

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT NO.I

Excise Appeal No.1350 of 2011

(Arising out of Order-In-Original No.49/Commr./LKO/CX/2010-11 dated 31.12.2010 passed by Commissioner, Central Excise & Service Tax, Lucknow)

Commissioner, Central Excise & Service Tax, Lucknow
.....Appellant

(7-A, Ashok Marg, Lucknow-226010)

VERSUS

M/s Harsh Traders **....Respondent**

(165, Deep Nagar, RDSO, Manak Nagar, Lucknow)

APPEARANCE:

Shri Manish Raj, Authorized Representative for the Appellant
None for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70175/2023

DATE OF HEARING : 03.11.2023
DATE OF DECISION : 03.11.2023

SANJIV SRIVASTAVA:

This appeal filed by revenue is directed against the Order-In-Original No. 49/Commr./LKO/CX/2010-11 dated 31.12.2010 of the Commissioner, Central Excise & Service Tax, Lucknow. While adjudging the case demand of central excise duty of Rs.137.50 Lakhs Rs.275.00 Lakhs has been confirmed against on the respondent. However, while imposing a penalty, a penalty of only Rs.137.50 lakhs has been imposed on the appellant under Section 11AC of the Central Excise Act, 1944.

2.0 Revenue has filed this appeal only seeking a modification in the impugned order to the extent that penalty equivalent to the duty confirmed under Section 11AC of the Central Excise Act

should be imposed and the total penalty should have been 137.50 lakh + Rs.275.00 lakhs.

3.0 Notice for hearing was issued to the respondent a number of times which have been received back undelivered. The matter has been adjourned on each occasion for the reason that respondent did not respond to any of the notices issued to them by the registry. Matter has been adjourned for more than 03 times whereas as per proviso to Section 35C 1(A) matter could have been adjourned maximum for 03 times on the request of any party to appeal. For ready reference Section 35C(1A) is reproduced below:-

"Section 35C. Orders of Appellate Tribunal. -

(1A) The Appellate Tribunal may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing:

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal."

Rule 21 of the CESTAT Procedure Rules, 1982 provides as follows:

"RULE 21. Hearing of appeals ex parte. — *Where on the day fixed for the hearing of the appeal or on any other day to which the hearing is adjourned the appellant appears and the respondent does not appear when the appeal is called on for hearing, the Tribunal may hear and decide the appeal ex parte."*

Thus in terms of Rule 21 of the Cestat procedure Rules, 1982 this appeal has been taken up for hearing ex-parte.

4.0 Learned Departmental Representative appearing on behalf of the appellant-Department submits that by reiterating the grounds taken in the appeal it is only by oversight Adjudication Authority has failed to impose penalty in respect of demand confirmed by her amounting to Rs.275.00 lakhs.

5.0 We have considered the impugned order along with the submissions made in the appeal and during the course of arguments. It is interesting to note that appellant has

consistently evaded appearing before the Adjudicating Authority.

Relevant para of the O-I-O is reproduced below:-

43."The opportunity of personal hearing were given to Shri Ranjeet Verma proprietor of M/s Harsh Traders and Smt Seema Verma, w/o Shri Ranjeet Verma on 16.6.2010. Both, Shri Ranjeet Verma and Smt Seema Verma failed to appear for personal hearing on 16.6.2010.

44. A letter dated 30.6.2010 was received from Shri Ranjeet Verma and Smt Seema Verma wherein it was informed that indicating that they are residing at the new address: i.e Clo Smt Kamlesh Verma, Behind RDSO Gurudwara, Deep Nagar, Lucknow, Mobile No 7668508147.

45. According to the request of the assessee and Smt Seema Verma another opportunity /date for personal hearing on 17.8.2010 at 11.30 Hrs was given to M/s Harsh Traders, 165, Deep Nagar, Lucknow and Smt Seema Vema, w/o Shri Ranjeet Verma and M/s Aditya Packs, Lucknow vide this office C.No V(30)Adj)/Lko/238/2009/8255-58 dated 21.7.2010.

46. The letter was sent for delivery through Range Superintendent. The Superintendent, Central Excise, Range-1. Talkatora, Division-1, Lucknow informed that he had contacted Shri Ranjeet Verma on 29.7.2010, on the mobile number communicated by the assessee in letter dated 30.6.2010 to serve the letter for personal hearing fixed on 17.8.2010. Shri Ranjeet Verma had informed that he would be available at his sister's place (ie at the new address mentioned in his letter dated 30.6.2010) around 13.00 Hrs to receive the letter. The officers reached the place but did not find Shri Ranjeet Verma or Smt Seema Verma. The lady present at the new address introduced herself as Smt Kamlesh Verma -sister of Shri Ranjeet Verma. She informed the officers that Shri Ranjeet Verma and Smt Seema Verma had left the address at 165, Deep Nagar, RDSO, Lucknow and the new address was not known to her. She also refused to receive the letters. Thereafter the officers visited the premises at 165, Deep Nagar, RDSO, Lucknow but found it locked and no one was found in the premises. It was informed by the neighbors that the premises was closed

since long time. Consequently, the letter granting opportunity of personal hearing to Shri Ranjeet Verma and Smt Seema Verma was sent by speed post but was returned as 'undelivered by the postal authorities. Therefore on 5.8.2010, the Central Excise officers pasted the letter granting opportunity of personal hearing on 17.8.2010 at the front door of M/s Harsh Traders, 165, Deep Nagar, RDSO, Lucknow under the provisions of Section 37 C (1) of the Central Excise Act, 1944.

47. On 17.8.2010, Shri G.K.Dhusia, Consultant for M/s Aditya Packs, Lucknow appeared for personal hearing before the Commissioner, Central Excise and Service Tax, Lucknow and reiterated the points of the written reply and had nothing to say besides that.

48. Shri Ranjeet Verma, proprietor of M/s Harsh Traders, 165-Deep Nagar, RDSO, Manak Nagar, Lucknow and Smt Seema Verma both failed to turn up for personal hearing on 17.8.2010 at 11.30 Hrs.

49. Another opportunity for personal hearing was given to M/s Harsh Traders. 165-Deep Nagar, RDSO, Manak Nagar, Lucknow and Smt Seema Verma on 27.9.2010 at 11.30 Hrs.

50 The Superintendent, Central Excise, Range-1, Talkatora, Division-1, Lucknow vide letter C.No 20-CE/14/harsh Traders/RTK/07/452 dated 27.9.2010 informed that the letter for personal hearing on 27.9.2010 was given through the counsel (of M/s Harsh Traders) to Shri S.N.Srivastava (Advocate), C-5, Sector -B, Aliganj, Lucknow, but the same were returned by Shri S.N.. Srivastava, counsel for M/s Harsh Trader with the remark "returned the applicant's copy as he is not traceable". The officers found premises locked at M/s Harsh Traders, 165, Deep Nagar, RDSO as well as the address of Smt Kamlesh Verma. The officers pasted the photocopies of the notice of granting opportunity of personal hearing on 27.9.2010 at the front door of the premises of M/s Harsh Traders, 165, Deep Nagar, RDSO, Lucknow and at the door of Smt Kamlesh Verma under the proper Panchnama dated 24.9.2009

51 *Shri Ranjeet Verma, proprietor of M/s Harsh Traders. 165-Deep Nagar, RDSO, Manak Nagar, Lucknow and Smt Seema Verma both failed to turn up for personal hearing on 27.9.2010 at 11.30 Hrs also. Since ample opportunity had been provided to the noticees to represent their case and they seem to be deliberately misusing the time given to them. I propose to take up the case for adjudication on the basis of records available."*

6.0 We also note that Hon'ble Supreme Court has in the case of Ishwarlal Mali Rathod [Order dated September 20, 2021 in Special Leave Petition (Civil) Nos.14117-14118 OF 2021] has observed the case as follows:

"1. *Present is the classic example of misuse of the adjournments granted by the court. Present SLPs have been preferred challenging the impugned order dated 17.02.2021 passed by the High Court of Madhya Pradesh, Bench at Indore in M.P. No.107 of 2021 and M.P. No. 108 of 2021 by which the High Court has dismissed the said misc. petition preferred by the petitioner – original defendant, confirming the order passed by the learned Trial Court dated 21.12.2020 closing the right to cross-examine the plaintiff's witness.*

...

4. *As observed hereinabove, present is a classic example of misuse of adjournments granted by the court. It is to be noted that the respondents herein – original plaintiffs filed the suit for eviction, arrears of rent and mesne profit as far as back in the year 2013. That thereafter despite the repeated adjournments sought and granted by the court and even twice the adjournments were granted as a last opportunity and even the cost was imposed, the defendant failed to cross examine the plaintiff's witness. Although the adequate liberty was given to the defendant to cross examine the plaintiff's witness, they never availed of the same and went on delaying the proceedings by repeated prayers of adjournment and unfortunately the Trial Court and even subsequently the High Court continued to grant adjournment after*

adjournment and as such contributed the delay in disposal of the suit which as such was for eviction. Such approach is wholly condemnable. Law and professional ethics do not permit such practice. Repeated adjournments on one or the other pretext and adopting the dilatory tactics is an insult to justice and concept of speedy disposal of cases. Petitioner – defendant acted in a manner to cause colossal insult to justice and to concept of speedy disposal of civil litigation.

5. Grant of repeated adjournments in routine manner and how it affects ultimately the justice delivery system as such came to be considered by this court in catena of decisions and asking/grant of repeated adjournments have been repeatedly condemned by this court.

5.1 In the case of Shiv Cotex v. Tirgun Auto Plast (P) Ltd. (2011) 9 SCC 678, it is observed and held in paragraphs 14 to 17 as under:-

"14. ... Is the court obliged to give adjournment after adjournment merely because the stakes are high in the dispute? Should the court be a silent spectator and leave control of the case to a party to the case who has decided not to take the case forward?

15. It is sad, but true, that the litigants seek—and the courts grant—adjournments at the drop of the hat. In the cases where the Judges are little proactive and refuse to accede to the requests of unnecessary adjournments, the litigants deploy all sorts of methods in protracting the litigation. It is not surprising that civil disputes drag on and on. The misplaced sympathy and indulgence by the appellate and revisional courts compound the malady further. The case in hand is a case of such misplaced sympathy. It is high time that courts become sensitive to delays in justice delivery system and realise that adjournments do dent the efficacy of the judicial process and if this menace is not controlled adequately, the litigant public may lose faith in

the system sooner than later. The courts, particularly trial courts, must ensure that on every date of hearing, effective progress takes place in the suit.

16. No litigant has a right to abuse the procedure provided in CPC. Adjournments have grown like cancer corroding the entire body of justice delivery system.

17.... A party to the suit is not at liberty to proceed with the trial at its leisure and pleasure and has no right to determine when the evidence would be let in by it or the matter should be heard. The parties to a suit—whether the plaintiff or the defendant—must cooperate with the court in ensuring the effective work on the date of hearing for which the matter has been fixed. If they don't, they do so at their own peril.”

5.2 Commenting on the delay in the justice delivery system, although in respect of the criminal trial, Krishna Iyer, J. in the case of Babu Singh v. State of U.P. (1978) 1 SCC 579 has observed in paragraph 4 as under:-

“4. ... Our justice system, even in grave cases, suffers from slow motion syndrome which is lethal to 'fair trial', whatever the ultimate decision. Speedy justice is a component of social justice since the community, as a whole, is concerned in the criminal being condignly and finally punished within a reasonable time and the innocent being absolved from the inordinate ordeal of criminal proceedings.”

5.3 In the case of Noor Mohammed v. Jethanand and Anr. (2013) 5 SCC 202, using very harsh words and condemning the repeated adjournments sought by the lawyers and granted by the courts, this court has observed in paragraph 1, 12, 13, 27 and 28 as under:-

“1. In a democratic body polity which is governed by a written Constitution and where the Rule of Law is paramount, the judiciary is regarded as sentinel on the qui

vive not only to protect the fundamental rights of the citizens but also to see that the democratic values as enshrined in the Constitution are respected and the faith and hope of the people in the constitutional system are not atrophied. Sacrosanctity of the Rule of Law neither recognises a master and a slave nor does it conceive of a ruler and a subject but, in quintessentially, encapsules and sings in glory of the values of liberty, equality and justice in accordance with law requiring the present generation to have the responsibility to sustain them with all fairness for the posterity ostracizing all affectations. To maintain the sacredness of democracy, sacrifice in continuum by every member of the collective is a categorical imperative. The fundamental conception of democracy can only be preserved as a colossal and priceless treasure where virtue and values of justice rule supreme and intellectual anemia is kept at bay by constant patience, consistent perseverance, and argus eyed vigilance. The foundation of justice, apart from other things, rests on the speedy delineation of the lis pending in courts. It would not be an exaggeration to state that it is the primary morality of justice and ethical fulcrum of the judiciary. Its profundity lies in not allowing anything to cripple the same or to do any act which would freeze it or make it suffer from impotency. Delayed delineation of a controversy in a court of law creates a dent in the normative dispensation of justice and in the ultimate eventuate, the Bench and the Bar gradually lose their reverence, for the sense of divinity and nobility really flows from the institutional serviceability. Therefore, historically, emphasis has been laid on individual institutionalism and collective institutionalism of an adjudicator while administering justice. It can be stated without any fear of contradiction that the collective collegiality can never be regarded as an alien concept to speedy dispensation of

justice. That is the hallmark of duty, and that is the real measure.

12. The proceedings in the second appeal before the High Court, if we allow ourselves to say so, epitomises the corrosive effect that adjournments can have on a litigation and how a lis can get entangled in the tentacles of an octopus. The philosophy of justice, the role of a lawyer and the court, the obligation of a litigant and all legislative commands, the nobility of the Bench and the Bar, the ability and efficiency of all concerned and ultimately the divinity of law are likely to make way for apathy and indifference when delay of the present nature takes place, for procrastination on the part of anyone destroys the values of life and creates a catastrophic turbulence in the sanctity of law. The virtues of adjudication cannot be allowed to be paralyzed by adjournments and non demonstration of due diligence to deal with the matter. One cannot be oblivious to the feeling necessities of the time. No one can afford to sit in an ivory tower. Neither a Judge nor a lawyer can ignore "the total push and pressure of the cosmos". It is devastating to expect infinite patience. Change of attitude is the warrant and command of the day. We may recall with profit what Justice Cardozo had said: "It is true, I think, today in every department of the law that the social value of a rule has become a test of growing power and importance." [Benjamin N. Cardozo, The Nature of Judicial Process (Cosimo Inc., 2009) 73]

13. It has to be kept in mind that the time of leisure has to be given a decent burial. The sooner it takes place, the better it is. It is the obligation of the present generation to march with the time and remind oneself every moment that the rule of law is the centripodal concern and delay in delineation and disposal of cases injects an artificial virus and becomes a vitiating element. The unfortunate characteristics of endemic delays have to be avoided at

any cost. One has to bear in mind that this is the day, this is the hour and this is the moment, when all soldiers of law fight from the path. One has to remind oneself of the great saying, "Awake, Arise, 'O' Partha".

27. The anguish expressed in the past and the role ascribed to the Judges, the lawyers and the litigants is a matter of perpetual concern and the same has to be reflected upon every moment. An attitude of indifference can neither be appreciated nor tolerated. Therefore, the serviceability of the institution gains significance. That is the command of the Majesty of Law and none should make any maladroitness effort to create a concavity in the same. Procrastination, whether at the individual or institutional level, is a systemic disorder. Its corrosive effect and impact is like a disorderly state of the physical frame of a man suffering from an incurable and fast progressive malignancy. Delay either by the functionaries of the court or the members of the Bar significantly exhibits indolence and one can aphoristically say, borrowing a line from Southwell "creeping snails have the weakest force" [Robert Southwell, "Loss in Delay", in William B. Turnbull (Ed.), The Poetical Works of the Rev. Robert Southwell (John Russell Smith, London 1856), p. 60.] . Slightly more than five decades back, talking about the responsibility of the lawyers, Nizer Louis had put thus: "I consider it a lawyer's task to bring calm and confidence to the distressed client. Almost everyone who comes to a law office is emotionally affected by a problem. It is only a matter of degree and of the client's inner resources to withstand the pressure." [Nizer Louis, My Life in Court (Doubleday & Co. Inc., New York 1961), p. 213]

A few lines from the illustrious Justice Frankfurter is fruitful to recapitulate:

"I think a person who throughout his life is nothing but a practising lawyer fulfils a very great and essential

function in the life of society. Think of the responsibilities on the one hand, and the satisfaction on the other, to be a lawyer in the true sense.” [Felix Frankfurter, “Proceedings in Honor of Mr. Justice Frankfurter and Distinguished Alumni, Occasional Pamphlet No. 3” (Harvard Law School, Cambridge, 1960), pp. 4-5]

28. In a democratic set-up, intrinsic and embedded faith in the adjudicatory system is of seminal and pivotal concern. Delay gradually declines the citizenry faith in the system. It is the faith and faith alone that keeps the system alive. It provides oxygen constantly. Fragmentation of faith has the effect potentiality to bring in a state of cataclysm where justice may become a casualty. A litigant expects a reasoned verdict from a temperate Judge but does not intend to and, rightly so, to guillotine much of time at the altar of reasons. Timely delivery of justice keeps the faith ingrained and establishes the sustained stability. Access to speedy justice is regarded as a human right which is deeply rooted in the foundational concept of democracy and such a right is not only the creation of law but also a natural right. This right can be fully ripened by the requisite commitment of all concerned with the system. It cannot be regarded as a facet of Utopianism because such a thought is likely to make the right a mirage losing the centrality of purpose. Therefore, whoever has a role to play in the justice dispensation system cannot be allowed to remotely conceive of a casual approach.”

5.4 In the aforesaid decision, this court also considered the role of advocate in the justice delivery system and considered the earlier decisions in paragraphs 17 to 22 which read as under:-

“17. In Ramon Services (P) Ltd. v. Subhash Kapoor [(2001) 1 SCC 118 : 2001 SCC (Cri) 3 : 2001 SCC (L&S) 152 : AIR 2001 SC 207] , after referring to a passage from Mahabir Prasad Singh v. Jacks Aviation (P) Ltd. [(1999) 1 SCC 37 : AIR 1999 SC 287] , the Court cautioned thus :

(Ramon Services case [(2001) 1 SCC 118 : 2001 SCC (Cri) 3 : 2001 SCC (L&S) 152 : AIR 2001 SC 207] , SCC p. 126, para 15)

"15. ... Nonetheless we put the profession to notice that in future the advocate would also be answerable for the consequence suffered by the party if the non-appearance was solely on the ground of a strike call. It is unjust and inequitable to cause the party alone to suffer for the self imposed dereliction of his advocate. We may further add that the litigant who suffers entirely on account of his advocate's nonappearance in court, has also the remedy to sue the advocate for damages but that remedy would remain unaffected by the course adopted in this case. Even so, in situations like this, when the court mulcts the party with costs for the failure of his advocate to appear, we make it clear that the same court has power to permit the party to realize the costs from the advocate concerned. However, such direction can be passed only after affording an opportunity to the advocate. If he has any justifiable cause the court can certainly absolve him from such a liability."

Be it noted, though the said passage was stated in the context of strike by the lawyers, yet it has its accent on non-appearance by a counsel in the court.

18. In this context, we may refer to the pronouncement in Pandurang Dattatraya Khandekar v. Bar Council of Maharashtra [(1984) 2 SCC 556 : 1984 SCC (Cri) 335] , wherein the Court observed that : (SCC p. 563, para 9)

"9. ... An advocate stands in a loco parentis towards the litigants and it therefore follows that the client is entitled to receive disinterested, sincere and honest treatment especially where the client approaches the advocate for succor in times of need."

19. In Lt. Col. S.J. Chaudhary v. State (Delhi Admn.) [(1984) 1 SCC 722 : 1984 SCC (Cri) 163 : AIR 1984 SC

618] , a three-Judge Bench, while dealing with the role of an advocate in a criminal trial, has observed as follows : (SCC pp. 723-24, para 3)

"3. We are unable to appreciate the difficulty said to be experienced by the petitioner. It is stated that his advocate is finding it difficult to attend the court from day to day. It is the duty of every advocate, who accepts the brief in a criminal case to attend the trial from day to day. We cannot over-stress the duty of the advocate to attend to the trial from day to day. Having accepted the brief, he will be committing a breach of his professional duty, if he so fails to attend."

20. In *Mahabir Prasad Singh* [(1999) 1 SCC 37 : AIR 1999 SC 287], the Bench, laying emphasis on the obligation of a lawyer in his duty towards the Court and the duty of the Court to the Bar, has ruled as under: (SCC p. 44, paras 17-18)

"17. ... 'A lawyer is under obligation to do nothing that shall detract from the dignity of the court of which he is himself a sworn officer and assistant. He should at all times pay deferential respect to the Judge, and scrupulously observe the decorum of the courtroom.' [Warevelle's Legal Ethics, p. 182]

18. Of course, it is not a unilateral affair. There is a reciprocal duty for the court also to be courteous to the members of the Bar and to make every endeavour for maintaining and protecting the respect which members of the Bar are entitled to have from their clients as well as from the litigant public. Both the Bench and the Bar are the two inextricable wings of the judicial forum and therefore the aforesaid mutual respect is sine qua non for the efficient functioning of the solemn work carried on in courts of law. But that does not mean that any advocate or a group of them can boycott the courts or any particular court and ask the court to desist from discharging

judicial functions. At any rate, no advocate can ask the court to avoid a case on the ground that he does not want to appear in that court."

21. While recapitulating the duties of a lawyer towards the court and society, being a member of the legal profession, this Court in O.P. Sharma v. High Court of P&H [(2011) 6 SCC 86 : (2011) 3 SCC (Civ) 218 : (2011) 2 SCC (Cri) 821 : (2011) 2 SCC (L&S) 11] has observed that : (SCC p. 92, para 17)

"17. The role and status of lawyers at the beginning of sovereign and democratic India is accounted as extremely vital in deciding that the nation's administration was to be governed by the rule of law."

The Bench emphasised on the role of eminent lawyers in the framing of the Constitution. The emphasis was also laid on the concept that lawyers are the officers of the court in the administration of justice.

22. In R.K. Garg v. State of H.P. [(1981) 3 SCC 166 : 1981 SCC (Cri) 663] , Chandrachud, C.J., speaking for the Court pertaining to the relationship between the Bench and the Bar, opined thus : (SCC p. 170, para 9)

"9. ... the Bar and the Bench are an integral part of the same mechanism which administers justice to the people. Many members of the Bench are drawn from the Bar and their past association is a source of inspiration and pride to them. It ought to be a matter of equal pride to the Bar. It is unquestionably true that courtesy breeds courtesy and just as charity has to begin at home, courtesy must begin with the Judge. A discourteous Judge is like an ill tuned instrument in the setting of a courtroom. But members of the Bar will do well to remember that such flagrant violations of professional ethics and cultured conduct will only result in the ultimate destruction of a system without which no democracy can survive."

5.5 Today the judiciary and the justice delivery system is facing acute problem of delay which ultimately affects the right of the litigant to access to justice and the speedy trial. Arrears are mounting because of such delay and dilatory tactics and asking repeated adjournments by the advocates and mechanically and in routine manner granted by the courts. It cannot be disputed that due to delay in access to justice and not getting the timely justice it may shaken the trust and confidence of the litigants in the justice delivery system. Many a times, the task of adjournments is used to kill Justice. Repeated adjournments break the back of the litigants. The courts are enjoying upon to perform their duties with the object of strengthening the confidence of common man in the institution entrusted with the administration of the justice. Any effort which weakens the system and shake the faith of the common man in the justice dispensation has to be discouraged. Therefore the courts shall not grant the adjournments in routine manner and mechanically and shall not be a party to cause for delay in dispensing the justice. The courts have to be diligence and take timely action in order to usher in efficient justice dispensation system and maintain faith in rule of law. We are also aware that whenever the trial courts refused to grant unnecessary adjournments many a times they are accused of being strict and they may face displeasure of the Bar. However, the judicial officers shall not worry about that if his conscience is clear and the judicial officer has to bear in mind his duties to the litigants who are before the courts and who have come for justice and for whom Courts are meant and all efforts shall be made by the courts to provide timely justice to the litigants. Take an example of the present case. Suit was for eviction. Many a times the suits are filed for eviction on the ground of bonafide requirements of the landlord. If plaintiff who seeks eviction decree on the ground of personal bonafide requirement is not getting the timely justice and he ultimately gets the decree after 10 to 15 years, at times cause for getting the eviction decree on the ground of personal

bonafide requirement may be defeated. The resultant effect would be that such a litigant would lose confidence in the justice delivery system and instead of filing civil suit and following the law he may adopt the other mode which has no backing of law and ultimately it affects the rule of law. Therefore, the court shall be very slow in granting adjournments and as observed hereinabove they shall not grant repeated adjournments in routine manner. Time has now come to change the work culture and get out of the adjournment culture so that confidence and trust put by the litigants in the Justice delivery system is not shaken and Rule of Law is maintained.

5.6 In view of the above and for the reasons stated above and considering the fact that in the present case ten times adjournments were given between 2015 to 2019 and twice the orders were passed granting time for cross examination as a last chance and that too at one point of time even a cost was also imposed and even thereafter also when lastly the High Court passed an order with extending the time it was specifically mentioned that no further time shall be extended and/or granted still the petitioner – defendant never availed of the liberty and the grace shown. In fact it can be said that the petitioner – defendant misused the liberty and the grace shown by the court. It is reported that as such now even the main suit has been disposed of. In view of the circumstances, the present SLPs deserve to be dismissed and are accordingly dismissed.”

7. On the basis of the records, the case has been adjudicated by the Original Authority confirming the demand amounting to Rs. 137.50 lakh + Rs.2.75 lakhs. While confirming the demand for invoking the provisions of extended period and for imposition of penalty under Section 11AC, adjudicating authority has recorded as follows:

"104 I hold that on 11.5.09, one Pouch Packing Machine installed in the registered premises of M/s Harsh Trader, 165, Deep nagar, Lucknow, was found operational. The excisable/

notified goods "Gutkha" with brand name 'Prem Bahar' and 'Partner' (MRP Re 1.00) were being manufactured since July 2008 in contravention of Pan Masala Machines (Capacity Determination and Collection of Duty) Rules, 2008. I find, duty amounting to Rs 137.50 Lakhs is demandable and liable to recovery from M/s Harsh Traders, Lucknow under the proviso to Section 11 A (1) of the Central Excise Act, 1944 alongwith interest under Section 11AB of the Central Excise Act, 1944.

105. 104 I hold that on 11.5.09, two Pouch Packing Machines installed in the unregistered premises Little Care Public School, Behind RDSO, Gurudwara, Surya Nagar, Lucknow were found operational. The excisable/ notified goods "Gutkha" with brand name 'Prem Bahar' and 'Partner' (MRP Re 1.00) were being manufactured since July 2008 in contravention of Pan Masala Machines (Capacity Determination and Collection of Duty) Rules, 2008. I find, duty amounting to Rs 275.00 Lakhs is demandable and liable to recovery from M/s Harsh Traders, Lucknow under the proviso to Section 11 A (1) of the Central Excise Act, 1944 alongwith interest under Section 11AB of the Central Excise Act, 1944.

110. I find that Noticee No 1 and Noticee No 2 are liable to penal action separately, under 17(1) of Pan Masala Machines (Capacity Determination and Collection of Duty) Rules, 2008, tread with Rule 25 of the Central Excise Rules, 2002 and Section 11AC of the Central Excise Act, 1944 for contravention of the Rules committed at 165 Deep Nagar, RDSO, Manak Nagar, Lucknow and Little Care Public School, Behind RDSO, Gurudwara, Surya Nagar, Lucknow.

8. From the above it is quite evident that the duty has been confirmed against appellant by invoking the proviso to Section 11A (1) of the Central Excise Act, 1944 and respondent has been held liable for penalty under Section 11 AC for the duty confirmed at both the premises i.e the registered premises of M/s Harsh Trader, 165, Deep nagar, RDSO, Manak Nagar Lucknow and unregistered premises at Little Care Public School, Behind RDSO, Gurudwara, Surya Nagar, Lucknow. However

while imposing the penalty under Section 11 AC penalty has been imposed only in respect of the duty confirmed at the registered premises of M/s Harsh Trader, 165, Deep nagar, RDSO, Manak Nagar Lucknow

9. It is a settled law that in a case where demand has been confirmed invoking extended period of limitation penalty equivalent to duty evaded needs to be imposed and there is no discretion to any authority as held by the Hon'ble Supreme Court in the case of Union of India V/s M/s Rajasthan Spinning & Weaving reported as 2009 (238) E.L.T. 3 (S.C.). Relevant part of the judgment is reproduced below:-

"14. Sub-section 1A of Section 11A provides that in case the person in default to whom the notice is given under the proviso to sub-section 1 makes payment of duty in full or in part as may be accepted by him, together with interest under Section 11AB and penalty equal to 25% of the accepted amount of duty within thirty days of the date of receipt of notice then the proceeding against him would be deemed to be conclusive (without prejudice to the provisions of Sections 9, 9A and 9AA) as provided in the proviso to sub-section 2 of Section 11A. Sub-section 1A and the proviso to sub-section 2 were inserted with effect from July 13, 2006 and, therefore, have no application to the periods relevant to the two appeals.

15. Sub-section 2B of Section 11A provides that in case the person in default makes payment of the escaped amount of duty before the service of notice then the Revenue will not give him the notice under sub-section 1. This, perhaps, is the basis of the common though erroneous view that no penalty would be leviable if the escaped amount of duty is paid before the service of notice. It, however, overlooks the two explanations qualifying the main provision. Explanation 1 makes it clear that the payment would, nevertheless, be subject to imposition of interest under Section 11AB. Explanation 2 makes it further clear that in case the escape of duty is intentional and by reason of deception the main provision of sub section 2B will have no application.

16. The other provision with which we are concerned in this case is Section 11AC relating to penalty. It is as follows :

[11AC. Penalty for short-levy or non-levy of duty in certain cases.- where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (2) of section 11A, shall also be liable to pay a penalty equal to the duty so determined :

[Provided that where such duty as determined under sub-section (2) of section 11A, and the interest payable thereon under section 11AB, is paid within thirty days from the date of communication of the order of the Central Excise Officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the duty so determined :

Provided further that the benefit of reduced penalty under the first proviso shall be available if the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso :

Provided also that where the duty determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purpose of this section, the duty as reduced or increased, as the case may be, shall be taken into account :

Provided also that in case where the duty determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available, if the amount of duty so increased, the interest payable thereon and twenty-five per cent of the consequential increase of penalty have also been paid within thirty days of the communication of the order by which such increase in the duty takes effect -

Explanation. - For the removal of doubts, it is hereby declared that -

(1) the provisions of this section shall also apply to cases in which the order determining the duty under sub-section (2) of section 11A relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President;

(1) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person.]

17. The main body of Section 11AC lays down the conditions and circumstances that would attract penalty and the various provisos enumerate the conditions, subject to which and the extent to which the penalty may be reduced.

18. One cannot fail to notice that both the proviso to sub-section 1 of Section 11A and Section 11AC use the same expressions : "...by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,...". In other words the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty. It, therefore, follows that if the notice under Section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application of the penalty provision in Section 11AC of the Act. On behalf of the assesseees it was also submitted that Sections 11A and 11AC not only operate in different fields but the two provisions are also separated by time. The penalty provision of Section 11AC would come into play only after an order is passed under Section

11A(2) with the finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in Section 11AC.

19. From the aforesaid discussion it is clear that penalty under Section 11AC, as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section.

20. At this stage, we need to examine the recent decision of this Court in Dharamendra Textile (supra). In almost every case relating to penalty, the decision is referred to on behalf of the Revenue as if it laid down that in every case of non-payment or short payment of duty the penalty clause would automatically get attracted and the authority had no discretion in the matter. One of us (Aftab Alam, J.) was a party to the decision in Dharamendra Textile and we see no reason to understand or read that decision in that manner. In Dharamendra Textile the court framed the issues before it, in paragraph 2 of the decision, as follows :

"2. A Division Bench of this Court has referred the controversy involved in these appeals to a larger Bench doubting the correctness of the view expressed in Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai & Anr. [2007 (8) SCALE 304]. The question which arises for determination in all these appeals is whether Section 11AC of the Central Excise Act, 1944 (in short the 'Act') inserted by Finance Act, 1996 with the intention of imposing mandatory penalty on persons who evaded payment of tax should be read to contain mens rea as an essential ingredient and whether there is a scope for levying penalty below the prescribed minimum. Before the Division Bench, stand of the revenue was that said section should be read as penalty for statutory offence and the authority imposing penalty has no discretion in the matter of imposition of penalty and the adjudicating authority in such cases was duty bound to impose penalty equal to the duties so determined. The assessee on the other hand referred to Section 271(1)(c) of the Income Tax Act, 1961 (in short the IT Act') taking the stand that Section

11AC of the Act is identically worded and in a given case it was open to the assessing officer not to impose any penalty. The Division Bench made reference to Rule 96ZQ and Rule 96ZO of the Central Excise Rules, 1944 (in short the "Rules") and a decision of this Court in Chairman, SEBI v. Shriram Mutual Fund & Anr. [2006 (5) SCC 361] and was of the view that the basic scheme for imposition of penalty under section 271(1)(c) of IT Act, Section 11AC of the Act and Rule 96ZQ(5) of the Rules is common. According to the Division Bench the correct position in law was laid down in Chairman, SEBI's case (supra) and not in Dilip Shroff's case (supra). Therefore, the matter was referred to a larger Bench."

After referring to a number of decisions on interpretation and construction of statutory provisions, in paragraphs 26 and 27 of the decision, the court observed and held as follows :

"26. In Union Budget of 1996-97, Section 11AC of the Act was introduced. It has made the position clear that there is no scope for any discretion. In para 136 of the Union Budget reference has been made to the provision stating that the levy of penalty is a mandatory penalty. In the Notes on Clauses also the similar indication has been given.

"27. Above being the position, the plea that the Rules 96ZQ and 96ZO have a concept of discretion inbuilt cannot be sustained. Dilip Shroff's case (supra) was not correctly decided but Chairman, SEBI's case (supra) has analysed the legal position in the correct perspectives. The reference is answered.....".

21. From the above, we fail to see how the decision in Dharamendra Textile can be said to hold that Section 11AC would apply to every case of non-payment or short payment of duty regardless of the conditions expressly mentioned in the section for its application.

22. There is another very strong reason for holding that Dharamendra Textile could not have interpreted Section 11AC in the manner as suggested because in that case that was not even the stand of the revenue. In paragraph 5 of the decision the

court noted the submission made on behalf of the revenue as follows :

"5. Mr. Chandrashekharan, Additional Solicitor General submitted that in Rules 96ZQ and 96ZO there is no reference to any mens rea as in section 11AC where mens rea is prescribed statutorily. This is clear from the extended period of limitation permissible under Section 11A of the Act. It is in essence submitted that the penalty is for statutory offence. It is pointed out that the proviso to Section 11A deals with the time for initiation of action. Section 11AC is only a mechanism for computation and the quantum of penalty. It is stated that the consequences of fraud etc. relate to the extended period of limitation and the onus is on the revenue to establish that the extended period of limitation is applicable. Once that hurdle is crossed by the revenue, the assessee is exposed to penalty and the quantum of penalty is fixed. It is pointed out that even if in some statutes mens rea is specifically provided for, so is the limit or imposition of penalty, that is the maximum fixed or the quantum has to be between two limits fixed. In the cases at hand, there is no variable and, therefore, no discretion. It is pointed out that prior to insertion of Section 11AC, Rule 173Q was in vogue in which no mens rea was provided for. It only stated "which he knows or has reason to believe". The said clause referred to wilful action. According to learned counsel what was inferentially provided in some respects in Rule 173Q, now stands explicitly provided in Section 11AC. Where the outer limit of penalty is fixed and the statute provides that it should not exceed a particular limit, that itself indicates scope for discretion but that is not the case here."

23. The decision in Dharamendra Textile must, therefore, be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to

the duty determined under sub-section (2) of Section 11A. That is what Dharamendra Textile decides.”

10. Taking note of the above, we are of the view that the appeal of the Revenue is having merits and needs to be allowed.

11.0 Appeal filed by the Revenue is allowed.

(Dictated and pronounced in open court)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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