(2016) 07 AHC CK 0017

In the Allahabad High Court

Kisan Sahakari Chini Mills Ltd. APPELLANT

Vs

Commissioner of C. Ex., Meerut RESPONDENT

Date of Decision : 11-07-2016

Acts Referred:
Central Excise Appeal No. 21 of 2010

Citation : (2017) 345 ELT 613

Hon'ble Judges : Sudhir Agarwal and Kaushal Jayendra Thaker, JJ.

Bench : Division Bench

Advocate : Shri Shakeel Ahmad, Counsel, for the Appellant; Shri S.P. Kesarwani and VKS Raghuvanshi, Counsels, for the Respondent

Final Decision : Dismissed

Judgement

1. Heard Sri Shakeel Ahmad, learned Counsel for appellant and Sri Krishna Agrawal for respondent.

2. This appeal under Section 35G of Central Excise Act has arisen from judgment and order dated 27-7-2009 passed by Customs, Excise and Service Tax Appellate Tribunal, New Delhi.

3. The appeal was admitted on the following two substantial questions of law :-

"(i) Whether upon the facts and circumstances of the case, the Tribunal has not gone into the error of law and fact committed by the Commissioner (Appeals), who has approved the dip method of verifying the stock of molasses and has ignored the facts that in physical verification dated 31-12-1995 by City Magistrate, no significant difference was noticed?

(ii) Whether upon the facts and circumstances of the case the Tribunal was justified in absence of any evidence of clandestine removal of open market sale, the Tribunal was justified in allowing the condonation to the extent of 2% of the stock of 12,972 qtls. stored in Tank No. 2?"

4. Sri Shakeel Ahmad, learned Counsel for appellant, contended that there was

no evidence whatsoever to show that there was a clandestine removal of molasses for open market sale inasmuch as no shortage of molasses was found so as to make appellant responsible in any manner.

5. We find from record that Central Excise Officer when checked storage tank Nos. 1 and 2 by dip reading method in presence of Chief Chemist of appellant''s factory and molasses clerk, found a huge shortage vis-?-vis the quantity determined by dip reading method and one mentioned in the stock card and RG-1 maintained by appellant. Shortage had to be explained by appellant since it was only the appellant and its agent, who were in the capacity to remove molasses. Appellant did not dispute actual shortage but tried to explain shortage in the grounds of appeal filed before Commissioner (Appeals) that shortage was due to some miscreant employees of the factory, who may have left the valve connected with the tank open and pipeline near molasses weighment tank. This explanation shows that shortage in molasses was not seriously disputed by appellant and instead it tried to explain that shortage was on account of some fault on the part of employees of appellant and there was no clandestine removal. The said explanation could not be substantiated by appellant by adducing any evidence whatsoever, thus, to suggest that Revenue did not adduce any evidence to show clandestine removal is misconceived. When a fact is admitted by a party but it attempts to explain the same, onus lie upon such party to prove such explanation. In the present case, shortage in molasses was admitted by appellant but it tried to explain that it was on account of fault on the part of some employees and is not a clandestine removal. This explanation was to prove this fact hence onus lay upon appellant and not the department for reason that shortage was admitted and reason of shortage was and could have been within the knowledge of appellant. Since it failed to discharge its burden, authorities below were justified in drawing an inference against appellant.

6. Learned Counsel for appellant contended that whenever there is any shortage, there is no presumption that it is due to clandestine removal but may be for various reasons. The material was in the premises and control of assessee and if there was shortage, reason of shortage has to be explained by assessee, who is presumed to possess knowledge as to why there is shortage. Moreover, when appellant contended that shortage might be due to some fault of employees, the factum that it was not within his knowledge, consent or approval was also to be proved by appellant. Even otherwise, if shortage was due to some negligence on the part of employee, the employee is also an agent of appellant, for any act committed by employee, appellant, being principal is responsible.

7. Hence in present case, onus to prove that shortage was not on account of any objectionable conduct on the part of appellant, was upon appellant which it fails to prove. Tribunal, therefore, was justified in taking a view otherwise and against appellant. Question 2, therefore, is answered against appellant.

8. So far as question 1 is concerned, since shortage in physical verification, as already said and evident from record that same was not disputed by appellant,

any verification by other authority at some other point of time, would not help appellant and, therefore, question 1 is also answered against appellant.

9. In the result, we find no error in order impugned in this appeal. Appeal lacks merits and is dismissed accordingly.