(1989) 04 BOM CK 0032

In the Bombay High Court

Case No : Criminal Application No. 300 of 1986

Arun B. Toshniwal APPELLANT

Vs

Asstt. Collector of Customs and C. Ex. RESPONDENT

Date of Decision : 27-04-1989

Acts Referred:

Central Excise Rules, 1944 — Rule 173Q
Central Excises and Salt Act, 1944 — Section 17, 9, 9(1)

Citation : (1991) 38 ECR 121 : (1989) 43 ELT 621

Hon'ble Judges : H. Suresh, J

Bench : Single Bench

Judgement

1. The petitioners are the Directors of a Company known as Messrs Toshniwal Instruments (Bom.) Pvt. Ltd., who is Respondent No. 2 in this petition. The Company manufactures various types of instruments and meters subject to excisable duty.

2. Respondent No. 1, an Assistant Collector of Customs, filed a Criminal Case No. 95/85 against the said Company as also the petitioners charging them with the offences under Sections 9(1)(b), 9(1)(bb), 9(1)(bbb), 9(1)(c), 9(1)(d) and Section 17 of the Central Excises and Salt Act, 1944. The allegation is that the accused were clearing excisable goods, namely, meters and instruments manufactured by them, outside the factory on returnable challans without payment of Central Excise duty thereon and without following Central Excise procedures applicable in respect of fully manufactured excisable goods to be cleared outside the factory premises and without any permission from the proper officer to allow them to deviate from the procedure prescribed under the law. According to the prosecution, though initially they thought that the accused had removed goods worth Rs. 17,52,980/- without payment of the Central Excise duty, on investigation it was found much less. The authorities issued a show cause notice and followed up the procedure for imposing a penalty. In that they finally found that the accused had sent goods worth Rs. 3,65,975/- and the duty involved was Rs. 29,534.40. In the said adjudication proceedings, the Company

was called upon to pay the said duty and penalty of Rs. 29,500/- was also imposed as provided under Rule 173-Q of the Central Excise Rules, 1944. It appears that the Company has taken up the matter in appeal before the Tribunal and the matter is still pending.

3. The present petition is on the basis that the Directors of the Company could not have been prosecuted unless the complainant makes specific allegations of overt acts as against them. The submission is that there are no such allegations against the petitioners and that they are being prosecuted only because they happened to be the Directors of the Company.

4. Mr. Desai appearing for the petitioners cited number of cases to show that under the Act as it stood prior to its amendment in 1985, a Director of a Company would not be liable for any offence under the Central Excises and salt Act, 1944 unless there were specific allegations against him. Mr. Desai strongly relied on the case of Ramesh Inder Singh v. Shri M. S. Gill, IRS Assistant Collector, Customs & Central Excise, Jullundur, reported in 1984 (18) ELT (P&H) = 1984 ECR 2343 (P&H). Mr. Desai further submitted that unless it can be said that the Directors are responsible for the conduct of the business of the Company no such Directors can ever be prosecuted under this Act. His submission is that it was the Manager of the Company who made a mistake in allowing certain goods to be sent out of the factory premises without the payment of the duty under a mistaken belief and that, therefore, he alone should have been prosecuted and not the Directors. He, however, agrees that the Company being a person can, of course, be prosecuted.

5. It is not necessary for me to decide this question at this stage. However, I am aware that in certain cases the Supreme Court has stated that it is only such of the Directors who have taken part in the transaction or who are responsible for the transactions would be liable for prosecution under such similar acts. However, in the present case, I am not prepared to say that there are no such allegations against the petitioners as such. If one goes through paras 5, 6, 7 and 8 the allegations are against all the accused. In para 6 it has been expressly stated that the accused were responsible for the acts of the Company in the normal course and were attending to and performing duties at the material time. The records of the factory which have been sealed are being maintained by the Company, obviously to the knowledge of the petitioners. Again, in para 14 of the Complaint, it has been expressly stated that the accused have removed the excisable goods and the goods have been cleared from the factory premises without the Central Excise Gate Pass and that thereby they have evaded payment of duty payable under the Act. They have also been charged u/s 9(1)(d) which is an offence of attempting to commit or abetting the commission of any of the offences mentioned under Clauses (a) and (b) of Section 9. In these circumstances, it is not possible for me to say that the complaint discloses no specific averments as against each of these petitioners. It is a matter of evidence and it is for the complainant to lead such evidence as is possible and to establish

the case. It is possible that ultimately the complainant fails to establish the case as against these accused persons, it is open at that point of time to argue that they cannot be liable under the Act.

6. Mr. Desai then submitted that in the adjudication proceedings before the Collector of Central Excise and Customs, the Collector has come to the conclusion that the petitioners and the company had no mala fide intention to evade payment. He, therefore, submitted, relying on certain observations made by Kotwal J. in the Criminal Application No. 709 of 1981 decided by him on 6/7th August, 1984, that if there was no mens rea and they had not intentionally evaded a duty, then, in that there would be no purpose in prosecuting the petitioners as in any event they would ultimately be acquitted. It is in this connection I asked Mr. Desai to furnish to the Court a copy of the order passed by the Collector of Customs. I have gone through the said order and I find that there is no such finding that the company or the petitioners had no such mala fide intention or that they had not intentionally evaded the duty. The observation is to the effect that assuming that there was no mala fide intention to evade payment of the Central Excise duty, still having regard to the fact that the petitioners have admitted that they have taken out from the factory goods worth Rs. 3 lakhs and odd, it can be said that they evaded payment of duty and that they have removed the goods without payment of duty. Therefore, this argument will not hold good inasmuch as there is no positive finding that there is any such finding by the Collector that the petitioners or the Company had not intentionally evaded payment of duty.

7. In the result, this petition does not survive and is dismissed. Rule discharged.

