

jpc

IN THE HIGH COURT OF JUDICATURE OF BOMBAY  
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4618 OF 2010

IVRCL Infrastructures & Projects Ltd  
Reg. Office: M-22/3RT, Vijaynagar Colony,  
Hyderabad 500 057

.. Petitioner

**Versus**

1. The Union of India  
Through the Secretary in the Ministry of Finance  
Aayakar Bhavan, M.K. Road,  
Churchgate, Mumbai 400 020
2. The Commissioner of Custom (Imports)  
Jawaharlal Nehru Customs House,  
Sheva, Tal. Uran, Dist. Raigad  
Pin 400 707, Maharashtra
3. The Assistant Commissioner of Customs  
Jawaharlal Nehru Customs House,  
Sheva, Tal. Uran, Dist. Raigad  
Pin 400 707, Maharashtra

.. Respondents

....

Mr. Prakash Shah i/by P.D. Legal for the Petitioner  
Mr. R. V. Desai, Senior Counsel a/w Mr. R.B. Pardeshi, for the  
Respondent

....

CORAM: V. C. DAGA, &  
S. J. KATHAWALLA, JJ.  
DATED: 30<sup>th</sup> June, 2010.

**JUDGMENT**( Per S.J.Kathawalla, J.)

1. Heard
2. Rule.
3. Mr. R. V. Desai, learned Senior Counsel for the Respondents waives service.
4. By consent of the parties, Rule made returnable forthwith and the Petition is taken up for final hearing.
5. By this Writ Petition, the Petitioner has prayed for a Writ of Certiorari or a writ in the nature of Certiorari or any other writ, order or direction under Article 226 of the Constitution of India to the Respondent No.3 to forthwith pay interest of Rs.9,36,558/- for the period from 11.12.2004 to 12.11.2008, @ 6% per annum, as notified and in terms of Section 27-A of the Customs Act, 1962.

**The facts:**

6. The Petitioner is a public limited Company. In October, 2009 the Petitioner had entered into a joint venture agreement with M/s. Shapoori Pallonji & Co. Ltd. A contract was awarded to the joint venture by the National Highway Authority of India limited for construction of roads between Srikakulam and Ichapuram for The Golden Quadrilateral Phase-2 Project in Andhra Pradesh.

7. The Petitioner imported SEVEDALA S-400EC Superior Cone Crusher from Sweden vide Bill of Entry No.694653 dated 17.10.2001 and claimed the benefit of exemption under Sl.No.217 of Notification No. 17/01-Cus. dated 1.3.2001. The Notification granted exemption from payment of BCD and CVD in respect of certain capital goods imported, inter alia, for the purpose of construction of Highways. The goods were assessed provisionally by the Respondents by extending the benefit of the exemption as claimed by the Petitioner in the bill of entry dated 17.10.2001, as provided in Section 18 of the Customs Act, 1962. The Petitioner also executed a PD Bond with Bank Guarantee to secure the differential duty. The reason for making the assessment provisional was that while the contract for construction of road has been awarded to the Joint Venture Company, the import was made by the Petitioner i.e. one of the JV Company and not by the JV Company.

8. The Deputy Commissioner of Customs, by his letter dated 8<sup>th</sup> March, 2002 finalized the provisional assessment denying the benefit of Notification No. 17/01-Cus dated 1.3.2001. Hence the Petitioner paid Customs Duty of Rs.39,84,195/- under protest vide a Demand Draft on 18<sup>th</sup> March, 2002 and intimated the same to the Department. The Petitioner filed an appeal before the Commissioner of Customs (Appeals), Nhava Sheva against the order of final assessment. By an order dated 26.8.2003, passed by the Commissioner of Customs (Appeals), the appeal of the Petitioner was rejected. The Petitioner therefore filed an

Appeal before the Appellate Tribunal, New Delhi against the order passed by the Commissioner of Customs (Appeals). On 5.7.2004, the Appellate Tribunal passed an order allowing the Appeal filed by the Petitioner against the order dated 26.8.2003 and held that the Petitioner is entitled to the benefit of Notification No. 17/01-Cus. dated 1.3.2001. The Petitioner, in view of this order, filed an application dated 11<sup>th</sup> September, 2004 for refund of excess custom duty amounting to Rs.39,84,195/- paid on 18.3.2002. The Petitioner also claimed interest applicable on the duty so paid. On 10.10.2006, the Petitioner once again sought refund of duty along with the interest from Respondent No.2 and also enclosed a certificate from a Chartered Accountant confirming that an amount of Rs. 39,84,195/- is shown as receivable from the Customs Department in the books of accounts and hence the refund amount is not hit by the doctrine of unjust enrichment. The Petitioner, vide letters dated 30.4.2007, 10.7.2007 and, 28.7.2008 reminded the Respondents to sanction the refund alongwith interest. A personal hearing was granted to the Petitioner on 21.8.2008. Respondent No.3, vide their order dated 17.10.2008 sanctioned the refund of Rs.39,84,195/- without interest. On 12.11.2008, the Petitioner was issued a cheque of Rs.39,84,195/- by the Respondent without interest. The Petitioner, vide letter dated 7.2.2009 addressed to the Respondent No.3 requested for sanction of interest. Since the Respondents did not consider the representation of the Petitioner nor was the interest paid, the Petitioner issued a notice under Section 80 of the CPC to the Respondents through their Advocate

requesting for grant of interest under Section 27-A of the Customs Act, 1962. The Petitioner therefore filed the present writ petition.

**Submissions:**

9. It is submitted on behalf of the Petitioner that the Petitioner is entitled to receive interest @ 6% per annum on the amount of Rs. 39,84,195/- from 11<sup>th</sup> December, 2004 i.e. after three months from the date of receipt of the application seeking refund filed by the Petitioner with the respondents. The actual dis-imbursement by way of issuance of cheque for Rs.39,84,195/- to the Petitioner was made on 12.11.2008 without any interest. It is submitted that Section 27 and Section 27-A of the Customs Act, 1962 are identical to Section 11-B and Section 11BB of the Central Excise Act, 1944. Unless an application filed under Section 27 of the Customs Act, 1962 is rejected by the Respondent by an express finding that the application cannot be termed as an application under Section 27 of the Customs Act, 1962 the liability to pay interest after expiry of the period of three months from the date of receipt of that application cannot be denied. In support of this submission, the decision of this Court in **Swaraj Mazda Ltd. Vs. Union of India 2009 (235) E.L.T. 788** was relied on, wherein it was held that in the absence of any finding within a period of three months from the receipt of the Application seeking refund under Section 11-B of the Central Excise Act, 1944, to the effect that the said Application is incomplete and cannot be termed as an Application under Section 11B of the Central Excise Act, 1944, the

liability to pay interest to the Petitioner after expiry of a period of three months from the date of receipt of the Application dated 9<sup>th</sup> July, 2003 cannot be denied by the Respondent. An SLP preferred by the Revenue from the above judgment was dismissed by the Hon'ble Supreme Court by its order dated 22<sup>nd</sup> March, 2010. It is further submitted that the refund amount is not hit by the doctrine of unjust enrichment. It is therefore submitted that the Petitioner is entitled to receive interest, from the Respondents, on the amount of Rs.39,84,195/- from 11<sup>th</sup> October, 2004 to 11<sup>th</sup> November, 2008.

**Per Contra:**

10. The learned Senior Counsel Mr. Desai, appearing for the Respondents has submitted that though it is true that the Petitioner applied for refund under Section 27 of the Customs Act, 1962 vide application dated 11<sup>th</sup> September, 2004, the Petitioner has submitted a Certificate from a Chartered Accountant confirming that an amount of Rs. 39,84,195/- is shown as receivable from the Customs Department in the books of accounts only on 10<sup>th</sup> October, 2006. Mr. Desai was reminded by this Court that by a Department Circular MF(D.R.)F.No. 275/37/2K-CX, 8A dated 2.1.2002, it is clarified that refund Applications under Section 11B(1) of the Central Excise Act, 1944 or under Section 27(1) of the Customs Act, 1962 need not be insisted upon. A simple letter from the person who has made such a deposit, requesting the return of the amount, alongwith an attested copy of the order-in-appeal or CEGAT

order consequent to which the deposit made becomes returnable and an attested Photostat copy of the Challan in Form TR6 evidencing the payment of the amount of such deposit, addressed to the concerned Assistant/Deputy Commissioner of Central Excise or Customs as the case may be, will suffice.

**Conclusion:**

11. We have considered the above issue at length and expressed our reasoned view in the case of **M/s Pride Foramer Vs. The Commissioner of Custom (Imports) dated 14<sup>th</sup> June, 2010 in Writ Petition No.2629 of 2006** that under Section 27 of the Customs Act, 1962, if an applicant has not submitted papers alongwith the application showing that the application is not hit by the doctrine of unjust enrichment, the Assistant Commissioner or the Deputy Commissioner of Customs is still required to pass an order qua the entitlement of refund. However, the Assistant Commissioner or the Deputy Commissioner of Customs, on not being satisfied that the applicant is not hit by the doctrine of unjust enrichment may direct that the said amount of refund be deposited in the Consumer Welfare fund. In the instant case, the Respondent No.3 has not passed any order whatsoever in the application filed by the Petitioner dated 11<sup>th</sup> November, 2004 seeking refund, within three months from the date of receipt of the the said application.

12. Sections 27 and 27-A of the Customs Act, 1962 and Sections 11B and 11 BB of the Central Excise Act, 1944 are identical in all respects. In the decision of the Division bench of this Court in **Swaraj Mazda Limited (supra)** to which one of us (V.C. Daga, J) is party, this Court, has set aside the finding of the Revisional Authority that the applications submitted by the Petitioner for refund were not completed and were completed only on production of Certificate pursuant to the Appeal order, and has held that unless a finding is recorded that an application that was filed by the Petitioner under Section 11B of the Central Excise Act 1944 cannot be termed as an application made under Section 11B, liability to pay interest after expiry of a period of three months from the date of receipt of that application cannot be denied. In the present case too, the Respondent has not recorded any finding within a period of three months from the date of receipt of the Application dated 11<sup>th</sup> September, 2004, that the Application cannot be termed as an application under Section 27 of the Customs Act, 1962. Therefore, the liability to pay interest to the Petitioner after expiry of a period of three months from the date of receipt of the Application dated 11<sup>th</sup> September, 2004 cannot be denied by the Respondents. Therefore, in view of the decisions of this Court in **Swaraj Mazda Ltd. (Supra)** and **M/s Pride Foramer (Supra)** we are of the view that the Respondents ought to have paid the said amount of Rs.39,84,195/- before 11<sup>th</sup> December, 2004. However, the Respondents have failed and neglected to do the same and have thereby deprived the Petitioner the legitimate use of its funds.



13. Under the circumstances, as held earlier, the Respondents ought to have paid the amount of Rs.39,84,195/- to the Petitioner before 11<sup>th</sup> December, 2004 i.e. three months from the date of receipt of the Petitioner's Application dated 11<sup>th</sup> September, 2004. The Respondents not only failed to respond to the Application filed by the Petitioner within three months of receiving the same, but also failed and neglected to refund to the Petitioner the amount of Rs. 39,84,195/- on or before 11<sup>th</sup> December, 2004 on one pretext or the other and deprived the Petitioner the legitimate use of its funds till 11<sup>th</sup> November, 2008. The aforesaid conduct of the Respondents cannot be overlooked since by doing so the purpose of introducing Section 27-A to the Customs Act, 1962 and issuance of circulars from time to time would be defeated. These measures are taken to enable assesseees to get their refunds on time and thereby discourage the Respondents from delaying grant of refunds. Under these circumstances, we pass the following order:

### **ORDER**

1. The Respondents shall pay the Petitioner interest @ 6 % p.a. on the sum of Rs.39,84,195/- from 11<sup>th</sup> December, 2004 to 11<sup>th</sup> November, 2008 on or before 15<sup>th</sup> August, 2010, failing which the Respondents shall be liable to pay interest @ 10%p.a. w.e.f. 16<sup>th</sup> August 2010 till payment in full and final.
2. Rule is accordingly made absolute in terms of the above order, with costs quantified in the sum of Rs.10,000/-.

( S. J. KATHAWALLA, J.)

(V. C. DAGA, J.)