

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 2113 OF 2007

M/S. M.J. EXPORTERS PVT. LTD. ... Appellant

VERSUS

UNION OF INDIA & ORS. ... Respondents

O R D E R

By means of this appeal preferred by the appellant (writ petitioner in the High Court), the appellant has challenged the validity of orders dated 28.03.2006 passed by the High Court of Bombay in Writ petition No. 338 of 2006 preferred by the appellant. The appellant had challenged the demand of interest which was raised by the respondent-Department on the amount of duty paid belatedly. The High Court has rejected the prayer of the appellant by the impugned judgment giving only a partial relief which is limited to recalculating of the interest in the manner that would be taken note of hereinafter at the appropriate stage.

Before that, we would like to state factual matrix which has led to the controversy involved in the instant appeal. There was a dispute about the payment of excise duty by the appellant. Show Cause Notice dated 06.04.1993 was issued to the appellant invoking the proviso to Section 28 (1) of the Customs Act, 1962 (hereinafter referred to as 'Act'). This was adjudicated upon by passing Order-in-Original dated 28.01.1994 under Section 28(2) of

the Act confirming the demand. The appellant filed appeal thereagainst which was allowed by the Customs, Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as 'CEGAT') on 20.05.1999. The order of the CEGAT was challenged by the Department by filing appeal in this Court. This court allowed the appeal of the Department on 14.08.2001 thereby setting aside the order of the CEGAT and confirming the Order-in-Original passed by the Collector and thus restoring the demand of duty as contained in Adjudication Order dated 28.01.1994.

As per this final order, a sum of Rs. 2,94,42,867 along with penalty in the sum of Rs.1 crore became payable. The appellant requested the Department to allow the appellant to make the aforesaid payment in installment as it was facing financial crunch. Vide communication dated 04.07.2002, the Department accepted the request for payment of the amount of duty and interest thereon within a period of one year from 27.06.2002. During this period, the entire amount of duty as well as penalty was paid.

After receiving the amount payable towards duty and penalty, the Department wrote the letter dated 09.02.2004 to the appellant demanding interest on the delayed payment and informing the appellant that a sum of Rs.8,43,62,504/- was to be recovered from the appellant by way of interest. The appellant vide letter dated 17.02.2004 objected to the demand of the said interest. However, this objection of the

appellant was overruled and on 03.03.2004, the appellant was again asked to pay the aforesaid amount failing which coercive action was threatened. At this juncture, the appellant approached the High Court of Bombay and contested the validity of the demand of interest raised by the respondent by filing Writ Petition No. 1278 of 2004. The respondent filed its counter affidavit to the said writ petition. In paragraph 6 and 7 of the counter affidavit filed by the respondent the following averments were made: -

"6. I say that the petitioners are contesting the above communication dated 04.07.02 from the Respondent No.6 through this present writ petition much after lapse of one and half year. I say that the Petitioners have availed the facility to clear the dues in installments starting from 28.11.2001 to 31.12.2003 (2 years) on the basis of the communication dated 04.07.2002 from the Addl. Commissioner. I say that the petitioner being aware of the interest liability as stated in the respondents communication 04.07.2002 and having availed the facility of making payments in installments are wholly unjustified to challenge the said communication dated 04.07.2002 through this present writ petition. I say that the amount of demanded as interest w.e.f.19.10.88 vide impugned letters dated 09.02.04 and 03.03.04 is apparently wrong on the part of the respondents herein since the duty was confirmed vide order dated 28.01.94 passed by the Collector of Customs in the instant case.

7. I say that the customs duty was confirmed on 28.01.94 prior to the Finance Bill, 1995 received the assent of the President (i.e. 26.05.95). In terms of Section 28AA of the Customs Act, 1962, the petitioners are liable to pay interest on delayed payments after the three months from the date on which the Finance Bill, 1995 received the assent of the President. I, therefore, say that the respondents are empowered to collect interest amount w.e.f.26.08.95 as per the provisions of the Section 28AA of the Customs Act, 1962."

When the matter came up for hearing before the High Court, after hearing the counsel for the parties for some time and in the light of averments made by the respondents in paragraphs 6 and 7 of the counter affidavit, the learned counsel for the appellant in the High Court sought permission to withdraw the writ petition to enable the appellant to make appropriate representation raising its grievances. This liberty was granted and the writ petition was dismissed as withdrawn vide orders dated 02.08.2004. Thereafter, the appellant made representation contesting the payment of interest on certain grounds and also in respect of the calculations made by the respondent.

At this stage, we may mention that there was an amendment in the Customs Act in the year 1995 which came into effect from 26.05.1995. By the said amendment, Section 28(1) was amended and new provision in the form of Section 28AA was also inserted. Insofar as Section 28 is concerned, vide amendment in the said provision, new Section 28 introduced the provision for payment of interest as well. Simultaneously, with the insertion of new Section 28AA, provisions for interest on delayed payment of duty was introduced. Section 28AA, *inter alia*, provided that where a person chargeable with duty determined under sub-Section (2) of Section 28 fails to pay such duty within three months from the date of determination, he shall pay, in addition to the duty, interest as well as per the rate specified

therein.

Proviso to this section stipulated that where the duty is determined under sub-Section (2) of Section 28 before the date on which said section came into force and that person fails to pay such duty within three months from such date then that person would be liable to pay interest under this Section from the date immediately after three months from the said date, till the payment of such duty.

In the nutshell, the effect of the aforesaid provision was to charge interest after the expiry of three months from the date when this provision came into force. The President has given assent to the aforesaid amendment on 26.05.1995. Insofar as the appellant is concerned, in his case, duty had already been determined prior to coming into force of this amendment inasmuch as Order-in-Original confirming the duty was passed on 28.01.1994 as already noted above.

Having regard to this provision, the interest was payable, if at all, with effect from 26.08.1995. Interest in the sum of Rs.8,43,62,504/- which were earlier demanded by the respondent was calculated with effect from 28.01.1994. Therefore, the Government re-calculated the interest from 26.08.1995 and inform the appellant that the interest now payable was in the sum of Rs.4,67,02,251/-. The appellant objected to the payment of this interest as well taking number of pleas in this behalf and again

challenged the demand of this interest by filing Writ Petition No. 338 of 2006 which has been disposed of by the impugned judgment of the High Court. Before the High Court, the only argument raised by the learned counsel for the appellant was that there was no failure to pay the duty within three months from the date Section 28AA of the Act had come into force and in these circumstances, interest could not be levied upon the appellant under the said provision even with effect from 26.08.1995. It was further argued that, if at all, the interest was leviable, it could only be from the expiry of three months of the order of the Supreme Court passed on 14.08.2001. This argument of the counsel for the appellant is categorically noted in paragraph 10 of the impugned judgment and is rejected by giving cogent reasons. We are not even supposed to go into those reasons as in the present appeal, the appellant has not found fault with these reasons. Instead, an altogether different point is raised before us by Mr. Shyam Diwan, learned senior counsel appearing for the appellant, at the Bar. His submission was predicated on the provisions contained in Section 28(1) of the Act read with Section 28AA of the Act and his contention was that there could not have been any demand of interest without first serving Show Cause Notice. Mr. Diwan was candid in admitting that this argument was not raised before the High Court. However, his submission was that since it was a pure legal question based on the facts already existing on record, he could be allowed

to raise this question. In support of this submission, he referred to two judgments of this Court viz., '*Chittoori Subbanna v. Kudappa Subbanna and Others*' [1965 (2) SCR 661] and '*Rajendra Shankar Shukla and Ors. v. State of Chhattisgarh & Ors.*' [2015 (8) SCALE 384].

No doubt, if the question of law raised in the final Court is a pure question of law and there is no controversy on facts, which are already on record, and on the basis of those facts, the question of law can be determined in the interest of justice, such a question of law could be allowed to be raised even if it was not raised in the Court. However, in the present case, having regard to the manner in which the case proceeded in the courts below, we feel that the appellant cannot be allowed to raise this question.

Mr. K.Radhakrishnan, learned senior counsel appearing for the Department, has drawn our attention to the Order dated 02.08.2004 which was passed in Writ Petition No. 1278 of 2004. His submission was that in the earlier round of litigation before the High Court when the demand of interest was questioned, it was given up inasmuch as after arguments on this issue, the counsel for the appellant had withdrawn the writ petition. At that time, while allowing the appellant to withdraw the writ petition, the dispute was confined only to the calculation of interest as is clear from the order dated 02.08.2004 itself which specifically referred to the averments made in paragraphs 6 and 7. These

paragraphs have already been extracted above. In paragraph 6 particularly, Respondent No. 1 made some remarks about the calculation of the interest and had stated that it needed re-calculation. Therefore, after the dismissal of the said writ petition as withdrawn, the only issue that remains for consideration was how much interest is payable and the correct calculations thereof. It is a matter of record which flows from the correspondence exchanged thereafter between the parties that insofar as Department is concerned, it only re-worked the amount of interest and demanded interest in the sum of Rs.4,67,02,251/- after reducing the figure from 8,43,62,504/- because of the reasons already stated above.

Consequently in the second writ petition, when the appellant as well as its counsel knew that the issue as to whether the interest is payable or not on other grounds had already been foreclosed in the earlier writ petition, the counsel for the appellant did not make any submission with regard to the aforesaid plea raising the issue in Show Cause Notice and limited his prayer from the date from which the interest was to be paid.

In these circumstances, we feel that when this issue was raised and abandoned in the first writ petition which was dismissed as withdrawn, the principles of constructive res-judicata which is laid down under Order 23 Rule 1 of the Code of Civil Procedure, 1908, and which principles are

extendable to writ proceedings as well as held by this Court in '*Sarguja Transport Service v. State Transport Appellate Tribunal, M.P., Gwalior and Others*' [1987 (1) SCR 200] would squarely be applicable.

For these reasons, we are of the opinion that it is not permissible for the appellant to now raise such arguments. We, thus, do not find any error passed by the High Court which results in the dismissal of this appeal.

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

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

New Delhi;
October 08, 2015.

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Civil Appeal No. 2113/2007

M/S. M.J. EXPORTERS PVT. LTD.

Appellant(s)

VERSUS

UNION OF INDIA & ORS.

Respondent(s)

Date : 08/10/2015 This appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE ROHINTON FALI NARIMAN

For Appellant(s)

Mr. Shyam Diwan, Sr. Adv.
Mr. Pramod B. Agarwala, Adv.
Mr. Prashant Mehra, Adv.
Mr. Aman Kalra, Adv.

For Respondent(s)

Mr. K. Radhakrishnan, Sr. Adv.
Ms. Sunita Rani Singh, Adv.
Mr. Ritesh Kumar, Adv.
Mr. B. Krishna Prasad, Adv.UPON hearing the counsel the Court made the following
O R D E R

The appeal is dismissed in terms of the signed order.

(Nidhi Ahuja)
COURT MASTER(Renu Diwan)
COURT MASTER

[Signed order is placed on the file.]