(1969) 03 CAL CK 0009

In the Calcutta High Court

IN RE LYNALL, DECD.

Date of Decision : 29-03-1969

Acts Referred:
Finance Act, 1894 — Section 7(5)

Citation : (1970) 75 ITR 564

Hon'ble Judges : Widgery, J;Plowman, J;Harman, J;Gross, J;Before Plowman, J

Bench : Full Bench

Judgement

D. Basu, J.—The Petitioner is a registered co-operative society and was formed with the object of manufacturing cotton fabrics on power-looms. The society alleges that it has 16 power-looms allotted to its eight members and that it has engaged the Ashoke Textile Corporation as its selling agents for sale of the cloth produced by the Petitioner.

2. The Petitioner''s case is that the cotton fabrics produced by the Petitioner co-operative society is exempted from excise duty by virtue of a notification issued on April 30, 1960, under Rule 8(1) of the Central Excise Rules, 1944; that notwithstanding such exemption certain officials appointed by the Excise Department entered into the premises of the Petitioner on November 24, 1964, and searched and seized the books of account as well as the entire stock of cloth lying at the Petitioner''s factory. On the same date Respondent No. 6, the Deputy Superintendent of Central Excise, served a notice (annEx. B to the petition, p. 29) upon the Petitioner calling upon it to submit returns for the purpose of assessment to excise duty and also restrained the clearance of any goods from the Petitioner''s factory without payment of Central excise duty on and from November 24, 1964.

3. The Petitioner challenges the validity of the search and seizure as well as the notice and order at annEx. B aforesaid on various grounds of which those which were pressed at the hearing will be dealt with in this judgment.

4. The petition is opposed by an affidavit-in-opposition filed on behalf'' of Respondents 1-6.

5. (I) The first question for determination is whether the cotton fabrics produced at the Petitioner''s factory are exempted from excise duty payable under the Central Excise Act.

6. The Petitioner relies upon G.S.R. 490/30-4-60, issued by the Government of India in exercise of its power under Rule 8(1) of the Excise Rules as well as annEx. C to the counter-affidavit. The controversy between the parties is as to the interpretation of the text of this notification, the material portion of which reads:

Exempts cotton fabrics produced on power-looms owned by any co-operative society or owned by or allotted to the members of the society, which is registered...before the 31st March, 1961.

7. The contention of the Respondents is that the foregoing exemption is available only when the co-operative society manufactures the fabrics on its account through its members and not when outsiders get their goods produced by the power-looms of the society, the object of the exemption being the protection of petty producers of cotton fabrics, not owning more than four power-looms, from unreasonable competition by big producers.

In order to substantiate this interpretation of the 1960 notification the Respondent want to take the Court to the predecessors of this notification issued in the years 1957 and 1959.

8. The 1957 notification (annEx. A) does not refer to co-operative societies but is a general exemption granted to any person, pro vided the following condition, inter alia, is satisfied.

Cotton fabrics manufactured by or on behalf of the same person in one or more factories commonly known as power-looms in which less than 5 power-looms...the installed.

9. Co-operative societies, as such, came to be exempted for the first time in 1959, by the notification of July 31, 1959 (annEx. C to the counter-affidavit). The conditions subject to which the exemption was allowed are

(a) That the cotton fabrics reproduced by a co-operative society formed of owners of cotton power-looms, which is registered on or before March 31, 1961,

(b) that every member of the co-operative society has been exempt from excise duty for three years immediately preceding the date of his joining the society,

(c) that the total number of power-looms owned by the society is not more than four times the number of its members,

(d) that a certificate to the foregoing effect from the State Government is produced by each member of the society.

10. Before the three-year term of the 1959 notification expired, it was superseded by the 1960 notification in question which reproduced the same

conditions. The only material difference in the texts of the 1959 and 1960 notifications appears to be that instead of the words-Society formed of owners of cotton power-looms.

The words substituted in 1960 were?produced on power-looms owned by any co-operative society or owned by or allotted to members of the society.

11. The result of this change was that the exemption would be available not only where the power-looms belonged to the members but also where the society itself was the owner of the looms which were allotted to its members who would produce the fabrics. I do not see in this change anything to suggest that the exemption would not be available where the power-looms were used to produce fabrics at the order of or on behalf of some non-member. It is nowhere suggested in these notifications that the materials or the goods produced must also belong to the society.

12. It is true that the exemption was introduced to help petty producers, but that is secured by limiting the number of power-looms that could be owned by the society or its members in order to obtain the exemption. They would not forfeit the exemption if the small-scale factories were to produce goods for the benefit of a third party. The case of the Respondents is that it is a third party named the Ashoke Textiles who are the real producers and owners of the produced goods. But even accepting this finding of fact, I am unable to agree that the Petitioner would lose the exemption, the other conditions of the notification having been admittedly satisfied in this case merely because the society is producing the goods on behalf of a third party. If that be the object of the Government, the notification should be suitably amended. The Respondents want me to import the words ''by or on behalf of from the notification of 1957 into the notification of 1960, but that is not permissible since, as I have said,, the notification exempting the co-operative societies is an independent notification and there is nothing to indicate that terms must be read subject to the notification of 1957. The Court cannot read in the notification of 1960 words which do not exist there. That is a business of the authority which is empowered to make these statutory instruments by making suitable amendments.

13. It was contended, as a last resort, that even under the notification of 1960, the exemption is available where the real producer is a third party, the Respondents'' case being that the real producer in the instant case is not the society but the Ashoke Textiles. But the words ''producer'' in the notification is to be read with the word ''power-looms'', it is used in the sense of manufacture with the aid of the power-looms. In the instant case, there is no doubt that, even on the Respondents'' pleading, the power-looms are being worked by the society or its members, though the finished products might belong to the Ashoke Textiles, as the Respondents contend.

14. The Respondents also relied on the letter of the Registrar of Co-operative Societies at annEx. F where the latter objected to the Society that the Society

was "leasing out looms of the Society to a third party against the interests of the Society". Taking this allegation on its face value, it could be a ground for the Registrar to proceed against the Society under the provisions of the Co-operative Societies Act, but the Respondents could not forfeit the exemption so long as the notification was not changed or the Respondents established that the power-looms were no longer run by the society or its members but by the Ashoke Textiles or its men ; there is no such evidence on the record. The loose "word ''leasing'' used by a third party cannot be resorted to by the Respondents for denying the statutory exemption to the Petitioner.

15. Having given my anxious consideration, I cannot but hold that the fabrics produced at the Petitioner''s factory are exempted from Central excise duty by virtue of the annexure at p. 29 of the Petitioner. Calling upon the Petitioner to submit returns for assessment must be held to be invalid.

16. (II) It is argued by the learned Advocate for the Petitioner that once the liability of the Petitioner to pay the excise duty goes, not only will the impugned notice dated November 24, 1964, becomes invalid automatically, but the search and seizure must also be held to have been void ab initio.

17. The contention of the Respondents, however, is that under the provisions of the Customs Act, 1962, read with Section 12 of the Central Excise and Salt Act, 1944, the Respondents have the power to effect search and seizure even on a reasonable belief that the goods at the premises of the Petitioner are liable to excise duty. Section 12 of the Excise Act says:

The Central Government may, by notification in the Official Gazette, declare that any of the provisions of the Sea Customs Act, 1878, relating to the levy and exemption from customs duties...offences and penalties, confiscation and procedure relating to offence and appeals shall, with such modifications and alterations as it may consider necessary or desirable to adapt them to the circumstances, be applicable in regard to like matters in respect of the duties imposed by Section 3.

18. Learned Advocate for the Respondents is right so far as he urges that this is an instance of legislation by incorporation and that since the Sea Customs Act, 1878, has been repealed and replaced by the Customs Act, 1962, the corresponding provisions of the Customs Act, 1962, have to be read into the Excise Act, 1944, as if it was a part thereof.

19. The Respondents want to avail themselves of the provisions of Section 110 of the Customs Act, 1962, which has been applied ''in respect of the duties imposed'' by Section 3 of the Excise Act, by issuing a G.S.R. on May 4, 1963, subject to certain modifications. When we modify the provisions of Section 110 of the Customs Act, 1962, according to the said notification, it will read as follows in its incorporation into the text of the Excise Act:

(1) If the proper officer, as defined in Clause (xi) of Rule 2 of the Central Excise

Rules, 1944, has reason to believe that any goods are liable to confiscation under the Central Excise and Salt Act, 1944, and the Central Excise Rules, 1944, he may seize such goods. Provided that where it is not practicable to seize such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods expect with the previous permission of such officer.

(2) Where any goods are seized under Sub-sections (1) and no notice in respect thereof is given under Clause (a) of Section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized, Provided that the aforesaid period of six months may, on sufficient cause being shown, be extended by the Collector (as defined in Clause (ii) of Rule 2 of the Central Excise Rules, 1944) for a period not exceeding six months.

(3) The proper officer may seize any documents or things which in his opinion will be useful for, or relevant to, any proceeding under this Act....

20. Together with Section 110 of the Customs Act, as so modified, we are to read Rule 201 of the Rules made under the Excise Act, which also empowers an Excise officer to search any premises...in which he has reason to believe that excisable goods are stored or manufactured. But the following contention''s made on behalf of the Petitioner in this context appear to have been substantiated?

(i) The ''reasonable belief referred to in Section 110 of the Customs Act and Rule 201 of the Excise Rules must be the belief of the officer who makes the search and the seizure who, in the present case, was Respondent 6, the Deputy Superintendent, but no affidavit as to such belief of his has been filed by himself.

(ii) Though seizure of books is authorised by Section 110(3), it will be lawful only if it is shown that the empowered officer was of the opinion that it would be useful for, or relevant to, any proceeding under this Act. In Durga Prasad v. Superintendent, Central Excise AIR 1966 S.C. 1209 (1215) this was shown by an order of the Collector by which the seizure was ordered, reciting such opinion and there was an affidavit to the same effect. In the instant case, nothing of this nature has been produced.

21. If the above findings be correct the search as well as the seizure of the books as well as the prohibitory order against removal of goods, made by the second part of the annexure at p. 29 of the Petitioner must also be held to be invalid.

22. There is another stronger ground in favour of the Petitioner to which we must now advert.

23. (Ill) Section 18 of the Excise Act requires that all searches made under the Act shall be carried out in accordance with the provisions of the Code of Criminal Procedure. Section 165 of the Code of Criminal Procedure has been the subject of treatment by the Supreme Court and it has now been held that a search held in contravention of the mandatory conditions, of this section is invalid and that,

consequently, anything recovered by such illegal search must be returned: Board of Revenue v. Jhaver. These conditions are:

(a) The empowered officer must have reasonable grounds for believing that anything necessary for the purpose of investigation (in the instant case detection of excisable goods) may be found in any place within his jurisdiction.

(b) He must be of the opinion that such thing cannot be otherwise got without undue delay.

(c) He must record in writing the grounds of his belief.

(d) He must specify in such writing, so far as possible, the thing for which the search is to be made.

(e) If the empowered officer who entertains the belief is unable to conduct the search himself, he must record the reasons therefore and authorise a subordinate officer.

24. From the counter-affidavit it is evident that the foregoing conditions were not satisfied in this case and there is no writing recording the reasons of an empowered officer produced before me. In the result, the search in the instant case must be held to have been invalid, according to the decision in The Commissioner of Commercial Taxes and Others etc. Vs. R.S. Jhaver and Others etc., and The State of Rajasthan Vs. Rehman, and goods seized as a result of the search must be released.

25. It appears that the goods, other than the books which were seized have, in pursuance of the Court''s order dated March 1 1965, been sold and the sum demanded by the Respondents has been deposited with the Collector, Respondent No. 1.

26. In the result, this Rule is made absolute. The Respondents be directed?

(a) not to give any effect to the order of the Deputy Superintendent at p. 29 of the annexure to the petition;

(b) to release the books of account seized from the Petitioner''s premises as listed at pp. 21-26 of the petition; and

(c) to return to the Petitioner any sum which may have been deposited with Respondent No. 1 in pursuance of this Court''s order dated March 1, 1965, para. (e).

27. In the circumstances of the case I make no order as to costs.

28. As prayed for, on behalf of the Respondents, the operation of this order shall remain stayed for a period of two months from this date.