

(1995) 11 KAR CK 0029
In the Karnataka High Court
Case No : Writ Petition No. 499 of 1992

Associated Cement Companies Limited	APPELLANT
Vs	
Union of India	RESPONDENT

Date of Decision : 10-11-1995

Acts Referred:

Central Excise Act, 1944 — Section 11 A, 11 A (1)
Constitution of India, 1950 — Article 226

Citation : (1996) 88 ELT 348

Hon'ble Judges : M.L. Pendse, J;B. Padmaraj, J

Bench : Division Bench

Advocate : Shri S.G. Sundaraswamy, for the Appellant; Shri V. Mukund Menon, C.G.S.C., for the Respondent

Judgement

1. As soon as this appeal was called out for hearing, we made it clear to both the counsels that we would not like to take up this appeal for hearing as one of us, (Chief Justice), is a share-holder if the appellant No.1 company. Both the counsels stated that not only they have no objection to this Bench hearing the appeal, but they insisted that appeal should be heard by the Bench. In view of the specific submission made by both the counsels, we had taken up the appeal for hearing.

2. The appellant No.1, The Associated Cement Companies Limited, is a company registered under Companies Act, 1956 and is engaged in the manufacture of cement. The company had set-up a factory at Wadi Gulbarga district of State of Karnataka some time in the year 1968. The factory initially had a capacity to manufacture 4 lakh Metric Tonnes of cement and subsequently it was increased to 6 lakh Metric tonnes. The manufacture of cement is liable to payment of Excise Duty under the provisions of Central Excise and Salt Act, 1944.

3. The country experienced severe shortage of cement in Nineteen Eighty and government of India was keen on the manufacturers setting up new factories for increasing production of cement. The Government of India had offered various

incentives and concessions to the manufacturers of cement. Relying upon the assurance given by Government of India, the Company set up second plant known as Phase-II in the Factory in July, 1982 and capacity was 10 lakh Metric Tonnes. The manufacture of cement commenced in July, 1982 in the second plant of the Company. On 29-4-1987 the Government of India in exercise of powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, exempted cement falling under sub-heading No.2502.20 of the Schedule to the Central Excise Tariff Act, from so much of duty of excise leviable thereon, as is in excess of the amount calculated at the rate of Rs. 205 per tonne. The notification required that exemption is available provided cement is manufactured in a factory, which had commenced production during the period commencing from January 1, 1982 and ending with March 31, 1986. It is not necessary to refer to the other requirements for availing of the benefit of exemption. The notification was to remain in operation till March 31, 1990.

4. As the Company had commenced production of cement in the Factory in July, 1982 and was entitled to the benefit of exemption under the notification, the Company informed the Assistant Collector of Central Excise, Gulbarga that refund application will be filed shortly. The Company filed classification list claiming that the Company is eligible for the benefit available under the notification. The Company addressed two letters dated October 7, 1987 and December 14, 1987 to the Collector of Central Excise setting out in detail the reasons why the second plant, where production commenced in July, 1982, is a factory entitled to the benefit of exemption notification. The Company pointed out that the investment for the second plant was to the tune of Rs. 100 crores and the second plant has a far larger capacity than the original plant. The Company also pointed out that a separate Industrial Licence for the second phase was applied for. The Company asserted that second phase plant is altogether a new plant, machinery and equipment of which are completely new. The Company also informed that a separate Central Excise Licence for the new plant was already sought for. The Company, therefore, requested that appropriate order should be passed informing the Assistant Collector that benefit of exemption notification is available in respect of manufacture of cement in the Phase-II plant. The request was reiterated by another letter dated December 14, 1987.

On February 15, 1988, the Additional Collector, Central Excise, Belgaum informed the Company that the Collector Excise, Belgaum has found that the benefit under exemption notification shall be admissible in respect of cement manufactured by Phase-II unit and which had commenced production during July, 1982.

5. On April 4, 1988, the Company submitted an application for refund of Rs. 1,37,58,521,25 in respect of the duty paid between April 29, 1987 and ending with March 31, 1988. The claim for refund was based on the availability of benefit under the exemption notification. On May 2, 1988 the Assistant Collector of Central Excise, Gulbarga served show-cause notice upon the Company to explain why the claim of refund should not be rejected. The grounds set-out in

the show-cause notice were - (a) Company had not obtained L4 licence for Phase-II unit till March 24, 1988, (b) that the Company had failed to produce the certificate from the Competent Authority that production in respect of Phase-II unit is not less than 30% of the annual licensed capacity of the plant, (c) that the Company had recovered the amount of duty from the customers and, therefore, the grant of refund would amount to unjust enrichment. The Company filed detailed reply in answer to the grounds set-out in the show-cause notice. The Assistant Collector by order dated June 30, 1988 came to the conclusion that the claim for refund filed by the Company is entitled to succeed, but only for the period commencing from July 15, 1987 to March 31, 1988. The Assistant Collector held that though the Company was entitled to refund for the earlier period that is, from April 29, 1987 to July 15, 1987, the same could not be awarded as the claim was barred by limitation. The order of adjudication passed by the Assistant Collector deals with every ground mentioned in the show-cause notice and holds that the claim of the Company cannot be denied. The ground of unjust enrichment was specifically dealt with in paragraph 5.2 of the order and finding was recorded in favour of the Company. The company carried appeal before the Collector against that part of the order of the Assistant Collector, which denied refund for the period commencing from April 29, 1987 till July 15, 1987. The appeal ended in dismissal by order passed by the Collector on January 23, 1989. It is required to be stated that the Department did not challenge the order of refund granted by the Assistant Collector and that order has acquired finality. In accordance with the order of refund, a sum of Rs. 1,25,92,716/- was refunded to the Company.

6. On February 26, 1989, the Assistant Collector, Central Excise, Gulbarga served show-cause notice upon the Company inter alia claiming that on review of the facts and circumstances for determining the eligibility of Phase-II unit for the benefit under the notification, it was found that phase-II unit was not proved beyond all reasonable doubts as a new factory, which commenced production between January 18, 1982 and March 31, 1986. The complaint in the show-cause notice was that Phase-II unit was separate factory, but part of the original factory. The Company filed reply to the show-cause notice and the Assistant Collector by order dated May 18, 1989 discharged the notice holding that Phase-II unit was a separate factory and had commenced production during the relevant period set-out in the exemption notification. The order passed by the Assistant Collector had also acquired finality.

7. In spite of conclusion of two adjudication proceedings, a third show-cause notice dt. December 21, 1990 was issued by the Collector of Central Excise, Belgaum to the Company. This show-cause notice asserts that the Company had secured refund of duties by wilful misstatement which led Department to treat Phase-II unit as an independent factory. Three reasons are given in the show-cause notice to suggest that Phase-II unit was not an independent unit or a factory and those reasons are :

- (a) The two units have common storage yard,
- (b) The two units have only one conveyor belt, from which coal is being transported for consumption, and
- (c) The two units have common staff.

The second ground set-up in the show-cause notice is that the Company had recovered from the customers the whole of the duty of excise at the time of sale of the goods and has wilfully misstated in the claim for refund that they have paid duty. The show cause notice claims that the wilful misstatement has resulted in unjust enrichment by the Company. The show-cause notice then sets-out that initially refund was granted by order dated June 13, 1988 of a sum of Rs. 1,25,92,716/- and subsequently of a sum of Rs. 22,52,943/- making a total of Rs. 1,48,45,659/-. The Company was called upon to show-cause why the amount erroneously refunded, should not be repaid by the Company. The power to issue the show-cause notice was exercised under proviso to sub-section (1) of Section 11A of the Act, claiming that the period of limitation was 5 years from the date of refund. It would not be out of place to mention that this third show-cause notice dated December 21, 1990 was issued after the life of the exemption notification came to an end on March 31, 1990.

8. The Company challenged the issuance of third show-cause notice by filing petition under Article 226 of the constitution. The company claimed that exercise of powers to issue third show-cause notice was in contravention of the provisions of the Act. It was claimed that Collector had no jurisdiction to issue the third show-cause notice after the proceedings were adjudicated on more than two occasions. The Company also claimed that the reasons set-out in the third show-cause notice are entirely unsustainable and the claim was made to reopen the proceedings only with a view to pass adverse orders against the Company. The Learned Single Judge by impugned judgment dated February 24, 1992, dismissed the Petition holding that though it is undoubtedly true that the proceedings were adjudicated on more than two occasions, still question as to whether Phase-II unit of the Company is a new factor or otherwise is a vexed question and the determination of the same cannot be prevented. The Learned Judge felt that if there is a mistake earlier on the part of the authorities, then the adjudication can be reopened by reference to proviso to sub-section (1) of Section 11A of the Act. The decision of the Learned Single Judge is under challenge.

12. Mr. Sundaraswamy, learned counsel appearing on behalf of the appellants submitted that the learned Single Judge was in error in not setting aside the third show-cause notice by observing that question as to whether the Phase-II unit is a separate unit or not is a vexed question and not easy to answer. The learned counsel submitted that the approach of the learned Single Judge was entirely erroneous and the issue, which was urged by the Company, was not answered. We find considerable merit in the submission urged by the Learned

counsel. The two contentions, which require determination, are :

- (1) Whether it is open for the Collector to exercise powers under Proviso to sub-section (1) of Section 11A of the act after the proceedings were determined by order of adjudication on more than one occasion ? and,
- (2) That even assuming that it is open to issue third show-cause notice inspite of orders of adjudication, whether the exercise of powers was justified on the facts and circumstances of the case ?

In our judgment, answers to both the questions must be in favour of the Assessee-company. As mentioned hereinabove, the Company sought benefit available under the notification by addressing three letters dated October 7, 1987, December 14, 1987 and December, 3, 1987. The perusal of these three letters, which are exhibited as Annexures-C, C-1 & C-2 to the petition, leave no manner of doubt that Company had disclosed all the relevant material particulars to the Excise Authorities in support of the claim the Phase-II unit was a separate factory entitled to avail of the benefit under the exemption notification. The Collector, Belgaum informed the Company on February 15, 1988 that Phase-II unit is entitled to the benefit of exemption notification. It is required to be stated at this juncture that before this communication, the Excise Authorities had deputed officers to visit the unit and ascertained whether the Phase-II unit was separate and distinct entity and decision was taken to give benefit of notification only on satisfaction that Phase-II unit is a separate unit. In pursuance to the decision of the Excise Authority, refund application was filed and was granted after the Assistant Collector served show-cause notice enquiring as to why refund should not be refused on diverse grounds. The Company satisfied the adjudicating authority about the validity of the claim of refund and then the order of adjudication came to be passed. The Department did not challenge the order of adjudication passed on June 13, 1988 nor any proceedings were adopted under sub-section (2) of Section 35E of the Act by the superior authorities to review the decision. Not only the amount of refund was paid to the appellant, but on February 26, 1989 second show-cause notice was issued to claim that Phase-II unit was not an independent unit and the refund granted was under a mistake. But the show-cause notice was discharged and proceedings were closed by order dated May 18, 1989 after the Assistant Collector was satisfied that the ground given in the show-cause notice was not good. In face of these orders of adjudication, it is difficult to imagine how the third show-cause notice can at all be served. Mr. Menon, learned counsel appearing for the Department submitted that powers conferred u/s 11A are extremely wide and it is open for the authorities to reopen any order of adjudication and there is no limitation inspite of any number of proceedings by already adjudicated. It is impossible to accede to such submission. The order of adjudication must acquire finality, whether the order is passed by Assistant Collector or Collector in appeal or by CEGAT or by Supreme Court. In case, upheld right upto the Supreme Court, the authorities would claim that the order can be reopened under the provisions of Section 11A

of the Act. Acceding to the contention of the learned Counsel would lead to unusual results and so wide as to bypass the order of adjudication. It is not open for the Excise Authorities to claim that order of adjudication is based as mistakes and, therefore, can be reviewed and fresh show-cause notices can be served. We specifically enquired from the learned counsel as to how many show-cause notices can be issued and we must state that the learned counsel found it extremely difficult to answer the query. In the present case, two show-cause notices were issued by the authorities, first when the refund claim was made and after the replies were filed by the company in answer to the show-cause notice, orders of adjudication were passed in favour of the company. It is not dispute that the two orders of adjudication had specifically examined the question as to whether Phase-II unit of the Company is a separate entity and entitled to benefit. The order had also examined whether the doctrine of unjust enrichment is attracted to the claim for refund. The adjudicating authority had held in favour of the appellant Company and merely because, some officer in the Department did not like the decision, that cannot confer jurisdiction to issue the third show-cause notice. In our judgment, the issuance of third show-cause notice was without any jurisdiction and the exercise of powers was totally unjust and improper.

9. It cannot also be overlooked that reference was made to Proviso to sub-section (1) to issue the third show-cause notice because the Proviso enlarges the period of limitation from 6 months to 5 years in case of wilful suppression, collusion or fraud on the part of the Assessee. As mentioned hereinabove, the order of refund was passed and payment made on June 13, 1988. The exercise of powers after more than four and half years was undertaken with reference to Proviso to sub-section (1) of Section 11A by claiming that there was wilful suppression on the part of the Company in making misstatement that Phase-II unit was an independent unit. The claim made in the show-cause notice is totally false and misleading. As mentioned hereinabove, the issue arose for adjudication in earlier two proceedings and the finding was recorded in favour of the appellant. The correspondence which is produced on record un-mistakenly establishes that Company kept all the cards before the Revenue authorities. The Revenue authorities had deputed officers to inspect the factory and make report, it surpasses our imagination as to how it is open for the authorities to turn round in December, 1990 and to claim that Phase-II unit is not an independent unit and claim made by the Company for refund was based on misstatement. The grounds set-out in the third show-cause notice are not correct and have been set-out only to claim that powers can be exercised under proviso to sub-section (1) of Section 11A. The second ground in the show-cause notice that the grant of refund results in the unjust enrichment is equally without any substance. An identical question was raised on behalf of the Department in the first proceedings, which had resulted into an order of adjudication of June 13, 1988. A specific finding was recorded by the Assistant Collector that the principle of unjust enrichment is not at all applicable to the facts of the case. The Department accepted the finding

and did not carry any appeal. It is, therefore, not permissible to reopen the issue, which stands concluded on the spacious ground that the Company had made misstatements. In our judgment, the third show-cause notice is based on unsustainable grounds and was clearly misuse of power. In our judgment, in the first instance, the Collector had no jurisdiction whatsoever to issue the third show-cause notice and even otherwise, the basis of issuance of the notice was illfounded. Under these circumstances, the learned Single Judge was in error in not granting the relief of quashing the third show-cause notice.

10. The findings of the learned Single Judge that the issue whether Phase-II unit was an independent unit or otherwise is a vexed question and, therefore, the respondents should be permitted to proceed with the hearing of the third show-cause notice is clearly erroneous. It is not necessary for this Court to examine whether the issue was a vexed question or otherwise when the adjudicating authority had decided the issue on more than two occasions. It is not open to re-examine the issue as and when the authorities like and the principle of finality of decisions cannot be thrown to winds only because some officer in the Department feels that the orders passed by the adjudicating authority are not correct.

Mr. Menon, learned counsel referred to decision of this Court reported in Gurupriya Tele Auto (P) Ltd. Vs. Supdt. of Central Excise, but in our judgment, the said decision has no application whatsoever to the issue involved in this case.

11. Accordingly, appeal is allowed and the judgment dated February 24, 1992 delivered by the learned Single Judge is set aside and petition is allowed and Rule made absolute in terms of prayer (a). In the circumstances of the case, there will be no order as to costs.

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