

(2002) 01 BOM CK 0065
In the Bombay High Court
Case No : Writ Petition No. 5147 of 1998

Century Rayon

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 25-01-2002

Acts Referred:

Central Excise Rules, 1944 — Rule 10, 209, 209(2), 210, 226
Central Excises and Salt Act, 1944 — Section 14
Constitution of India, 1950 — Article 133, 136, 14, 141, 226

Citation : (2003) 2 BomCR 207 : (2002) 84 ECC 46 : (2002) 142 ELT 319 :
(2002) 4 MhLj 187

Hon'ble Judges : V.C. Daga, J; J.P. Devadhar, J

Bench : Division Bench

Advocate : Prakash Shah and Suvarna, i.b.DSK Legal, for the Appellant; R.V. Desai and P.S. Jetly, for the Respondent

Final Decision : Allowed

Judgement

V.C. Daga, J.—This petition is directed against the circular issued by the Central Board of Excise and Customs (Board for short) dated 7-4-1998 and consequent show cause notice dated 10-8-1998 alleging therein that the Petitioner No. 1 M/s. Century Rayon has wilfully suppressed the fact of manufacture of "Cinder" with an intention to evade payment of excise duty (duty for short) and evaded duty to the tune of Rs. 12,39,350/- and why the same be not recovered from them with penalty under Rule 209A of the Central Excise Rules, 1944 (Rules for short) framed under the Central Excises and Salt Act, 1944 (Act for short).

FACTS IN BRIEF:

The 1st petitioners herein are the Division of Century Textile Industries Ltd., a Company registered under the Indian Companies Act, 1956, engaged, inter alia, in the manufacture of excisable goods, having its factory, inter alia, at Shahad, Taluka - Kalyan, Dist. Thane. The 2nd petitioner is the Vice President (Finance) of the first Petitioner/Company.

3. The petitioners have coal fired boiler for generating steam in their factory at Shahad. The steam generated in the said boiler is used in the manufacture of excisable goods. The petitioners purchase coal, classifiable under Chapter 27, and use it in the generation of the said steam. During the generation of the said steam, coal ash (cinder) emerges by way of waste product.

3. The petitioners cleared such cinder as waste without payment of duty, in view of the decision of the Board holding that the cinder is not excisable and that cinder obtained while burning coal in the boiler does not amount to manufacture within the meaning of the Act, even if it is sold for a consideration.

4. The 1st respondent, in exercise of powers conferred upon it under erstwhile Rule (8) of the Rules, had also issued Notification dated 10-2-1976, being Notification No. 76 of 1986 in tune with the view taken by the Tribunal, exempting inter alia cinder from the payment of duty. Notwithstanding the view of the Tribunal that cinder obtained by burning coal in boiler did not constitute manufacture, by subsequent another Notification bearing No. 11/96, dated 23rd July, 1996, earlier notification came to be amended and the exemption granted to cinder came to be withdrawn. The Board again issued another circular dated 7th April, 1998 bearing No. 386/19/90/98-CX and clarified that the Coal Ash (cinder) is an excisable commodity with the result respondents started treating cinder as an excisable commodity.

5. The officers of the 2nd respondent on available information noticing non-payment of excise duty on cinder by the petitioners searched the premises of the 1st petitioner on 11th February, 1998 and detained 70 tonnes of cinder. The statement of petitioner No. 2 was recorded on 24th June, 1998 u/s 14 of the Act. The 2nd petitioner in his statement inter alia admitted that petitioners were not paying duty on cinder (ash) in view of the decision of the Tribunal in the case of Swadeshi Cotton Mills Ltd., subsequently affirmed by the Apex Court in appeal.

6. The petitioners, in view of the seizure of the cinder, and the view entertained by the respondents that cinder is liable to duty, filed classification list under protest, and started clearing cinder on payment of duty under protest. The seized cinder was released provisionally on execution of B-13 Bond and the petitioner No. 1 was allowed to clear the same on payment of duty.

7. The 3rd respondent, the Additional Commissioner of Central Excise, Mumbai-III, issued show cause notice-cum-demand notice on 10th August, 1993 calling upon the 1st petitioner to show cause as to why: (i) Central Excise Duty amounting to Rs. 12,39,350/- should not be demanded and recovered from the petitioners under proviso to Sub-section (1) of Section 114A of the Act read with Rule 9(2) of the Rules; (ii) Interest at the appropriate rate on the duty determined to be payable should not be demanded and recovered from the petitioners under the provisions of Section 11AB of the Act; (iii) Penalty should not be imposed on the petitioners under the provisions of Rule 173Q and/or Rule 9(2) and/or Rule 52A and/or Rule 226 and/or Rule 209 of the Rules; (iv) 70

tonnes of cinder (coal ash) valued at Rs. 34,000/- detained on 11-2-1998 should not be confiscated under Rules 173Q, 9(2), 52A, 226 and 209 of the Rules; and (v) any land, building, plant, machinery, material, conveyance should not be confiscated under the provisions of Rule 173Q read with Rule 209(2) of the Rules 1944.

8. The 2nd respondent was also called upon to show cause as to why personal penalty under Rule 210 be not imposed on him, for having committed breach of the provisions of the Act and the Rules. The charge of the said show cause-cum-demand notice was that the cinder being excisable item was liable to duty at the rate of 10 per cent from 23rd July, 1996 to 28th March, 1997 and at the rate of 8 per cent from 1st March, 1997 onwards. The petitioners replied to the said show cause notice dated 10th August, 1998 vide their reply dated 5th September, 1998, contending therein that cinder cannot be treated as excisable item under the Act.

9. In the submission of the petitioners, the clarification issued by the Board dated 7th April, 1998, on the basis of which cinder is being treated as an excisable commodity, is ultra vires the provisions of the Act, as such the same is liable to be declared as bad and illegal and subsequent show cause notice dated 10th August, 1998 is also liable to be quashed and set aside being without jurisdiction and without authority of law. The petitioners have, therefore, invoked writ jurisdiction of this Court under Article 226 of the Constitution of India, to challenge the Circular dated 7th April, 1998, issued by the Board (Ex. A) and the consequent show cause notice dated 10th August, 1998 (Ex. D) being arbitrary and violative of Article 14 of the Constitution of India.

The Arguments:

10. The learned Counsel for the petitioners submitted that cinder by burning coal in boilers during the process of manufacture of excisable goods did not constitute manufacture or production of excisable commodity. Sine qua non for levy of duty of excise is manufacture. The emergence of cinder in the process of burning coal in the boiler does not amount to manufacture of cinder (ash), consequently, there cannot be duty of excise on the goods emerged as waste in the course of manufacture of the finished product. The submission is that when the goods themselves do not emerge as final intended product, the same cannot be treated or considered as excisable commodity for levying duty under the Act. He placed reliance on the judgment of the Gujarat High Court dated 4-4-2000 in the base of Ahmedabad Electricity Co. Ltd. v. Union of India reported in 2001 (131) E.L.T. 535 (Guj.), in support of his submission.

11. The second limb of submission is that the Tribunal in several judgments including the judgment delivered in the case of Collector of Central Excise v. Papyrus Papers Ltd. - 1988 (33) E.L.T. 97 (Tribunal) had taken the view that cinder produced during the manufacture of excisable product is not liable to excise duty even if it is sold for consideration.

12. It is also brought to our notice that the Supreme Court has dismissed the Civil Appeal No. 4022 of 1989 filed by the Collector of Central Excise against the final order No. 12111/1989, dated 21-4-1989 passed by the CEGAT, New Delhi in the case of Swadeshi Cotton Mills Ltd. v. C.C.E. (supra) (reported under caption "Court Room Highlights" in 1996 (82) E.L.T. A160). The contention is that once the Supreme Court has dismissed the appeal and has upheld the order of the Tribunal, the same is binding on the respondents. They cannot be allowed to take a different view. Consequently, the submission is that the respondents cannot be allowed to proceed with the show cause notice.

13. The another shade of the said submission is that different consideration may apply when SLP under Article 136 of the Constitution is simply dismissed saying dismissed in contrast to the dismissal of appeal provided under Article 133. The contention is that when SLP is dismissed, the Supreme Court does not comment on the correctness or otherwise of the order from which leave to appeal was sought. It only shows that the Supreme Court does not consider it to be a fit case for exercise of its jurisdiction under Article 136 of the Constitution. But when the appeal provided by statute is dismissed, the doctrine of merger applies, even though dismissed by a non speaking order. In such cases, the Supreme Court upholds the decision of the High Court or Tribunal from which the appeal is provided under Clause (3) of Article 133. This doctrine of merger does not apply in case of dismissal of SLP under Article 136 of the Constitution. The learned Counsel placed reliance on the judgment of the Supreme Court in the case of V.M. Salgaocar and Bros. Pvt. Ltd. Vs. Commissioner of Income Tax, in support of his submission.

14. The next submission was pressed into service, based on the principle uniformly followed in judgment rendered by the High Courts and the Supreme Courts under the Income Tax Act is that while interpreting a central statute, a judgment rendered by any High Court must be held binding unless there is a different judgment of the jurisdictional High Court or the Supreme Court. Secondly, in the judgment dated 2nd February, 2001 in Writ Petition No. 2420 of 1987 Sunflag Iron and Steel Co. Ltd. v. The Additional Collector of Central Excise, Nagpur & Ors. wherein a view has been taken by this Court that even adjudicatory and Appellate Authorities under the Central Excise Act must observe some judicial/quasi judicial discipline and respect orders of CEGAT.

15. The last submission is that in the event of contest between binding judgment of CEGAT/Tribunal and a binding circular of CBEC/Board, the latter must yield. The learned Counsel for the petitioners also relied upon the unreported judgment of the Division Bench of this Court in the case of Ballarpur Ind. Co. v. Union of India delivered on 3rd April, 2001 in Writ Petition 1735 of 2001 in support of his submissions.

16. The learned Counsel while summing up his submissions, submitted that the levy of duty on cinder is unconstitutional and invalid beyond the scope of the Act as such suffers from the vice of Article 14 of the Constitution of India. The

circular of CBEC/Board and consequent show cause notice dated 10-8-1998, therefore, are liable to be quashed and set aside.

17. Per contra, the learned Counsel for the respondents raised a solitary contention that the judgment of the Gujarat High Court dated 4-4-2000 in the case of M/s. Ahmedabad Electricity Co. (cited supra) is a subject matter of challenge in the Supreme Court as the SLP is still pending, hence the respondents be permitted to proceed with the adjudication of show cause notice and whatever may be the decision of the adjudicating authority, the same would always be subject to statutory appeal provided under the Act, as such no writ jurisdiction be exercised in favour of the petitioners. He produced a letter of CBEC/Board dated 15th November, 2001 to show that the SLP has been filed in the Supreme Court and the same is still pending for consideration. No special leave appears to have been granted. At any rate, no material in this behalf has been produced before us to show that special leave has been granted.

"17. In rejoinder, the learned Counsel appearing for the petitioners submitted that this Court while granting rule had refused to grant interim relief in favour of the petitioners. The circular issued by the CBEC/Board would be very much binding on the Appellate Authority exercising jurisdiction under the Act with the result, right up to Tribunal the petitioners may not get any relief. He, therefore, contended that considering the peculiar position in which petitioners are placed vis-a-vis their competitors from other part of the country, this Court should not refuse to consider their case on merits. The Issues:

18. The crux of the issue is as under:

Whether in the facts and circumstances of the case and considering the legal position prevailing as on date, the respondents should be permitted to proceed with pursuant to or in implementation of or in furtherance of the circular of the Board dated 7th April, 1998 and to act upon consequent show cause notice dated 10th August, 1998.

CONSIDERATION

19. At the outset, we wish to emphasise that no positive statement has been made or material is produced before us to show that SLP has been admitted and pending in the Supreme Court from the judgment of the Gujarat High Court in the case of Ahmedabad Electricity Co. Ltd. (cited supra). In our opinion mere filing of SLP may not detain us from considering the question on merits. The Supreme Court in this behalf in the case Kunhayammed and Others Vs. State of Kerala and Another, had occasion to observe as under :

"Mere pendency of an application seeking leave to appeal does not put in jeopardy the finality of the decree or order sought to be subjected to exercise of appellate jurisdiction by the Supreme Court. It is only if the application is allowed and leave to appeal granted then the finality of the decree or order under challenge is jeopardised as the pendency of appeal reopens the issue decided

and the Supreme Court is then scrutinising the correctness of the decision in exercise of its appellate jurisdiction."

However, without going into the issue pending before the Supreme Court, which related to the validity of the circular of CBEC/Board dated 7-4-1998, this petition can be considered on the basis of the legal position prevailing as on date culled out from the facts narrated therein without touching the question pending before the Supreme Court. As such, we, in our own wisdom, propose to follow alternate path to consider the present petition on the canvas of the issue framed hereinabove.

20. Before we deal with the aforesaid issue, it is appropriate to consider the legal principles derived from the cases relied upon by the petitioners. The first case sought to be relied upon by the petitioners in the case of V.M. Salgaoncar & Bros, Ltd. (cited supra). The Supreme Court, while dealing with doctrine of merger, has referred to its earlier judgment in the case of Supreme Court Employees Welfare Association v. Union of India - and quoted Para 22 therefrom, which reads as under :

"It has been already noticed that the Special Leave Petitions filed on behalf of the Union of India against the said judgments of the Delhi High Court were summarily dismissed by this Court. It is now well settled principle of law that when a SLP is summarily dismissed under Article 136 of the Constitution, by such dismissal this Court does not lay down any law, as envisaged by Article 141 of the Constitution, as contended by the learned Attorney General. In Indian Oil Corporation Ltd. Vs. State of Bihar and others, , it has been held by this Court that the dismissal of a SLP in limine by a non-speaking order does not justify any inference that, by necessary implication, the contentions raised in the SLP on the merits of the case have been rejected by the Supreme Court. It has been further held that the effect of a speaking order of dismissal of a SLP without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to be that the Supreme Court had decided only that it was not a fit case where special leave should be granted. In Union of India (UOI) Vs. All India Services Pensioners" Association and Another, , this Court has given reasons for dismissing the special leave petition. When such reasons are given, the decision becomes one which attracts Article 141 of the Constitution which provides that the law declared by the Supreme Court shall be binding on all the Courts within the territory of India. It, therefore, follows that when no reason is given, but a SLP is dismissed simpliciter, it cannot be said that there has been a declaration of law by this Court under Article 141 of the Constitution."

The 3 Judge Bench of the Supreme Court in the case of Kunhayammed and Others Vs. State of Kerala and Another, had occasion to trace history of its judicial opinion as it has progressed through the time based on its various previous judgments and while affirming the judgment of the 2 Judge Bench in the case of VM. Salgaoncar Bros., it clearly laid down that the dismissal of appeal even without reasons would result in merger. The observations are as under

(Para-32):

"Leave granted - dismissal without reasons - merger results.

It may be that in spite of having granted leave to appeal, the Court may dismiss the appeal on such grounds as may have provided foundation for refusing the grant at the earlier stage. But that will be a dismissal of appeal. The decision of this Court would result in superseding the decision under appeal attracting doctrine of merger."

Based on the above judgments, the recognised basic principle of law sought to be pressed into service is that if an appeal is provided from an order passed by the Court or Tribunal, the decision of the appellate Court is the operative decision in law. The decision of the higher Court would result in superseding the decision under appeal attracting doctrine of merger.

21. The next judgment sought to be relied upon is of the Division Bench of this Court in the case, of Ballarpur Industries case (cited supra) which has also recognised certain Well known principles of law. They can be better understood in the words of the Division Bench itself quoted hereunder :

"The principle uniformly followed in judgments rendered by the High Courts and Supreme Courts under the Income Tax Act is that while interpreting a central statute, a judgment rendered by any High Court must be held binding unless there is a differing judgment of the jurisdictional High Court or the Supreme Court. Secondly, in the judgment dated 2nd February, 2001 in Writ Petition No. 2420 of 1987 Sunflag Iron & Steel Co. Ltd. v. The Additional Coffee for of Central Excise, Nagpur and Others delivered by the Division Bench of this Court sitting at Nagpur, to which one of us (Srikrishna, J.) was a party, the view has been taken that even adjudicatory and appellate authorities under the Central Excise must observe some judicial/quasi judicial discipline and respect orders of CEGAT."

Principles derived from the above judgments are categorised as under:

(i) Dismissal of an appeal under Article 133 of the Constitution of India without reasons or by non-speaking order would result in superseding the decision under appeal attracting doctrine of merger and the same principle of law holds good to the appeals provided under the statute.

(ii) The judgment rendered by the High Court while interpreting a central statute is binding on the authorities created under the Act unless there is a differing judgment or view of the jurisdictional High Court or Supreme Court.

(iii) The Adjudicatory and Appellate Authorities under the Act are bound to respect the judgment of the CEGAT/Tribunal, it being judicial authority and also by way of judicial discipline.

(iv) In the event of contest, between binding judgment of CEGAT/Tribunal and binding Circular of the CBEC/Board the latter must yield.

Application of principles to this case & Finding:

22. Turning to the facts of the present case, the Board vide its Circular No. 386/19/98-CX, dated 7th April, 1998 had declared that cinder is an excisable commodity classifiable under Heading No. 2621 and is chargeable to appropriate rate of duty. The said circular cannot be held to be legal and valid. CEGAT/Tribunal in *Collector of Central Excise v. Papyrus Papers Ltd.* -1988 (33) E.L.T. 97 (Tribunal) and in another unreported decisions i.e. *Swadeshi Mills* (cited supra); *Alok Udyog Vanaspati & Plywood Ltd. v. Collector of Central Excise, Calcutta* -1994 (74) E.L.T. 261 (Tribunal) has held that cinder is not excisable item as such not liable to payment of duty. In this view of the matter, applying first principle referred to hereinabove, the dismissal of the appeal by the Supreme Court may be by a non-speaking order without reasons has resulted in merger and the order of the Tribunal stands merged in the order of the Supreme Court. Therefore, it can very well be said that the view of the Supreme Court as on date is that the cinder is not an excisable commodity.

23. In this view of the matter, in absence of the contrary view occupying the field, cinder cannot be treated as excisable commodity. It was thus not open for the Respondents to treat this commodity as excisable item. Consequently, it is not open for Respondent No. 2 to proceed with the adjudication of the show cause notice.

24. Secondly, as observed hereinabove, Gujarat High Court in the case of *Ahmedabad Electricity Co.* has struck down the Notification issued by CBEC/Board. The SLP is still pending for admission. The judgment of the Gujarat High Court has neither been set aside nor stayed by the Supreme Court. As such the said judgment of the Gujarat High Court is still holding the field and is very much binding on the respondent. Thus, applying the above second principle of law categorized hereinabove, we are of the opinion that the respondents" have no jurisdiction to proceed with the adjudication of the show cause notice relying upon the Circular dated 7-4-1998, issued by the Board, as the said circular is binding on the respondents in absence of any contrary judicial view of the jurisdictional High Court or Supreme Court.

25. " Thirdly, the Tribunal/CEGAT being superior authority under the Act, it was obligatory on the part of the respondents to respect the judgments of the CEGAT following the well established principle of law that in the event of contest between the binding judgment of CEGAT/Tribunal, the latter must yield. Therefore, in our opinion, the respondents could not have issued show cause notice based on Board"s Circular dated 7-4-1998 nor could be allowed to proceed with the process of adjudication thereof.

Conclusion:

26. Accordingly, for the aforesaid 3 reasons based on well recognised and settled principles of law culled out from the various judgments referred to hereinabove, we hold that the circular, issued by the Board, dated 7-4-1998 (Ex. A) is no

longer good. Consequently, we have no option but to quash and set aside the show cause notice dated 10-8-1998 (Ex. D) issued by the respondents pursuant to or in implementation of the above impugned circular issued by the Board. Accordingly, we allow this petition.

In the result, rule is made absolute in terms of prayer clauses (a) and (b) with no order as to costs.