CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

SOUTH ZONAL BENCH AT BANGALORE

Bench- Division Bench

Court-I

M/s Samalkot Power Ltd.

Versus

CC, Visakhapatnam

Date of hearing: 24/09/2012

Date of decision: 25/09/2012

Application No.C/ROM/8 & 9/2012; C/ROM/10 & 11/2012

In

Appeal No. C/367& 460/2012

M/s Samalkot Power Ltd. …Appellants/ applicants

M/s Reliance Infrastructure Ltd.

Vs ,

CC, Visakhapatnam … Respondent/ applicant

Appearance:

Mr. Arvind Dattar , Sr. Advocate, Mr. S. Jaikumar & Mr. B. Venugopal,

Advocates for the appellants / applicants .

Mr. P. R. V. Ramanan, Special Consultant for the respondent/ applicant ,

Coram:

Hon'ble Mr P. G. Chacko, Member (judicial)

Hon'ble Mr.M. Veeraiyan, Member (Technical)

Misc ORDER NO. 735 TO 738 /2012

[Order per: P. G. Chacko]

1. These are applications filed by the appellants and the respondent under Section 129B (2) of the Customs Act seeking rectification of what they consider apparent mistakes in our Final Order Nos. 511& 512/2012 dt. 31/07 /2012. The Final Order was passed in the captioned appeals, one filed by M/s Samalkot Power Ltd. (SPL for short) and other filed by M/s Reliance Infastructure Ltd. (RIL for short).

2.1. We haave carefully perused the full text of our Final Order, bearing in mind the grievances raised by the appellants and the respondent in the present applications. We shall first deal with the respondent's grievances. It has been submitted that the correct date of Essentiality Certificate is 09/12/2011 and not 23/09/2011 mentioned in para-9 (c) of the Final Order. On a perusal of the relevant records, we note that the very caption of the certificate addressed to the Deputy Commissioner of Customs refers to Essentiality Certificate Dt. 23.09.2011. however the date of covering letter whereunder the certificate was issued by the competent authority is dt. 09/12/2011 The Certificate also bears dated initials of officers subordinate to the issuing authority, in its bottom margin and these dates are all dates of December 2011. Both sides have made submissions so as to drive home to us the respective points o the basis of the dates shown on the face of the Essentiality Certificate and the date of its covering letter. For our part, any of these dates needs no specific mention I para-9 (c) of our Final Order, which merely records the submission of SPL. On this basis, neither side can have any grievance if, from para-9 (c) the word and figures "dated 23. 09.2011 " are deleted . It is ordered accordingly and consequently the said para will read thus : "The" Essentialuity Certificate' duly issuedby Power Plant.

2.2 The second grievance raised by the respondent is with regard to para-11 (a) of the Final Order. In this context, we are grateful to the learned Special Consultant for the Department for having pointed out a linguistic mistake in the first sentence of the said Para. At the outset we shall correct this mistake by directing that the first word of that sentence be deleted and the second word shall start with capital alphabet. The substantive grievance of the respondent is that the submissions recorded in para-11 (a) are with reference to the Hon'ble Bombay High Court's judgment dt. 24/07/2009 which produced by the appellants during the hearing stage and, therefore , the last sentence of the said Para does not reflect the correct purport of the submissions made on behalf of the respondent. In this context we have also heard the counsel for the opposite side. After considering all the submissions, we are of the view that the grievance of the respondent can be redressed by substituting the words "Even otherwise" for the word "Therefore" in the last sentence of para11(a). The corrected sentence shall read thus: "Even otherwise, SPL's application for registration of the contract under the PIR was rightly rejected."

2.3 Yet another grievance raised before us on behalf of the respondent is that the submissions recorded in paragraphs 11(b) to (m) were made against the grounds raised by the appellants. After hearing both sides, we find that there is no dispute

with regard to this position. The grievance of the respondent is that this factual position is not clearly reflected in our order. We understand this grievance and are inclined to redress it by giving a caption for para-11(a) and a separate common caption for para 11(b) to (m). Accordingly, the following caption shall be inserted for sub-para (a) of para -11: “Submissions vis-a-vis Hon’ble Bombay High Court’s judgment”. The common caption for the rest of sub-paras of para-11 shall be as follows,”Submissions vis -a- vis ground of appeals”.

2.4 Yet another grievance raised by the respondent pertains to para -12(A) (e). In this connection, it has been submitted by the learned Special consultant for the respondent that the subject matter of this sub-para of para 12(A) was not before the adjudicating authority and the same emanated from certain documents (opinions of three experts) produced by the appellant during the course of hearing before the Tribunal. The grievance of the respondent is that no opportunity was given to discredit the new evidence produced by the appellant. Nevertheless, in the above sub-para, it was recorded to the effect that the evidence adduced on behalf of SPL had not been contested before the Tribunal. As a matter of fact, the expert opinion/certificate produced on behalf of SPL were considered by this Bench in the context of deciding one of the substantive issues raised in their appeal viz. whether the 2400MW power project could be considered to be setting up of a new power plant. As a matter of fact, the learned counsel for the appellants had, at the bar, heavily relied, on the above evidence in his endeavor to establish that the 2400MW power project should be considered to be setting up of a new power plant. The experts opinions were to the effect that the 2400MW power plant could independently function without, for any purpose whatsoever, depending on the existing 220AW power plant and its mechanical/electrical accessories. The above documentary evidence was found to be key to determination of the above substantive issue and hence reckoned for the purpose. Impliedly, the application filed by the appellants for bringing such evidence on record was allowed by the Bench. We also took note of the fact that no written objections were filed by or a behalf of, respondent vis-à-vis the appellant’s applications for bringing additional evidence on record. Nevertheless the present grievance of the respondent has been carefully considered at our end. After considering the submissions of both sides, we are inclined to redress the respondents grievance by directed that the sentence reading “This evidence adduced on behalf of SPL has not been contested before us” be deleted from sub-para (e) of para -12(A).

3. The Rom applications filed by the respondent are allowed to the aforesaid extent.

4.1 We shall now address the applications filed by the appellants. One of the grievances raised by them is with reference to sub-para (f) of para -12(A) of the final order. The learned counsel has argued that the finding recorded in the last

sentence of sub-para (f) ibid is contradictory to that recorded in the previous sub-para viz. sub-para (e). It has also been submitted that the "alternative claim" referred to on the penultimate sentence of sub-para (f) ibid needs a correction. According to the learned counsel, the alternative claim of RIL was that theirs was an EPC contract for executing the 2400MW power project and their claim was for the benefit of project import for the substantial expansion category and the benefit of notification NO.21/2002-Cus dt 01/03/2002 (Si.No.400(b)). It has been submitted that this claim of RIL was not correctly noted in sub-para (f) ibid. Per contra it has been submitted by the learned Special Consultant for the department that there was not mention of EPC contract in the above Notification and that, in so far as RIL's case is concerned, it cannot be said that there is any mistake in the findings recorded by the Bench in sub-para (f) ibid. We have given careful consideration to the rival submissions on the point. It is not in dispute that there was an alternative claim in RIL's appeal and that the same was for the benefit of Notification No. 21/200-Cus (Sl. No.400 (b)). In the operative part of the Final order, there is a clear direction to the adjudicating authority to consider RIL's alternative claim. Neither of the appellants has pointed out any mistake in this direction issued by this Bench to the adjudicating authority. In this scenario , the findings recorded in the last two sentences of sub-para (f) of para -12(A) of the Final Order may need a modification in view of the our findings recorded in the previous sub-para (e) as also the relevant direction issued to the adjudicating authority vide para -13 (v). Accordingly, the last four words of the penultimate sentence of sub-para (f) shall be deleted and the clause reading "which will be addressed later in this order" shall be substituted. Accordingly the penultimate sentence of sub*para (f) will read thus" Contextually we note that in RIL's appeal there is an alternative pea which will be addressed later in this order". Further, the last sentence of sub-para (f) of para-12(A) shall be deleted.

4.2 The next submission of the learned counsel for the appellants is based on Notification No. 12/2012-Cus. dt. 17/03/2012 and Notification No. 49/2012-Cus. dt. 10/09/2012. The first of these Notification was issued on 17/03/2012 before the hearing on the captioned appeals commenced. This Notification, which superseded Notification No. 21/2012 dt 01/03/2012 was not cited before this Bench by the counsel for the appellants. The second Notification No 49/2012-Cus. dt. 10/09/2012 (SI.No.507 and List No.32A appended thereto) is said to have given the required relief to SPL in respect of the 2400MW mega power project at Samalkot. It has been submitted that SINo.507 of Notification No.12/2012-Cus is more or less equivalent to SI.No.400(b) of the erstwhile Notification No. 21/2002-Cus and that the Samalkot Project has been specified at SI.No.110 of the List 32A which was appended to SI.No.507 ibid by the amending Notification No. 49/2012-Cus . According to the learned counsel for the appellants in the wake of the new Notifications issued by the Central Government purporting to grant the benefits to SPL, even the proposals in the show-cause notice have become redundant. It has been argued that, under

Rule 41 of the CESTAT (Procedure) Rules, 1982 this Bench has inherent power to recall the Final Order and pass a fresh order so as to give effect to the aforesaid Notifications issued in this year by the Central Government. The Learned counsel has also endeavoured to draw a parallel between Rule 41 ibid and Section 151 of the Code of Civil Procedure. The learned counel has relied on J.K Synthetics Ltd. vs. Collector of Central excise (1986(86) ELT 472 (S.C.)} in this context. According to the learned Special Consultant for the department, no relief can be claimed by the appellants under Section 129(B)(2) of the Custom Act on the basic of any notification which was either not cited bt the appellants before the Tribunal or did not exist at that time. It has been further submitted that, if the present prayer of the appellants is granted, it would amount to a review of the Final Order, which is outside the scope of the Section 129 (B) (2) of the act. We have given careful consideration to the submissions. It is not in dispute that Notification No. 12/2012-Cus., though issued by the Central Government in March 2012 superseding Notification no.21/2002-Cus. Dt. 01/03/2002, was not placed before this Tribunal by, or on behalf of, the appellants. That Notification was, therefore, not part of the record of the case when we passed the Final Order. What can be remedied under Section 129B(2) of Act is a mistake or an error-factual or legal-which is apparent from the record. A Notification which was not part of the record when the Final Order was passed cannot, therefore, be reckoned at this stage. If that be so, the second Notification issued by the Central Government in the current month amending Notification No.12/2012-Cus. Dt. 17/03/2012 also should remain outside the scope of the present applications. Much has been argued by the learned counsel with reference to Rule 41 and section 151 of the code of Civil Procedure. The point which was sought to be made by the learned counsel is that this Tribunal has inherent jurisdiction even to recall the Final Order and pass appropriate alternative orders so as to secure the ends of justice. We cannot agree with this omnibus proposition. Inherent jurisdiction was granted to all Civil courts by the legislative authority through Section 151 of the code of Civil Procedure so that during the course of the proceedings, the courts would be enabled to take care of unforeseen developments and pass appropriate orders so as to secure the ends of justice to the parties to the civil suit/appeal. That is a jurisdiction conferred by the legislature. Rule 41 of the CESTAT (Procedure) Rules stand on a different footing. This tribunal has invoked this Rule in ever so many cases but only to prevent the abuse of its proceedings or to secure the ends of justice after passing Final Order in appropriate cases. May that as it may, inherent jurisdiction, if any, cannot be exercised in a case squarely falling under a statutory provision. Before us are applications filed under section 129B(2) of the Customs Act. To deal with such applications, we derive the powers from the said provision of the statute and not from elsewhere. Further the facts of this case are such that there is no warrant for any recall of the Final Order or any reckoning of the new Notifications issued by the Central Government. We do not think that the said Notifications have any binding effect

on the Tribunal and, for that matter, we need not take any steps in the present proceedings to give effect to those Notification

4.3. Before parting with this area, we should also consider the case law cited by the learned counsel viz. J.K. Synthetics Ltd. (supra). That was an order passed by the Hon'ble Supreme Court on the facts of that case. The subject matter of the Civil Appeal considered by the Hon'ble Supreme Court was an ex parte order passed by this Tribunal on 31/08/1987. When the appeal was called for hearing, there was no representation for the appellant, a fact which was admitted by the appellant before the apex court also. The appeal was heard by the Tribunal and an order passed thereon on merits on the same day (31/08/1987). Later in the same day, counsel for the appellant turned up and requested for recall of the ex - parte order explaining the circumstances in which he could not appear earlier in the day. The plea was rejected. The counsel for the appellant also invoked Rule 41 of the CESTAT (Procedure) Rules while praying for recall of the Final Order already passed on merits. The Tribunal , however, did not accept the plea of the counsel. In the Civil Appeal filed by the party before the apex court also, Rule 41 ibid was invoked by the appellant. The appellant's counsel argued before the Apex Court that Rule 41 was wide enough to take within its sweep the recall of an order passed on the merits of an appeal if such order was necessary to secure the ends of justice. On the facts of that case, the counsel for the respondent did not oppose that argument of the counsel for the appellant. The Hon'ble Supreme Court , preceeding to consider the scope of the provisions invoked before it, observed that the power to proceed ex parte carried with it the power to enquire whether or not there was sufficient cause for the absence of a party at the hearing. On the facts of that case, the apex court held the Tribunal had the power to set aside the ex parte order inasmuch as the counsel for The appellant was unable to appear at the time of hearing for sufficient cause. The question before us is whether sufficient cause has been shown by the appellants for not citing Notification No. 12/2012-Cus. dt 17/03/2012 before the Bench at least at the final hearing stage. No reason whatsoever in this behalf is seen stated in the ROM applications of the appellants. We have already noted other circumstances of the case, which do not call for recall of the Final Order or any substantive amendment of the Final Order. The cited decision is, therefore, not applicable to the instant case.

4.4. In the result, the prayer made by the appellants on the basis of the two Notifications issued by the Central Government in 2012 is not liable to be entertained under Section 129B(2) of the Customs Act.

5. The ROM applications of the appellants are accordingly disposed of.

(Pronounced & dictated in open Court)