and that the goods were imported against invalid licenses. Accordingly, demand of customs duty was raised against respondent nos. 1 and 2. It also proposed confiscation of the goods and penal action against the respondents.

The Collector of Customs vide Order-in-Original dated 28.02.1995 upheld the misdeclaration and undervaluation and further held respondent no. 1 to pay customs duty of Rs.1,63,74,648/- along with penalty of Rs.1,64,00,000 and goods to be confiscated. Respondent no.2 goods valued at Rs.83,04,501/- to be confiscated. However, the same were provisionally released on furnishing Bank Guarantee of Rs. 1 crore, differential duty to the tune of Rs. 77,34,994/-. A further penalty of Rs. 2.63 crores was imposed. Respondent no. 3 was directed to pay Rs. 20 lakhs as penalty, respondent no. 4 was imposed the penalty of Rs. 1 crore and respondent no. 5 was to pay Rs. 1 lakh as penalty.

Aggrieved, the respondents filed appeals before the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as 'CESTAT') and the CESTAT vide its final order dated 10.09.2003, partly allowed the appeals thereby setting aside the order of the Collector regarding enhancement of the unit price, while upholding that import of the said goods was unauthorised and was liable for confiscation. However, the CESTAT reduced the amount of

fine imposed and set aside the penalties imposed on the respondents. Hence the present Appeals.

Insofar as the Revenue /Department is concerned, it is aggrieved by the following findings arrived at by the CESTAT in the impugned judgment: -

1. Accepting the version of the respondents-assessees that the goods in question were imported at UK pound 1.40 per bulk litre and not UK pound 3.78 per bulk litre as claimed by the Revenue.
2. The reduction of redemption fine from Rs.51,62,413/- to Rs. 10 lakhs.
3. The reduction of penalty on Mr. S. R. Nagpal from Rs.22,65,006 to Rs. 10 lakhs.

We may mention at this stage that against the other findings of the Tribunal which have gone against the assessee, the assessee has also filed the appeal which is pending before the Bombay High Court.

Insofar as the first issue of import price of the liquor in question is concerned, the order of the Collector reveals that the respondents-assessees have relied upon a letter indicating that the goods were imported at the rate of UK pound 1.40 per bulk litre. After discussing elaborately, the Collector rejected the authenticity or evidentiary value of the said letter. However, apart from

this letter, the respondents had also produced invoices and in these invoices price of UK pound 1.40 per bulk litre is specifically mentioned. The Collector has not taken into account or considered the import of these invoices. On the other hand, the CESTAT has remarked and rightly so, that when the invoices are produced showing the purchase price of the goods in question and authenticity of these invoices is not doubted by the Department, these will form as the primary evidence in support of the contention of the respondents that the imported goods were purchased at UK pound 1.40 per bulk litre. We thus, do not find any flaw in the reasoning of the CESTAT while deciding this issue.

Insofar as the reduction of redemption fine as well as the penalty is concerned, the CESTAT has given the following reasons in doing so: -

> "Redemption Fine
>
> In view of our finding on issue (i) that the goods are liable to confiscation as they have been imported without cover of a valid licence. We hold that levy of fine is warranted. However we note that for the first time in the case of Bussa Overseas Properties Ltd. vs. CC(I) Mumbai 2002(148) ELT 328, the Tribunal held that over-proof whisky having more than 55% alcohol content by vol. is a concentrate of alcoholic beverages and until this decision, a practice to allow clearances of similar goods under REP licence was prevalent. We also note that a long period has lapsed since the import and that the goods are raw materials for manufacture of alcoholic beverages that this is not a case of duty evasion as the finding on undervaluation has on set aside by us thereby reducing the gravamen of the charge. The assessable value of the goods imported by FCPL is Rs.15,08,040/- while the assessable value of the goods imported by SRN is Rs.22,78,578/-. The

fine levied by the Commissioner on FCPL is Rs.51,62,413/- and that of SRN is Rs.22,65,006/-. We are not able to fathom the logic behind fixing the above quantum of fines. There is nothing in the impugned order to indicate the basis on which the quantum was arrived at. Having regard to the above factors including the fact that the import Policy was liberalised subsequently and that only the charge of ITC violation has been sustained by us, we reduce the fine levied on FCPL to Rs. 10 lakhs and on SRN to Rs. 15 lakhs."

We are of the opinion that the CESTAT has given valid reasons for reducing the penalty and fine and the discretion exercised by the CESTAT on valid considerations does not call for any interference. These appeals are accordingly, dismissed. We make it clear that the dismissal of the appeals would not impact in any way the appeal which is preferred by the respondents-assessees and is pending in the Bombay High Court. The said appeal shall be decided by the Bombay High Court on its own merits.

<u>Civil Appeal No. 6541 of 2010</u>

The appellants herein are carrying on the business, *inter alia*, of manufacturing, sale and distribution of Indian Made Foreign Liquor (IMFL). They are the successor in interest of Shaw Wallace Distilleries. It so happened that in same proceedings which were initiated against one M/s. S. R. Nagpal and company and M/s. Finacord Chemicals Private Limited, who had imported certain goods from England and had sold to the appellant herein, the said goods which

were in custody of the appellant were seized by the Customs Department in those proceedings. The appellant felt aggrieved by the said seizure and approached the High Court of Bombay for release of the goods. In the said Writ Petition No. 3220 of 1991 filed by the appellant, interim order dated 25.10.1991 was passed which reads as under: -

> "Rules returnable forthwith Respondents waive service. Order as per minutes. Petition disposed of accordingly adjudication proceedings to proceed.
>
> Upon the petitioner no. 1 depositing the amount of Rs.1,56,64,500/- with the Additional Collector of Customs, Bombay the Petitioners are allowed to utilize 15664,50 bulk liters of Ethyl Alcohol which are the subject matter of the Supurthnama dated 7.10.1991."

Pursuant to the aforesaid order, the appellant deposited a sum of Rs. 1,56,64,500/- and got the siezed goods released. The appellant, thereafter, moved another application in the said writ petition praying that the money deposited by it be kept with the Nationalised Bank in a Fixed Deposit. On the said application, order dated 30.10.1991 was passed. Though the aforesaid request of the appellant was rejected, but at the same time, the Court gave the direction that in the event it is ultimately held that the appellant is entitled to get back the amount deposited by it, the same shall be refunded to the appellant with interest at the rate of 13 per cent per annum which was the rate of interest payable by the Nationalised Bank on Fixed Deposits at the relevant time.

The matter was proceeded against M/s. S. R. Nagpal and company and M/s. Finacord Chemicals Private Limited. The Order-in-Original was passed by the Commissioner against those firms. However ultimately the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to 'CESTAT') in the appeals filed by them, gave them substantial relief by allowing the appeals partly. The issue as to whether there was an under-invoicing in the import of the goods was decided in favour of the said parties and on that ground, the additional demand of duty was struck down. Even the redemption fine was reduced to Rs. 10 lakhs and as far as penalty is concerned, it was completely knocked off and set aside. We may mention here that against that order passed by the CESTAT, the Department had filed appeal and this court has affirmed that part of the order of the CESTAT dismissing the appeal of the Department. The effect thereof is that even qua M/s. S. R. Nagpal and company and M/s. Finacord Chemicals Private Limited, no additional duty or the penalty is payable and the only redemption fine to the extent of Rs. 10 lakhs is payable.

In the aforesaid background, the appellant herein, which was not even the importer of the goods but had purchased the goods from M/s. Finacord Chemicals Private Limited, made an application for refund of the amount of

Rs.1,56,64,500 which was deposited pursuant to the order dated 25.10.1991 passed by the High Court of Bombay in Writ Petition No. 3220 of 1991. The Commissioner while dealing with the case of M/s. S. R. Nagpal and company and M/s. Finacord Chemicals Private Limited had recorded certain findings in respect of the appellant herein as well. Insofar as the appellant is concerned, it is categorically held that no role could be attributed to the appellant in the import of goods in question and the appellant was the *bona fide* purchaser of the goods from the said two importers. The Commissioner also referred to the interim orders passed by the High Court of Bombay in the Writ Petition filed by the appellant, which are taken note of above. However, in his order, he ultimately recorded that the question of refund would arise only if the adjudication order holds the appellant to be entitled to this amount or part thereof. At the same time, it is significant to note some pertinent observations made by him in the order to the effect that the amount in question was in the nature of deposit by the appellant in lieu of permission to take back the goods and to utilise those goods pending adjudication and if adjudication orders so warrants, this amount could be appropriated towards dues as adjudicated, according to law.

After the order of the CESTAT holding that no additional duty was payable, the appellant made an

application for refund of the amount deposited by it stating that even the importers were held not liable to pay any duty. This application was, however, rejected invoking the doctrine of 'unjust enrichment'. Challenging the order, the appellant preferred Customs Appeal No. 56 of 2008 before the High Court of Bombay. Vide the impugned judgment dated 25.06.2009 rendered by the High Court of Bombay in the aforesaid appeal, the High Court has confirmed the applicability of the doctrine of unjust enrichment insofar as the demand of duty is concerned. However, insofar as the demand of fine is concerned, the High Court has held that the principle of unjust enrichment would not be attracted. It is this judgment which is under challenge in the present proceedings.

From the aforesaid narration of facts, it is clear that insofar as the appellant is concerned, it had not imported the goods in question. The importers were M/s.S.R.Nagpal and company and M/s. Finacord Chemicals Private Limited. The dispute of under-invoicing was also qua the said two importers on the basis of which custom was claiming lesser payment of duty by the said importers. In the adjudication proceedings, while imposing the duty against the said importers, a categorical finding was also recorded at the same time that the appellant had no role to play therein and was a *bona fide* purchaser of the goods from

the said importer which were imported by them. It is also manifest that the appellant came into picture only when the goods purchased by the appellant were seized by the custom department and he had to approach the High Court of Bombay for the release of those goods. What is significant is that as a condition for the release of the said goods, interim order directing the appellant to deposit the amount in the sum of Rs.1,56,64,500 was passed. It was not towards any custom duty. In this scenario, it is difficult to hold that the principle of unjust enrichment can at all be applied.

As far as the deposit of the aforesaid amount by the appellant and seeking refund thereof is concerned, we need not discuss the law on this aspect in detail as the position would become completely transparent on taking note of some of the circulars issued by the Central Board of Excise and Customs, New Delhi, itself. Further, these circulars are issued to give effect to certain judicial pronouncements.

First circular to which we would like to refer is Circular dated 02.01.2002 issued by the Board, wherein the Board clarified that in the matter of refund of pre-deposit, refunds would not be covered under the provisions of Section 11B of the Customs Act or Section 35F of the Central Excise Act, meaning thereby, the aforesaid provisions which pertain to aforesaid unjust enrichment would not be applicable. It

is also specifically pointed out in the said circular that these deposits are other than duty. The circular was issued keeping in view of the orders of this Court in few cases including in *Union of India* v. *Suvidhe Ltd.* It is clear from the following portion of this circular:

> **"The issue relating to refund of pre-deposit made during the pendency of appeal was discussed in the Board Meeting. It was decided that since the practice in the Department had all along been to consider such deposits as other than duty, such deposits should be returned in the event the appellant succeeds in appeal or the matter is remanded for fresh adjudication.**
> **2. It would be pertinent to mention that the Revenue had recently filed a Special Leave Petition against Mumbai High Court's order in the matter of NELCO LTD, challenging the grant of interest on delayed refund of pre-deposit as to whether:**
> **(i) the High Court is right in granting interest to the depositor since the law contained in Section 35F of the Act does in no way provide for any type of compensation in the event of an appellant finally succeeding in the appeal, and,**
> **(ii) the refunds so claimed are covered under the provisions of Section 11B of the Act and are governed by the parameters applicable to the claim of refund of duty as the amount is deposited under Section 35F of the Central Excise Act, 1944.**
>
> **The Hon'ble Supreme Court *vide* its order dated 26-11-2001 dismissed the appeal. Even though the Apex Court did not spell out the reasons for dismissal, it can well be construed in the light of its earlier judgment in the case of *Suvidhe Ltd.* and *Mahavir Aluminium* that the law relating to refund of pre-deposit has become final."**

It is the order dated 07.08.1996 which was passed by this Court in *Union of India* v. *Suvidhe Ltd.* dismissing the special leave petition which was filed by the Union of India against the judgment of the High Court of Bombay in *Suvidhe Ltd.* v. *Union of India* [1996 (82) ELT 177]. Since the

special leave petition was dismissed *in limine,* we would like to reproduce para 2 of the judgment of the High Court wherein the High Court had observed that in case of such deposits, provisions of Section 11B of the Customs Act will have no application. This para reads as under: -

> **"2. Show cause notice issued by the Superintendent (Tech.) Central Excise to the petitioner to show cause why the refund claim for Excise Duty and Redemption fine paid in a sum of Rs.14,07,410/- should be denied under Section 11B of the Central Excise Rules and Act, 1944 (sic) is impugned in the present petition. The aforesaid amount is deposited by the Petitioners not towards Excise Duty buy by way of deposit under Section 35F for availing the remedy of an appeal. Appeal of the petitioners has been allowed by the Appellate Tribunal by its Judgment and order passed on 30th of November, 1993 with consequential relief. Petitioners' prayer for refund of the amount deposited under Section 35F has not received a favourable response. On the contrary the impugned show cause notice is issued why the amount deposited should not be forfeited. In our judgment, the claim raised by the Department in the show cause notice is thoroughly *dishonest* and *baseless.* In respect of a deposit made under Section 35F, provisions of Section 11B can never be applicable. A deposit under Section 35F is not a payment of Duty but only a pre-deposit for availing the right of appeal. Such amount is bound to be refunded when the appeal is allowed with consequential relief."**

By another Circular No.802/35/2004-CX., dated 08.12.2004 issued by the Board, the Board emphasised that such amounts should be refunded immediately as non-returning of the deposits attracts interest that has been granted by the courts in number of cases.

It is stated at the cost of repetition that since the

amount in question was deposited in compliance with the interim order passed by the High Court of Bombay, which was not towards duty, the question of unjust enrichment would not arise at all.

This appeal is, accordingly, allowed. That part of the order of the High Court of Bombay which dis-entitles refund of duty amount is set aside. The entire amount shall be refunded along with interest calculated at the rate of 13 per cent per annum, as order to this effect was specifically passed on 30.10.1991 in Writ Petition No. 3220 of 1991 by the High Court of Bombay.

Civil Appeal No. 3410 of 2006

In view of the orders passed above, this appeal preferred by the Commissioner of Customs is dismissed.

....., J.
[A.K. SIKRI]

....., J.
[ROHINTON FALI NARIMAN]

New Delhi;
April 08, 2015