(2013) 02 AHC CK 0099

In the Allahabad High Court

Case No : Central Excise Reference No. 6 of 2004

Commissioner of Central Excise	APPELLANT
Vs	
Govind Mills Ltd.	RESPONDENT

Date of Decision : 26-02-2013

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 11A(1), 35H, 9D
Evidence Act, 1872 — Section 18, 19, 20, 25

Citation : (2013) 4 ADJ 33 : (2013) 4 ADJ 31 : (2013) 294 ELT 361 : (2014) 43 GST 560 : (2013) 19 GSTR 335

Hon'ble Judges : Ram Surat Ram (Maurya), J;Prakash Krishna, J

Bench : Division Bench

Advocate : S.P. Kesarwani, for the Appellant; Praveen Kumar, Pankaj Bhatia and Gopal Verma, for the Respondent

Judgement

Ram Surat Ram (Maurya), J.—The Customs, Excise and Service Tax Appellate Tribunal, West Block No. 2, R.K. Puram, New Delhi (hereinafter referred to as "the Tribunal") has referred the following question, for opinion to this court, u/s 35H of the Central Excise Act, 1944 (herein after referred to as the Act):

Whether considering the facts after the Commissioner had determined the annual capacity of production, the Commissioner could review his order when he was informed that Deepak Gupta had issued fake certificates and as such the earlier determination was based on false and fabricated invoice/certificates regarding the annual capacity of production?

The facts giving rise to this reference are that M/s. Govind Mills Ltd. (the respondent) was engaged in the business of manufacture of non-alloy steel ingots, by installing induction furnaces, falling under Chapter sub-heading 7207.90, of the Central Excise Tariff Act, 1985. The respondent opted for payment of Central excise duty, under the compounded levy scheme, as per rule 96ZO(3) of the Central Excise Rules, 1944, through it''s letter dated September 1, 1997. The annual capacity of production of the induction furnaces of the respondent was determined provisionally then finally according to the provisions of the Induction Furnaces Annual Capacity Determination Rules, 1997. On his application, the annual capacity of production (ACP) and monthly duty liability (MDL) was provisionally determined, the ACP as 25,779.200 M.T. and MDL as Rs. 13,42,667 and communicated to the respondent, vide the letter dated September 30, 1997.

2. The respondent, through his letter dated October 16, 1997, filed an objection against the provisional determination, on which a team of the officers and technical expert physically measured the various parameters of induction furnaces of the respondent on February 13, 1998 and submitted its report. On the basis of this report, the Department by letter dated March 20, 1998 determined the ACP as 26,912.960 M.T. and MDL as Rs. 14,01,717 with effect from September 1, 1997. The respondent again filed an objection dated March 26, 1998 against the aforesaid determination and requested for determination of ACP and MDL according to the capacity shown in the invoices and certificates of the manufacturer of the crucibles. The Commissioner of Central Excise, Allahabad, vide the order dated April 1, 1998, relying upon the invoices and certificates finally determined the ACP and MDL as Rs. 11,75,833 with effect from September 1, 1997 and assessed excise duty on it.

3. Subsequently, an investigation was made by the excise officer against M/s. Steadfast Engineers, the manufacturer of crucibles of the respondent. During investigation, statement of Deepak Gupta, a partner of M/s. Steadfast Engineers, was recorded by the excise officer on August 20, 1998, in which he had stated that invoices issued to the respondent did not show the correct annual capacity of production and were issued without any knowledge that it would be used for Central excise purposes and had he known that the invoices would be used for Central excise purposes then he would not had issued the invoices. On the basis of the statement of Deepak Gupta, the excise officer submitted a report to the Commissioner of Central excise, Allahabad that the respondent had secured the assessment on the basis of the forged papers. The Commissioner of Central Excise, Allahabad reopened the proceedings against the respondent and issued a show-cause notice dated November 17, 1998 for revoking the order dated April 1, 1998 and fresh determination of the ACP and MDL and recovery of differential short-duty along with interest and penalty, on the ground that final determination dated April 1, 1998 was obtained by producing forged and fabricated documents. Simultaneous notice has also been issued to Deepak Gupta.

4. The respondent filed his reply to the show-cause notice and has stated that the invoices were voluntarily issued by the manufacturer of the crucibles. The respondent bona fide relied upon these invoices. They never came to know that the manufacturer had issued incorrect invoices to them. Even otherwise also the final determination was corroborated with physical verification report. The show-cause notice was beyond time. They requested to cross-examine Deepak Gupta,

partner of the manufacturer of crucibles and the excise officer, on the basis of whose statement and report the matter was reopened. However, the Commissioner has not permitted cross-examination on the ground that the relevant documents had already been supplied to the respondent along with the notice. Deepak Gupta also filed his reply and stated that his statement was not voluntary but was made under duress.

5. The Commissioner of Central Excise, Allahabad by the order dated October 31, 2000 held that confessional statement of Deepak Gupta recorded by the excise officer was admissible in evidence u/s 25 of the Evidence Act. The respondent has committed fraud and filed forged certificates, as proved from the statement of Deepak Gupta as such the previous assessment can be reopened. On these findings he accepted the report of the Department dated March 20, 1998 and determined the ACP as 26,912.960 M.T. and MDL as Rs. 14,01,717 with effect from September 1, 1997 and directed for realisation of excise duty accordingly and confirmed the demand of Rs. 21,19,196 and imposed penalty of Rs. 21,19,196 and directed for realisation of interest u/s 11AB of the Central Excise Act. He also imposed penalty of Rs. 10,00,000 on Shri C.P. Agrawal and Rs. 10,00,000 on Deepak Gupta.

6. The respondent, Shri C.P. Agrawal and Deepak Gupta filed an appeal from the order dated October 31, 2000. The appeal was heard by the Custom, Excise and Gold (Control) Appellate Tribunal, New Delhi who by the order dated May 15, 2002 held that the annual capacity of production (ACP) and monthly duty liability (MDL) was determined by the order dated April 1, 1998 which was an appealable order but no appeal was filed. There was no provision for review under the Central Excise Act, 1944 as such the subsequent order dated October 31, 2000 is null and void. On these findings the appeal was allowed and the order dated October 31, 2000 was set aside. On the application of the Department the aforementioned question has been referred for the opinion of this court.

7. We have heard Shri S.P. Kesarwani, standing counsel for the Department and Shri Praveen Kumar, advocate for the respondent. The standing counsel relying upon section 11A(1) proviso (as then was) submitted that as due to result of fraud committed by the respondent, the excise duty was short-levied as such the Excise Commissioner has rightly reopened the matter, when the fraud was detected. He further relying upon the judgments of the Supreme Court in United India Insurance Co. Ltd. Vs. Rajendra Singh and Others, , Commissioner of Central Excise, Vadodara Vs. Steelco Gujarat Ltd., ; Commissioner of Central Excise, Vadodara Vs. Steelco Gujarat Ltd., ; Commissioner of Central Excise, Vadodara Vs. Steelco Gujarat Ltd., and A.V. Papayya Sastry and Others Vs. Government of A.P. and Others, , and submitted that fraud vitiates most solemn action and every authority has inherent power to recall the order secured by committing fraud. As from the statement of Deepak Gupta recorded by the excise officer during the investigation, it is proved that the respondent has secured the earlier order by producing forged invoices as such the Excise

Commissioner has rightly exercised his power u/s 11A and recalled the order. Order of the Tribunal, holding that the Excise Commissioner has no power to review, is illegal.

8. In reply to the aforesaid arguments, Shri Praveen Kumar submitted that admittedly there is no provision for review as such after passing the order, the Excise Commissioner has become functus officio and has no power to recall his earlier order. He submitted that the statement of Deepak Gupta was recorded in another proceedings, for which the respondent has no concern, as such his statement cannot be relied upon against the respondent as Deepak Gupta has not been examined as a witness in this case. He further submitted that the respondent requested for cross-examination of Deepak Gupta but cross-examination was not permitted as such no reliance can be placed upon his statement which was recorded behind the back of the respondent. He also placed reliance on the judgment of the Supreme Court in Commissioner of Central Excise, Vadodara Vs. Steelco Gujarat Ltd., in which it has been held that there is no provision of review under the Central Excise Act, 1944.

9. We have considered the respective arguments of the parties. First question arise as to whether there was any material before the Excise Commissioner to hold that the earlier order was obtained by committing fraud. The Supreme Court in The Commissioner of Central Excise, Aurangabad Vs. Bajaj Auto Ltd., Waluj, Aurangabad, through its Vice President (Materials) and Others, held that initial burden lies upon the Department to prove that fraud has been committed for invoking the provisions of section 11A(1) proviso to the Central Excise Act, 1944. The Excise Commissioner has relied upon the statement of Deepak Gupta recorded by the excise officer during investigation held against his firm and found that as Deepak Gupta had admitted that he had issued invoices giving incorrect annual capacity of production as such the respondent has secured the previous order by producing forged document as he found that the statement of the Deepak Gupta was admissible u/s 25 of the Evidence Act.

10. Section 25 of the Evidence Act provides that no confession made to a police officer shall be proved as against a person accused of any offence. According to the Excise Commissioner as excise officer is not a police officer as such the voluntary statement made by Deepak Gupta before him was admissible and section 25 of the Evidence Act will not apply. The confession is an admission and is relevant under sections 18 to 20 of the Evidence Act. It can be relied against the person who has made such confession as his admission and not against any one else. The statement of Deepak Gupta has not been recorded as a witness in this proceeding as such there was no admissible evidence on record to hold that fraud has been committed by the respondent. The Excise Commissioner has illegally treated the statement of Deepak Gupta as an admission of the respondent.

11. The Supreme Court in State of Kerala Vs. K.T. Shaduli Yusuff etc., ; State of Kerala Vs. K.T. Shaduli Yusuff etc., and K.L. Tripathi Vs. State Bank of India and

Others, has held that the opportunity of being heard includes right to cross-examine the witnesses. In this case, the respondent requested for cross-examination of Deepak Gupta and the excise officer who had made the investigation against the firm, M/s. Steadfast Engineers and submitted the report, but the Commissioner has not permitted cross-examination. The Commissioner relied upon the report of the excise officer and the alleged statement of Deepak Gupta for invoking jurisdiction u/s 11A of the Act. The respondent had right to cross-examine these persons. Since cross-examination was not permitted, as such, these papers could not be relied upon.

12. Section 9D of the Act, provides that if a person is dead or cannot be found or incapable of giving evidence or is kept out of the way by the adverse party then his statement recorded before the Central excise officer of a gazetted rank during the course of any inquiry would be relevant. In this case, Deepak Gupta was available and has also filed his reply to the notice issued by the Excise Commissioner in which he had stated that his statement was recorded under duress thus his statement could not have been relied without his cross-examination. In this case, apart from the alleged statement of Deepak Gupta there was no material before the Excise Commissioner to hold that the respondent has produced fake invoices. The statement of Deepak Gupta was not recorded in this proceeding as such it could not, be read as an evidence and there was no material for exercising the powers under the proviso to section 11A(1) of the Act. In view of the aforesaid discussions the question referred in this reference is answered in the negative, i.e., against the Department and in favour of the respondent.

