(2008) 05 MAD CK 0011

In the Madras High Court

Case No : Criminal O.P (MD) No. 17682 of 2002

A. Jayagopal Alwar — APPELLANT

Vs

The Assistant Commissioner of Central Excise (Legal) — RESPONDENT

Date of Decision : 14-05-2008

Acts Referred:

Central Excise Rules, 1944 — Rule 173C, 173F, 173G, 173Q, 174
Central Excises and Salt Act, 1944 — Section 11A, 11A(1), 11A(2), 11AB, 11AC
Criminal Procedure Code, 1973 (CrPC) — Section 190, 482

Citation : (2008) 129 ECC 203 : (2008) 155 ECR 203 : (2008) 230 ELT 212

Hon'ble Judges : S. Nagamuthu, J

Bench : Single Bench

Advocate : B. Kumar for M. Ramasamy, for the Appellant; C. Arul Vadivel alias Sekar, Special Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

S. Nagamuthu, J.—Seeking to quash the private complaint in C.C. No. 13 of 2002 on the file of the learned Additional Chief Judicial Magistrate, Madurai, the petitioner, who is the one of the accused in the said case has come forward with this petition u/s 482 Cr.P.C.

2. Admittedly, the petitioner was employed as Senior Marketing Executive in a company known as M/s. Indian Aluminium Company Limited (in short hereinafter referred to as "INDAL") at Chennai. Yet another company known as M/s. Shree Meenatchi Aluminium Extrusions Limited, Madurai (in short hereinafter referred to as "SMALEX") was engaged in the manufacture of Aluminium Extrusions at Vellaripatti in Madurai District.

3. According to the allegations in the complaint, INDAL is the real manufacturer of Aluminium extrusions in terms of Section 2(f) of Central Excise Act 1944 and by suppressing the said fact, INDAL has engaged SMALEX by means of a Memorandum of understanding for getting their goods manufactured on job work basis and cleared the same without payment of appropriate duty on the actual

value as per Section 4 of the Central Excise Act read with Central Excise (Valuation) Rules 1975. The Central Excise Officers verified the documents and relevant records on 01.10.1996, during which several documents including the Memorandum of understanding were recovered. On perusal of the invoices and the documents, it came to light that on the raw materials supplied by INDAL, on job work basis SMALEX manufactured Aluminium extrusions and delivered the finished goods to the customers of INDAL as per the directions of INDAL. The Memorandum of Understanding between SMALEX and INDAL reads as follows:

(i) the covenants of the manufacturer (i.e.,) SMALEX are as follows:

(a) SMALEX shall receive the raw materials supplied by INDAL along with excise invoice, delivery challan and sales tax form, SMALEX shall take Modvat credit for the same.

(b) SMALEX shall thoroughly study the details of orders placed by INDAL and draw out time bound production plan and intimate the same to INDAL.

(c) SMALEX shall manufacture the product and will also adhere to the schedule given by INDAL in this respect from time to time.

(d) SMALEX shall keep the finished products in the manner as prescribed by INDAL to avoid damage or mix up with other goods.

(e) SMALEX will adhere to the quality control requirement as per specifications given by INDAL and also as per the sectional drawings supplied by INDAL.

(f) SMALEX will furnish weekly statement / report of the stock of the extrusion and raw materials shipped to INDAL.

(g) SMALEX will provide secretarial services to INDAL for documentation as and when required.

(ii) The owners (ie) INDAL hereby covenants to SMALEX as follows:

(a) communicate with SMALEX regarding size, profiles, sections or solids to be extruded from the raw materials supplied by INDAL. INDAL shall intimate SMALEX regarding technical specifications such as tolerances on dimensions, weight, length other technical details etc.,

(b) despatch the raw material to SMALEX with a delivery challan, excise invoice and the relevant sales tax form prescribed by the State Government concerned.

(c) INDAL shall assess the order position and accordingly decide upon the production schedule specification and requirement of raw material in consultation with SMALEX.

(d) INDAL shall intimate SMALEX regarding despatch details such as particulars of the customer to whom the extrusions have to be despatched sales tax numbers, insurances, method of packing and other information like choice of transporters etc., in details and intimate SMALEX regarding the delivery date while placing the order.

4. In paragraph 14 of the complaint, it is stated thus:

Thus, it is well established that A1 manufactured the Aluminium Extrusions on job work basis during the period from 01.04.1994 to 30.09.1996 as the agent of A3. Since the goods were manufactured on account of A3, A3 is the real manufacturer of the above said goods in terms of Section 2(f) of Central Excise Act 1944. A3 had never disclosed the existance of Memorandum of Understanding between A1 and A3 to the Central Excise Department and evaded payment of Central Excise duty to the tune of Rs. 38,22,550/- during 01.04.1994 to 30.09.1996. The said failure in compliance with the provision of Central Excise Law to the extent was intentional on the part of A-1 to A-4 and the Central Government was deprived of legitimate revenue to the tune of Rs. 38,32,550/- during the said period and thereby A-1 to A-4 have committed offences covered u/s 9(1)(a), 9(1)(b), 9(1)(bb) and 9(1)(c) of the Central Excise Act 1944 read with Rules 9(1), 52A, 173G, 173 F, 174 and 226 of CER 1944. Accordingly, A1 to A4 are punishable u/s 9(1)(a)(i), 9(1)(b)(i), 9(1)(bb)(i) and 9(1)(c)(i) of Central Excise Act 1944 read with Section 9AA.

Based on the above materials collected during verification and on the basis of the statements recorded from various persons, including the petitioner, the respondent laid the private complaint before the learned Additional Chief Judicial Magistrate, Madurai against a total number of six accused. The first accused is SMALEX company; the second accused is the Project Manager of the SMALEX; the third accused is INDAL ; the fourth accused (the petitioner herein) is the Senior Marketing Executive in INDAL; the fifth accused is another company known as M/s. Agents Aluminium Co., Ltd., and the sixth accused is the Director of the fifth accused. The offences said to have been committed are punishable under Sections 9(1)(a), 9(1)(b), 9(1)(bb), 9(1)(c), 9(1)(d) of Central Excise Act 1944 read with Rules 9(1), 52A, 53, 173 C, 173 G, 173 Q, 226 of the Central Excise Rules 1944 read with Section 9AA. It appears that the case against INDAL and the SMALEX was split up separately in which the petitioner is the second accused, which is now pending before the learned Additional Chief Judicial Magistrate, Madurai. Seeking to quash the same, the petitioner has come forward with this petition.

5. Admittedly, a show cause notice dated 14.08.2007 was issued, wherein demand for an amount of Rs. 38,32,550.00 from INDAL as differential duty on aluminium extrusions manufactured and cleared from the factory premises of SMALEX under INDAL''s invoices covering the period from 1994-95 to 1996 - 97 (upto 30.09.1996) by invoking the proviso to Section 11A(1) of the Central Excise Act, 1944 was made and also to recover interest u/s 11AB; impose penalty u/s 11AC and under erstwhile rules 9(2) and 173 Q of Central Excise Rules, 1944; demand an amount of Rs. 4,450 as differential duty from SMALEX on the clearances effected from their premises to the customers of AACL using the latters'' invoices by invoking the proviso to Section 11A(1) of the Central

Excise Act, 1944, recover an amount of Rs. 84,499.00 from SMALEX towards the shortage of modvated inputs, penalise SMALEX u/s 11AC and under erstwhile rules 9(2) and 173Q of Central Excise Rules, 1944 and also under erstwhile rule 209 A, and to penalise AACL under erstwhile Rule 209A. The details pertaining to the demand proposed were given in Annexures A to C to the Show Cause Notice.

6. Thereafter, a final order was made by the Commissioner of Central Excise, Madurai, directing the first accused INDAL to pay the amount u/s 11A(2) of the Central Excise Act, 1944. The Company, viz., INDAL challenged the same before the Customs, Excise and Gold (Control) Appellate Tribunal, South Zonal Bench at Madras. The Bench, by order dated 14.01.1999 set aside the order of the Commissioner and remanded the matter back to the Commissioner for fresh disposal. On such reconsideration, the Commissioner, by order dated 29.01.2002 has passed the following order:

35. In view of my foregoing findings, it is ordered as under:

(i) I hereby hold INDAL as the manufacturers of goods. However the proceedings initiated for recovery of differential duty are dropped on grounds of limitation. Consequently the proceedings initiated against INDAL for recovery of interest and for imposition of penalty also abate;

(ii) The penal proceedings proposed on SMALEX under erstwhile rule 209A are hereby dropped;

(iii) I hereby confirm an amount of Rs. 4,450.00 (Rupees Four Thousand four hundred and fifty only) u/s 11A(2) of the Central Excise Act, 1944 as differential duty on SMALEX towards the goods cleared to buyers under AACL''s invoices, by invoking the larger period of limitation under the proviso to Section 11A(1). The amount of Rs. 4,450.00 paid under T.R.Challan No. 23/97-98 dated 19.01.1998 is adjusted towards the same after vacating the protest;

(iv) I hereby confirm an amount of Rs. 84,499.00 (Rupees Eighty Four Thousand Four Hundred and ninety nine only) on SMALEX under erstwhile rule 57(2) read with erstwhile rule 57(1) of Central Excise Rules, 1944 by invoking the larger period of limitation under the Proviso to Section 11A(1) of the Central Excise Act, 1944. The amount of Rs. 84,499.00 paid under T.R.Challan No. 24/97-98 dated 19.01.1998 is adjusted towards the same, after vacating the protest;

(v) I impose a combined penalty of Rs. 5,000/- (Rupees Five Hundred only) on SMALEX under erstwhile rules 9(2), 173Q and 226 of Central Excise Rules, 1944.

(vi) I impose a penalty of Rs. 1,500.00 (Rupees One Thousand Five Hundred only) on AACL under erstwhile rule 209A of Central Excise Rules, 1944.

7. In the meantime, this private complaint was launched before the learned Additional Chief Judicial Magistrate, Madurai in the year 2002 i.e., some time before the order dated 29.01.2002 was passed by the Commissioner. Now, it is urged that the private complaint is liable to be quashed since the Commissioner

of Central Excise in the order referred to above has dropped the recovery of differential duty and also the penal proceedings.

8. A detailed counter has been filed by the respondent wherein it has been stated that the proceedings were dropped by the Commissioner only on the ground of limitation and therefore that will not have any effect in the criminal prosecution launched against the petitioner. It has been further stated that the Commissioner in the order referred to above has clearly held that INDAL is the manufacturer and so, the failure of the petitioner and INDAL to comply with the provisions of Sections 9(1)(a), 9(1)(b), 9(1)(bb), 9(1)(c) and 9(1)(d) of the Central Excise Act, 1944 would amount to offences.

9. I have carefully considered the rival submissions.

10. A careful scrutiny of the materials available on record, including the final order made by the Commissioner of Central Excise in his proceedings C. No. V./76/15/40/97.Adjn. dated 29.01.2002 would go to show that the Commissioner has held that INDAL is the manufacturer of the goods. There is also no dispute that the petitioner is the Senior Marketing Executive of the said Company, who is responsible for the day to day affairs of the company. u/s 9(1)(a) of the Act, if any one contravenes any of the provisions of Section 8, then it is an offence. Prima facie, in this case there are allegations that as per the findings of the Commissioner of Central Excise, INDAL was found in possession of excisable goods at the premises of SMALEX in violation of Section 8 of the Act. Thus, there is a prima facie case, making out an offence punishable u/s 9(1)(a) of the Act. Similarly, evasion of payment of any duty payable under this Act is punishable u/ s 9(1)(b) of the Act. As found by the Commissioner in his final order and also from the statement of the petitioner as well as the other persons, there are materials to show that INDAL manufactured goods at the premises of SMALEX, sold away the same to various customers during the relevant period and did not pay the duty in time and thus, there is evasion of payment of duty. Thus, there are strong materials available making out a prima facie case.

11. The next penal provision is Section 9(1)(bb) of the Act. It says that removal of excisable goods in contravention of any of the provisions of the Act or any rules is punishable. In this case, as stated above, there are materials to make out a prima facie case that excisable goods which were manufactured by INDAL at the premises of SMALEX at Madurai were sold to various customers and they were also removed. The statement of the carrier of the goods viz., one Mariyappan, Branch Manager of Rajalakshmi Transport, Madurai would go to show that he used to take delivery of Aluminium finished goods from SMALEX and transported the same to various destinations and when the consignments were loaded in his lorries, the consignor''s name was always indicated as INDAL in the way bills as well as in the outward Register. These materials would make it clear that excisable goods were removed from SMALEX premises by INDAL in contravention of the provisions and thus, there is no reason to quash the proceedings in respect of the offence u/s 9(1)(bb) of the Act.

12. In respect of the offence u/s 9(1)(c), it is to be seen that failure to supply any information to the Central Excise Department is an offence punishable under this provision. In this case, there are materials to show that information regarding manufacture of aluminium extrusions by INDAL at the premises at SMALEX were not allegedly submitted to the Department. Thus, there are prima facie allegations making out offences punishable under Sections 9(1)(c) and 9(1)(d) of the Act.

13. The learned Senior Counsel for the petitioner would submit that since the proceedings for recovery of the amount, including the penal proceedings have been dropped as per the order of the Commissioner, the private complaint is liable to be quashed. But, I am not able to agree with the said argument advanced for the simple reason that as per Section 11-A of the Act, recovery of any duty which has not been levied or paid should be made within a period of one year from the relevant date. The Commissioner in his order, though has held that INDAL is the manufacturer and therefore liable to pay the duty, still he has ordered for dropping of the proceedings only on the ground of limitation. If the Commissioner has given a finding that INDAL is not the manufacturer and therefore INDAL is not liable to pay any duty, then, there will be every force in the argument of the learned Senior Counsel, requiring this Court to accept the said argument. On the other hand, as stated above, in this case, the Commissioner has specifically held that INDAL is the manufacturer. The Government has been put to loss only on the ground of limitation. When the Commissioner has so held that INDAL is the manufacturer, it goes without saying that INDAL and the persons in charge of the company are liable to comply with the provisions of the Act.

14. The learned Senior Counsel would rely on an unreported judgment of this Court in Crl.O.P. No. 35264 of 2005 dated 13.12.2006 (Together Textile Mills v. The Deputy Commissioner of Central Excise), wherein a learned Single Judge has quashed the private complaint on the ground that the order levying duty made by the Commissioner was set aside by the Appellate Authority and when the matter is so pending before the Commissioner for adjudication, on remand, private complaint for non-payment of duty is not maintainable. But, in the case on hand, final order has been passed by the Commissioner wherein he has clearly stated that INDAL is the manufacturer. So, the argument advanced by the learned Senior Counsel that the private complaint is liable to be quashed in view of the order passed by the Commissioner cannot be accepted at all.

15. The next ground raised by the learned Senior Counsel is that the Central Board of Excise and Customs, New Delhi by letter F. No. 208/31/97-CX.6, dated 12.12.1997 has enhanced the monetary limit to launch prosecution from Rs. 5 lakhs to Rs. 25 lakhs prospectively so as to ensure better utilization of man power, time and resources of the Department. Relying on the said letter, the learned Senior Counsel would submit that since the levy in this case is for less than Rs. 25 lakhs, the prosecution is liable to be quashed. The learned Senior

Counsel would rely on a Judgment in Laxmi Narayan Sharma Vs. Superintendent, C. Ex. and Cus., to substantiate his contention that such circulars are binding on the officers of the Central Excise Department.

16. Of course, it is true that in the said circular, the Board has instructed the officers of the Central Excise Department to launch prosecution against persons where the monetary limit exceeds Rs. 25 lakhs. But, in my considered opinion, such a circular is not binding on the criminal Court as held by the Hon''ble Supreme Court in Assistant Collector of Customs and Another Vs. L.R. Malwani and Another, and this Court in South India Surgical Company v. K. Govindan, The Income Tax Officer reported in 2001 M.L.J. 1031. In my considered opinion, the said circular has got no relevance to the facts of the present case at all. If it is a case relating to prosecution in respect of non payment of duty alone, then the circular may be utilised by the accused. But, in this case, the Prosecution is not only for evasion of duty but also for non-furnishing of the information etc., which have got nothing to do with the monetary limits mentioned in the circular. That apart, the said circular is not binding on the Criminal Court. Under the provisions of the Act, the offences stated in the complaint are cognizable. There are no fetters on the power of the Court as mentioned in Section 190 Cr.P.C., to take cognizance of these offences enumerated in the complaint. By means of such a Circular, no Authority shall have the power to curtail the jurisdiction of a Judicial Magistrate to take cognizance of an offence on a private complaint. Therefore, the argument of the learned Senior Counsel that the lower Court ought not to have taken cognizance on the private complaint since the respondent is precluded from launching such a prosecution in view of the circular cannot be countenanced at all.

17. Thus, this Court is of the considered opinion that prima facie materials are available on record, requiring full fledged trial by the learned Judicial Magistrate. I do not find any valid ground to quash the proceedings. Hence, this Criminal Original Petition is dismissed. However, considering the fact that the case has been pending for about six years, the Trial Court is directed to dispose of the same as expeditiously as possible. It is also made clear that the Trial Court shall not get influenced by any of the observations made by this Court in this order.

