SUPREME COURT OF INDIA

Swastika Enterprises & Anr.

Vs.

Commnr. of Customs, Kolkata & Ors.

C.A.No.7570 of 2004

(A.K.Sikri and Rohinton Fali Nariman,JJ.,)

04.08.2015

JUDGMENT

A.K.Sikri,J.,

1. The question of law which arises in these two appeals is identical which concerns the interpretation that is to be accorded to the provisions of Kar Vivad Samadhan Scheme (for short, the 'Scheme') that was introduced under Chapter IV of the Finance (No.2) Act of 1998 (hereinafter referred to as the '1998 Act') and is contained in Sections 86 to 98 of the said Act. In particular, it is Section 95(ii)(b) of the 1998 Act that becomes the focus of the issue and the meaning that is to be assigned to the said clause would be the determinative of the outcome of the dispute. It has arisen under the following circumstances (facts are taken from Civil Appeal No. 7570 of 2004 for the sake of convenience):

2. The appellants carry on the business, inter alia, of importing old ships for the purpose of ship breaking and disposing of the scrap. In 1993, they imported a vessel called M.V. Pablo Metz and for clearance of these goods, filed the Bill of Entry under Section 46 of the Customs Act, 1962. Although the appellants contended that the said import was exempted from levy of 'additional customs duty' under an exemption Notification dated February 28, 1993, the Customs authorities, after hearing the appellants, felt it otherwise. An endorsement on the Bill of Entry was made for payment of additional customs duty of ?52,20,000 in addition to the basic customs duty. The said endorsement was made under Section 47 read with Section 153 of the Customs Act and required the appellants to make payment of the amount assessed within 7 days, failing which interest was chargeable.

3. This levy was challenged by the appellants by means of a writ petition before the High Court of Calcutta, which was disposed of by the High Court with a direction to the appellants to submit a bank guarantee for 50% of the disputed amount and a personal bond for the balance 50%.

4. It so happened that in the meantime, one M/s. Amar Steel Industries had succeeded in the writ petition filed by the said assessee on the same point as the learned Single Judge of the

Calcutta High Court had allowed its writ petition vide order dated April 16, 1993. However, the Revenue had preferred appeal against the said judgment, which was pending before the Division Bench. The Division Bench had passed an interim order dated May 17, 1993 staying the operation of the judgment of the Single Judge and, at the same time, had also given certain directions.

5. When the writ petition of the appellants was taken up for consideration and disposed of by the learned Single Judge on July 20, 1993, the aforesaid events in the case of M/s. Amar Steel Industries were taken cognizance of. Thus, while disposing of the writ petition and directing the appellants to submit bank guarantee of 50% of the disputed amount and a personal bond for the balance 50%, the learned Single Judge observed that he case of the appellants would abide by the result of the appeal of the Revenue in the case of M/s. Amar Steel Industries.

6. During the pendency of the appeal, the Union of India introduced the Scheme contained in Sections 86 to 98 of the 1998 Act. The Scheme provides for settlement of disputes relating to tax arrears both for direct taxes and indirect taxes. So far as indirect tax is concerned, Section 87(m)(iii) of the 1998 Act defines 'tax arrear' in respect of which the Scheme was to be applied. It reads as follows:

> "(a) the amount of duties (including drawback of duty, credit of duty or any amount representing duty), cesses, interest fine or penalty determined as due or payable under that enactment as on the 31st day of March, 1998 but remaining unpaid as on the date of making a declaration under section 88; or
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> (b) the amount of duties (including drawback of duty, credit of duty or any amount representing duty), cesses, interest, fine or penalty which constitutes the subject matter of a demand notice or a show-cause notice issued on or before the 31st day of March 1998 under the enactment but remaining unpaid on the date of making a declaration under section 88, but does not include any demand relating to erroneous refund and where a show- cause notice is issued to the declarant in respect of seizure of goods and demand of duties, the tax arrear shall not include the duties on such seized goods where such duties on the seized gods have not been quantified." The Scheme also provided the procedure to take benefit thereof. It required an assessee to make a declaration to the designated authority in respect of tax arrears and pay the amount payable under the Scheme to conclude in proceeding with respect to the recovery of such tax arrears. For the purpose of taxes payable under indirect tax enactments, the rates at which the settlement would be made are specified in Section 88(f) of the 1998 Act. For our purposes, crucial provision is Section 95(ii) which made the scheme inapplicable, in respect of indirect tax enactments, in the following cases:
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> "(a) In a case where prosecution for any offence punishable under any provisions of any indirect tax enactment has been instituted on or before the date of filing of the

declaration under Section 88, in respect of any tax arrears of such case under such indirect tax enactment.

(b) In a case where show-cause notice or a notice of demand under any indirect tax enactment has not be issued.

(c) In a case where no appeal or reference or writ petition is admitted and pending before any appellate authority or High Court or the Supreme Court or no application for revision is pending before the Central Government on the date of declaration made under Section 88." The appellants opted to avail of the Scheme and filed a declaration accordingly. However, the designated authority passed the order dated February 13, 1999 thereon whereby he rejected the declaration on the ground that in the appellants' case, no show-cause notice/demand notice had been issued and, therefore, by virtue of Section 95(ii)(b), the Scheme did not apply."

7. The appellants challenged the order dated February 13, 1999 by filing another writ petition before the High Court. The appellants also prayed for quashing of Section 95(ii)(b) of the 1998 Act if it was construed as requiring a notice of payment to be issued in any particular form. The learned Single Judge allowed the writ petition by his judgment dated April 19, 1999 holding that the said endorsement on the Bill of Entry constituted sufficient notice of demand to attract the Scheme.

8. The Revenue filed intra-court appeal before the Division Bench questioning the validity of the judgment of the learned Single Judge. In this appeal, the Revenue has succeeded as the Division Bench has reversed the order of the Single Judge by means of its judgment dated August 28, 2003 resulting in dismissal of the writ petition of the appellants and affirming the order of the designated authority rejecting the declaration of the appellants holding that the appellants were not entitled to take the benefit of the Scheme under Section 95(ii) of the 1998 Act. The Division Bench has gone a step further in rendering the impugned judgment as according to it the declaration filed by the appellants was not only hit by clause (b) but clause (c) of Section 95(ii) as well. It has held that neither clause (b) or (c) of Section 95(ii) of the 1998 Act is attracted inasmuch as there was no show-cause notice or notice of demand issued in the instant case. Further, no appeal or reference or writ petition of the respondent was admitted or pending before any authority mentioned in clause (c) above.

9. This is how the matter has landed up in this Court.

10. From the facts noted above, it is clear that on the import of the old vessel, the appellants had filed Bill of Entry under Section 46 of the Customs Act. The appellants claimed exemption from payment of additional custom duty. This stand of the appellants was not accepted resulting into an endorsement by the Revenue asking the appellants to pay additional customs duty of ?52,20,000. According to the appellants, this amounts to notice of demand within the meaning of clause (b) of Section 95(ii). It is also the case of the appellants that though technically the writ petition filed by the appellants challenging the aforesaid additional customs duty was disposed of by the High Court on July 20, 1993, the order of

Court was categorical, namely, the result of the appellants' case was made dependant upon the outcome of the appeal which was preferred by the Revenue in the case of M/s. Amar Steel Industries and in that sense the matter was still pending.

11. On the aforesaid facts, we have to examine whether the case of the appellants is covered by clause (b) and/or clause (c) of Section 95(ii) of the 1998 Act, thereby making them ineligible to utilise the benefit of the Scheme.

12. Insofar as clause (b) of Section 95(ii) is concerned, it is the case of the appellants that endorsement on the Bill of Entry to pay additional customs duty amounted to raising demand for payment of duty. On the other hand, the Revenue argues that the demand stands crystallized only when there is a show-cause notice issued under Section 28 of the Customs Act and after following the procedure the adjudicating authority passes an order on the said show-cause notice holding that customs duty or additional customs duty is payable and on that basis notice of demand is issued. It was, thus, argued that since no such steps were taken in the instant case, it cannot be said that any show-cause notice was issued (which was the admitted position) or notice of demand was given. It was also argued that endorsement on Bill of Entry will be regarded, at the most, a provisional assessment.

13. Having regard to the facts of this case, it is difficult to accept the contention of the Revenue predicated on the provisions of Section 28 of the Customs Act. Section 28 deals with recovery of dues not levied or short levied or erroneously refunded or where any interest payable has not been paid, part paid or erroneously refunded. In such circumstances, within a period of one year from the relevant date, appropriate officer is competent to serve a notice on the person chargeable with the duty or interest which has not been so levied or which has been short levied or short paid or to whom the refund is has erroneously been made, requiring him to show-cause why he should not pay the amount specified in the notice. Therefore, the contingency of issuing show-cause notice under this provision would arise where the duty has not been paid either on the ground that it was not levied at all or was short levied. Another reason for invoking the provision would be where duty has been erroneously refunded. Such a situation did not arise in the instant case. Moreover, we have to examine the mater in the light of the provision of this Scheme. In this context, we would like to refer to the judgment of this Court in *Union of India v. Nitdip Textiles Processors*[1]wherein it is held that under the following circumstances the amount payable shall be treated as 'tax arrears':

> "(i) where tax arrears are quantified but not paid as on 31.03.1998, and
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> (ii) where a demand or show-cause notice has been issued before 31.03.1998.
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> Thus, it becomes abundantly clear that the 'tax arrear' had, in any event, been quantified and had not been paid as on March 31, 1998. Moreover, when the Bill of Entry was filed by the appellants, after examining the matter, endorsement was made thereupon that additional duty in the sum of ?52,20,000 is payable. The appellants contested the same. The question is whether it amounts to notice of demand. In this behalf, we have to keep in mind that the 1998 Act does not contain any specific

provision prescribing the manner in which customs duty would be assessed or demanded in respect of goods imported under a Bill of Entry for home consumption. An endorsement on the Bill of Entry and return thereof to the importer asking the importer to pay the amount therein would amount to issuing a demand. On our specific query to the learned counsel for the Revenue that if the importer does not deposit the amount within the specified time on receiving the endorsement on the Bill of Entry, whether interest thereupon shall start accruing, the learned counsel for the Revenue was candid in answering the said question in the affirmative. In fact, that is the legal position contained in Section 46(1) read with Section 47(2) of the Customs Act. Under Section 46(1) (as it then stood), there was an obligation on the part of the importer to present a Bill of Entry in such cases. Section 47(2) of the Customs Act provides that in case there is a failure to pay the import duty within a specified period from the date on which Bill of Entry is returned to the importer, it would attract interest until the date of demand. At the relevant time, the demand was required to be made within 7 days. Otherwise, interest was payable, which was to be fixed between 20% and 30% per annum. It may be mentioned that fundamentals of this provision still remain intact although rate of interest and the period within which the demand is to be paid has been amended from time to time {as per the amended provision which prevails now, the only difference is that the demand is to be met within 2 days, excluding holidays, failing which interest payable is at a rate between 10% and 36% per annum}. Section 153 of the 1998 Act also becomes relevant as it clarifies that any order, decision, summons or notice under the Act may be served by tendering it to the person or to whom it is intended or to his agent. In the instant case, after the endorsement on Bill of Entry, it was admittedly served upon the appellants in the manner specified under Section 153.

14. In *Renuka Datla (Dr.) v. Commissioner of Income Tax, Karnataka*[2], this Court widely interpreted the term 'total tax determined and payable' appearing in Section 87(f) of the Scheme holding that no particular process of determination is contemplated. It has to be held that on principle, same meaning is to be accorded to the term 'determined as due or payable' in Section 87(m)(ii)(a) of the Scheme.

15. There is another manner of looking into the matter. Immediately after receiving the Bill of Entry with the endorsement to pay the amount of ?52,20,000, the appellants filed the writ petition in the High Court disputing the same with the contention that it was not payable. Obviously, it was a demand raised by way of endorsement on the Bill of Entry that prompted the appellants to challenge the same by filing the writ petition. The Revenue never took the plea that the case was premature in the sense that no demand had been crystallized in the absence of show-cause notice or adjudication order and, therefore, such a writ petition was not competent. Thus, both the parties understood that endorsement on Bill of Entry and service thereof upon the appellants was a notice of demand.

16. Even, with reference to the provisions of the Scheme, this endorsement shall have to be treated as notice of demand. We have already reproduced the provisions of Section 87(m) of the 1998 Act which defines 'tax arrears'. It, inter alia, includes the amount of dues remaining

unpaid as on the date of making a declaration under Section 88 of the 1998 Act. Indubitably, there was an amount of duty payable, which had remained unpaid on the date of making declaration by the appellants under Section 88. It would be absurd to hold that though there is a tax arrear, as the appellants were liable to pay the tax/duty demanded, and still the Scheme is inapplicable.

17. It would also be interesting to note that the Division Bench of the High Court in the impugned judgment has itself recorded that 'duty was assessed' on the Bill of Entry. This is so stated by the Revenue in the counter affidavit filed in the instant proceedings as well. Therefore, endorsement on the Bill of Entry is treated even by the High Court as well as the Department as the assessment.

18. It is necessary to keep in mind the purpose and the objective with which the Scheme was introduced. It pertained to the 'tax arrears' which was due and not paid as on March 31, 1998 and in order to recover such tax arrears expeditiously without undergoing any legal hassles, the Scheme was promulgated. Therefore, when it is found in the broader sense that there were tax arrears and the appellants were called upon to pay the said tax, mischief contained in Section 95(ii)(b) would not be attracted.

19. We now advert to the second limb of the matter, viz., whether the case would come within the embargo set out in clause (c). From the facts noted above, it is clear that when the High Court had disposed of the first writ petition of the appellants on July 20, 1993, it was explicit in making categorical remarks that the fate of the appellants' case would abide by the result of the appeal filed by the Revenue in a similar case of another assessee, namely, M/s. Amar Steel Industries. Thus, the appellants' challenge to the substantive levy of the additional duty was disposed of subject to the result of the Revenue's appeal in the case of M/s. Amar Steel Industries. Admittedly, the appeal of M/s. Amar Steel Industries, was still pending before the Division Bench when the Scheme was promulgated by the Legislature and the declaration was filed by the appellants. The said assessee has subsequently been permitted to avail of the Scheme. Therefore, prima facie it appears that mischief of clause (c) is not attracted. In any case it is not necessary to go into this aspect in detail, for another simple reason it needs to be remarked that the Revenue had not rejected the declarations filed by the appellants on this ground. It is the Division Bench of the High Court, in the impugned judgment, which has held against the appellants on this account. It is also very pertinent to point out that in the counter affidavit filed by the Revenue in the instant appeal, the Revenue appears to have given up this contention as the impugned order of the High Court is not defended on this ground at all.

20. The aforesaid discussion leads us to conclude that the impugned judgment of the High Court is erroneous and warrants to be set aside. We, accordingly, allow these appeals, set aside the impugned order and hold that the appellants shall be entitled to the benefit of Kar Vivad Samadhan Scheme.

21. No costs.

Judgment Referred.

[1]*(2012) 1 SCC 0226*
[2]*(2003) 2 SCC 0019*