SUPREME COURT OF INDIA

Essar Steel Limited & Anr.

Vs.

Union of India & Ors.

C.A.No.202 of 2002

(S.H.Kapadia and B.S.Reddy,JJ.,)

29.03.2007

JUDGMENT

S.H.Kapadia, J.,

1. In these civil appeals the controversy lies on the interpretation of the interim order dated 9.9.1991 passed by this Court in a stay application in Civil Appeal Nos. 3152-53 of 1991 filed by the Department.

2. Essar Steel Limited ("the importer" for short) submitted the Bills of Entry on which provisional assessment was made under Project Imports Regulations, 1986. The declared value was DM 46.75 million on which the importer paid Rs. 7.93 crores as duty. This was not accepted by the Department. They issued a show cause notice dated 24.10.1988. They made provisional assessment based on total transaction value of DM 84.15 million. Thus, the Department increased the transaction value from DM 46.75 million to DM 84.15 million, i.e., addition of DM 37.40 million. This increase was made by the Department by loading the assessable value on account of certain technical fees/ charges. Under the provisional assessment, the Department accordingly called upon the importer to pay Rs. 13.95 crores. As stated above, the importer had paid Rs. 7.93 crores, unconditionally, according to the declared value. After loading they paid a further amount of Rs. 6.02 crores under protest. Thus, the disputed amount of duty paid by the importer was Rs. 6.02 crores on account of the increased transaction value of DM 37.40 million. The amount was paid on 15/16.12.1988 by the importer. On payment, the goods were cleared on 15/16.12.1988.

3. The figures given in this judgment are rounded off to even numbers for the sake of convenience.

4. The order was challenged by the importer before CEGAT ("the Tribunal"). By judgment dated 13.2.1991 the Tribunal decided the appeal in favour of the importer and directed refund of Rs. 6.02 crores. Aggrieved by the decision of the Tribunal, the Department came to this Court by way of civil appeal nos. 3152-53/91. At the time of preliminary hearing on 9.9.1991 the following order was passed: "On the application for stay, we think, it is not appropriate to

order stay of the refunds. The respondent shall be entitled to the refund subject to the furnishment of a bank guarantee for the amount of the refund to the satisfaction of the Collector of Customs (Preventive) Ahmedabad. A fresh bank guarantee, in lieu of existing bank guarantee, shall be now furnished. The respondent shall ensure that the guarantee shall be for the entire period of the pendency of these appeals if necessary by renewal from time to time. The guarantee shall be strictly subject to this condition.

5. The refund shall be made within two weeks from the date of the furnishment of the bank guarantee or within a period of 6 weeks whichever is later. If the appellants succeed in appeals, the amount of refund obtained pursuant to order shall be made good and restituted back to the appellants by the respondent together with interest thereon @ 18% per annum from the date of the refund."

6. Finally, by judgment and order dated 19.11.1996, this Court disposed of the Department's civil appeal nos. 3152-53/91. It was held that fees paid by the importer to the foreign supplier for theoretical and practical training of engineers outside India was not includible in the assessable value of the plant. It was further held that engineering and consultancy fees paid to the foreign company was not fully includible in the value of the plant. That, only the expenditure incurred for dismantling the plant was includible. In short, out of the addition of DM 37.40 million in the assessable value for technical fees/ charges, this Court excluded DM 23 million in favour of the importer and included DM 14.3 million (in favour of the Department). In other words, the assessee substantially succeeded in the appeal. This Court set aside additions to the extent of DM 23 million.

7. After the decision of this Court, ultimately the final assessment order was passed by the Department on 16.2.2001. This order has been passed after the impugned judgment of the High Court dated 6.2.2001. Under the final assessment order dated 16.2.2001, on account of deletion of additions to the extent of DM 23 million the differential duty payable by the importer stood reduced to Rs. 10, 63, 39, 665/- According to the final assessment order the importer had already paid Rs. 9, 44, 29, 850/- leaving the balance of Rs. 1, 19, 09, 815/-, which stands paid by the importer. In other words, the entire account stands settled.

8. The Department now contends that the importer under the interim order dated 9.9.1991 was liable to pay interest @ 18% p.a. on Rs. 6.02 crores between the period 28.10.1991 to 10.7.1997; that under the said interim order passed by this Court it was stipulated that if the Department succeeds in the civil appeal nos. 3152-53/91 the importer was liable to restore the refunded amount to the Department with 18% interest. The entire controversy revolves round this interim order.

9. In our opinion, this litigation was totally unwarranted and time consuming. On one hand, the importer contended that under the Customs Act, 1962, as it stood at the relevant time, there was no provision for levy of interest on provisional assessment. According to the importer, the Department could have levied interest only on final assessment. According to the importer, the present case related to imports during the period September to November, 1988. According to the importer at that time there was no provision for levying of interest on

provisional assessment. According to the importer, section 47(2) was not applicable to the present case. According to the importer, at the relevant time, interest was payable only in a case where the importer fails to pay import duty under section 47(1) at the time of clearance within 5 days from the date on which the bill of entry is returned to him for payment of duty and that too on the amount of duty demanded at that stage by the Department. According to the importer, as indicated by the facts above, the import duty was paid within the stipulated period and, in the circumstances, section 47(2) was not applicable. It was further contended on behalf of the importer that the Department cannot call upon the importer to pay interest on the basis of the interim order of this Court which ultimately got merged into the final judgment dated 19.11.1996. On behalf of the importer it was lastly contended, that in the present case, the final assessment order was passed only on 16.2.2001; that during the period 28.10.1991 to 10.7.1997 there was no final assessment order; that the importer had succeeded substantially in getting the assessable value reduced and that the very fact that the law stood amended by Act 29 of 2006 with effect from 13.7.2006 vide section 18(3) under which interest could be levied even on provisional assessment indicates that prior to 13.7.2006 there was no provision in the Customs Act, 1962 to charge interest on provisional assessment except to the limited extent mentioned in the proviso to section 47(2) which, on the facts of this case, is not attracted. That, the doctrine of merger of the interim order in the final order was not applicable in the present case.

10. According to the Department, on the other hand, the Tribunal had passed an order of refund of Rs. 6.02 crores. According to the Tribunal, the assessable value was not liable to be loaded on account of technical fees/charges. The Department had filed civil appeal nos. 3152-53/91 against the decision of the Tribunal granting the refund. At the stage of preliminary hearing when the Department sought an order of stay of the refund, the importer was allowed the refund of Rs. 6.02 crores subject to the importer giving a bank guarantee to the satisfaction of the Collector. It was made clear in the interim order that Rs. 6.02 crores should be brought back by the importer if the Department succeeds in the said civil appeals and in such an event the importer shall return Rs. 6.02 crores to the Department with interest at the rate of 18% p.a. from the date of refund which, as stated above, in the present case, was on 28.10.1991. The Department contended before us that in view of the above interim order, the Department was entitled to interest on Rs. 6.02 crores commencing from 28.10.1991 to 10.7.1997 on which date the Department encashed the bank guarantee given by the importer.

11. As stated above, the entire controversy in the present case is irrelevant. The interim order passed by this Court was on the stay application made by the Department. The importer was allowed to withdraw Rs. 6.02 crores. The importer had undertaken to restore the amount if the Department succeeded in the appeal. In the present case, it is necessary to keep in mind the conceptual difference between the assessable value and the amount of duty payable thereon. As indicated above, the declared value was DM 46.75 million. This was not accepted by the Department. They increased the value from DM 46.75 million to DM 84.15 million. The Department included certain items. The importer objected to such inclusion. The loading of the value was to the tune of DM 37.40 million. In the final hearing, this Court disallowed the addition to the extent of DM 23 million out of DM 37.40 million, therefore,

the importer substantially succeeded in getting the assessable value reduced. The duty amount of Rs. 6.02 crores was based on the loading of certain items to the tune of DM 37.40 million which this Court did not accept. Duty is derived from the assessable value. As can be seen from the order of final assessment, the differential duty stood substantially reduced from Rs. 13.95 crores to Rs. 10.63 crores (approx.). The final assessment order has given a complete break-up of the amounts paid during the interregnum by the importer. When the litigation was going on the Department has recovered Rs. 6.02 crores on 10.7.1997; it has recovered Rs. 2.17 crores on 1.11.2000; the importer has paid Rs. 50 lacs on 6.1.2001 and the importer has paid Rs. 75 lacs on 10.2.2001. In all, an amount of Rs. 9.44 crores (approx.) got collected/ paid and the balance amount was Rs. 1.19 crores. This amount has also been paid. In the circumstances, the Department cannot seek to recover interest on the full amount of Rs. 6.02 crores which is the duty amount calculated on the increased/ loaded assessable value of DM 37.40 million. The Department has failed in its appeal in loading the assessable value by DM 37.40 million. The addition to the extent of DM 23 million is disallowed. In the circumstances, the question of charging interest under the interim order of this Court for the aforesaid period does not arise. We do not wish to go into larger controversy regarding chargeability of interest under the Customs Act, 1962 as it stood in 1988.

12. Before concluding, we may state that the importer and the Department have both come in appeal to this Court against the impugned judgment of the Gujarat High Court dated 6.2.2001 in Special Civil Application No. 12661/2000. In fairness to the High Court, we may state that the final assessment order came to be passed on 16.2.2001 which is after the impugned judgment. In the impugned judgment, it has been stated that the parties should have moved this Court for clarification of interim order dated 9.9.1991. We have clarified and explained the position. We do not wish to expand the controversy. Justice has been done in the matter. Accounts have been settled. Accordingly, we set aside the impugned judgment.

13. For the aforestated reasons, without going into the wider controversy, keeping the question of law open, we hold that the Department was not entitled to interest at the rate of 18% p.a. on Rs. 6.02 crores during the period 28.10.1991 to 10.7.1997 under the interim order dated 9.9.1991 of this Court, quoted above.

14. Accordingly, both the appeals are disposed of with no order as to costs.