(2013) 03 MAD CK 0203

In the Madras High Court

Case No : Writ Petition (MD) No. 69 of 2009, M.P. (MD) No''s. 1 and 2 of 2009 and M.P. (MD) No. 1 of 2010

M/s. Vijay Cements APPELLANT

Vs

The Additional Director General Directorate General of Central Excise Intelligence and The Commissioner of Central Excise RESPONDENT

Date of Decision : 14-03-2013

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 11AC, 35Q

Citation : (2014) 24 GSTR 405

Hon'ble Judges : D. Hariparanthaman, J

Bench : Single Bench

Advocate : S.P. Maharajan, for the Appellant; B. Vijay Karthikeyan, for the Respondent

Judgement

D. Hariparanthaman, J.—The Petitioner is a Mini Cement Plant. The officers of the first respondent conducted simultaneous search operation on 05.12.2006 at the factory premises of the Petitioner, Office premises of the petitioner, residential premises of the partners of the Petitioner''s firm, the residence of key employees and a cattle shed premises of Vijay Group at Vellakalpatti, on the specific information that the petitioner firm was indulging in evasion of Central Excise Duty. The search operations resulted in recovery of various incriminating documents, computers'' CPUs, pen-drives, Compact Discs and floppies and those items were seized under mahazars. The follow up actions were conducted on 21.12.2006, 22.12.2006, 23.12.2006, 12.02.2007, 13.02.2007 and 14.02.2007 with suppliers of raw materials and dealers of cement manufactured by the petitioner firm.

2. The investigation team recorded statements from the Managing Partner, key employees and suppliers of raw materials and dealers of finished goods. The whole proceedings ultimately culminated into the issuance of show cause notice in SCN No. 59 of 2008, dated 03.06.2008 under 11(A) (1) of the Central Excise

Act. The Petitioner firm was directed to show cause to the second respondent as to why Central Excise duty of Rs. 2,48,59,309/- and education cess of Rs. 3,76,748/- should not be demanded from them. The show cause notice also directed the petitioner firm to show cause as to why the penalty and interest should not be charged on them. The Petitioner firm was also directed to produce evidences on which they intended to rely in support of their defence.

3. The Petitioner sent an interim reply dated 12.12.2008. The petitioner also sought for cross-examination of all the witnesses including the mahazar witnesses. The second respondent fixed the personal hearing for cross examination of witnesses on 30.12.2008 at the office of the second respondent and 12 witnesses were appeared for cross-examination on that day.

4. The petitioner firm was represented before the second respondent through its counsel and Central Excise Consultant. The Investigation Officer Mr. Kalyanapasupathy was also present before the second respondent, who conducted re-examination of the witnesses in the cross-examination proceedings. The counsel and the Consultant for the petitioner protested against the presence of Mr. Kalyanapasupathy. According to them, the Investigation Officer would influence and intimidate the witnesses. The second respondent rejected the protest after recording the same by stating that the Investigation Officer could represent the case in the adjudication proceeding as per the decision of the Bombay High Court in Lakhanpal National Ltd. Vs. Union of India, .

5. Thus, the second respondent allowed the Investigation Officer to be present during the cross-examination proceedings and also permitted him to re-examine the witnesses. A few witnesses also lodged their protest stating that the presence of the Investigation Officer would intimidate them. But, their protest was rejected by the second respondent. The petitioner participated in the cross-examination proceedings. The second respondent made it clear that the Investigation Officer would be present in the remaining cross-examination proceedings also. Hence, the petitioner filed this Writ Petition seeking to quash the proceedings that were held on 30.12.2008 in pursuance to the show cause notice dated 03.06.2008 and consequently, to direct the second respondent to conduct the cross-examination proceedings without the presence and participation of any of the officers of the First Respondent.

6. The respondents filed counter affidavit refuting the allegations. It is stated that the presence of the Investigation officers are required for re-examination of witnesses as they only collected the statements from those witnesses and they could alone be able to re-examine the witnesses. The recording of statements by the Investigation Officer was nothing but examination in chief by the witnesses and those witnesses are subject to cross-examination before the second respondent and therefore, it is required for the Department to re-examine those witnesses, if necessary by the Investigation Officer. It is stated that the Bombay High Court in M/s. Lakhanpal National Ltd. vs. Union of India (cited supra) held that if the Department had barred from availing the assistance of the

Investigation Officer, it would cause prejudice to the Department. It is further stated that in the instant case, the assistance of the Investigation Officer was called for, due to voluminous records relied on and only the Investigation Officers are in a better position with regard to the relevance of evidences, since they collected the evidences.

7. Heard both sides.

8. The learned counsel for the petitioner vehemently contended that neither the Investigation Officer M. Kalyanapasupathy, nor any of the members of the Investigating team shall be present during cross-examination proceedings and they shall not do re-examination, since the same would influence the entire proceedings in favour of the Department. The adjudicating authority namely, the second respondent, himself would examine/re-examine/cross-examine the witnesses.

9. The learned counsel for the petitioner submitted that the presence of Investigation Officer in the cross-examination proceedings is nothing but the abdication of the authority by the second respondent. The petitioner relied on the following judgments in this regard:-

i) Commissioner of Income Tax, Shimla Vs. Greenworld Corporation, Parwanoo,

ii) DINSHAW DARABSHAW SHROFF Vs. COMMISSIONER OF Income Tax, CENTRAL.,

iii) Mahadayal Premchandra Vs. Commercial Tax Officer, Calcutta and Another,

iv) State of Uttar Pradesh and Others Vs. Maharaja Dharmander Prasad Singh and Others,

v) K.S. Shivji and Co. Vs. Joint Commercial Tax Officer, Esplanade Division, Madras,

10. The next submission of the learned counsel for the petitioner was that the second respondent suffers from bias due to the presence of the Investigation Officer in the cross-examination proceedings/re-examination of witnesses. The learned counsel relied on the following judgments for this purpose.

i) Rattan Lal Sharma Vs. Managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School and others,

ii) Tilak Chand Magatram Obhan Vs. Kamala Prasad Shukla and Others,

iii) Cantonment Executive Officer and Another Vs. Vijay D. Wani and Others,

iv) Institute of Chartered Accountants of India Vs. L.K. Ratna and Others,

11. The last submissions of the learned counsel for the petitioner is that the officers holding the investigation and the adjudication authority could not be one and the same and if the Investigation Officer and Adjudicating Authority are one

and the same, the same is vitiated being contrary to the maxim no man shall be a judge of his own cause. In this regard, the following judgments are relied on by the learned counsel for the petitioner;-

i) Shamlal Sen Pvt. Limited v. Collector of Customs reported in 2000 (125) ELT 405 (Cal.)

ii) Orkay Silk Mills Limited and another Vs. M.S. Bindra and others,

iii) Jeev and Diesels & Electricals Ltd., versus Commissioner of Customs Excise, Pondicherry reported in 2006 (203) ELT 629 (Tri.-Che.)

iv) 2011 (263) ELT 571

12. On the other hand, the learned counsel for the respondents contended that when the petitioner firm was represented by a lawyer and a consultant, the Department cannot be deprived of representing its case before the adjudication authority by the Investigation Officer, who conducted the investigation resulting in the issuance of show cause notice. It was submitted that if the second respondent had done the job of chief examination and re-examination of witnesses, later the proceeding could be attacked by the petitioner stating that the second respondent exceeded its authority and he acted as a prosecutor as well as a judge in the proceedings. The learned counsel relied on the following two judgments in this regard;-

i) Lakhanpal National Ltd. Vs. Union of India,

ii) Lakhanpal National Ltd. Vs. Union of India,

13. In fact, the leaned counsel for the respondents contended that having availed the assistance of a lawyer and a Consultant, the petitioner would not object for the representation of the Department by the Investigation Officials during the adjudication proceedings before the second respondent. It was argued that if the petitioner had any grievance, he could make out before the adjudicating authority and he could not demand that the investigation officer should not participate in the adjudication proceedings representing the department.

14. I have considered the submissions made on either side.

15. The first submission of the learned counsel for the petitioner was that the second respondent abdicated its authority by permitting the Investigation Officer to be present in the Cross-examination proceedings.

15.1 I am not able to understand as to how the presence of the Investigation Officer in the cross-examination proceedings or re-examinations of witnesses by the Investigation Officer would amount to abdication of authority by the second respondent. In fact, in my view, if the second respondent refused to permit the presence of Investigation Officer during cross-examination of the witnesses and refused permission to Investigation Officer for re-examination of witnesses, the same would amount to abdication of its authority, particularly in view of the two judgments relied on by the Department namely.

i) Sanghi Textiles Processors Pvt. Ltd. vs. C.C. Excise (cited supra), wherein a similar objection was made by the petitioner therein was rejected by the Andhra Pradesh High Court in the following words;-

In this context, we have to bear in mind that the Excise Department which had initiated the proceedings before the Collector against the petitioner has a right to have the assistance of the Investigating Officers who gathered the material on the basis of which the proceedings had been initiated. It is stated that the documents prepared and intended to be relied upon by the Excise Department in the enquiry run into about 1,46,000 pages. If the department is debarred from availing the assistance of the Investigating Officer without any reasonable basis, in our view, it would surely be prejudicial to the interest of the department.

ii) Lakhanpal National Ltd. Vs. Union of India, wherein in paragraph 5 it has been held as follows:-

After hearing Counsel for the parties, we are of the opinion that Section 11A needs to be read with Section 35Q. In the case of this nature it would be permissible for the Collector of Customs to take assistance of an authorised representative. In our opinion, no prejudice whatsoever would be caused to the petitioners. Petitioners are represented by several learned Advocates including some Senior Counsel. As against this, the Collector has to deal with several complex questions and if he thought fit to take assistance from an authorised representative, in the facts and circumstances of the present case, we do not see any illegality. Having regard to the facts and circumstances of the case, in our opinion, this is not a fit case where interim order should be granted. "Interim order is accordingly refused. Ad interim order to stand vacated."

16. The judgments relied on by the petitioner have no application to the facts of this case. Let me discuss each of the judgments separately.

i) In the case of Commissioner of Income Tax, Shimla v. Greenworld Corporation, Parwanoo (cited supra), it was found that the higher authority interfered with the decision making process of the Assessing authority. The same was disapproved by the Hon''ble Apex Court. The Apex Court has held that the Commissioner or any other higher authority may have supervisory jurisdiction in terms of circulars or orders issued by the CBDT, but the same shall not be construed to mean that the Assessing Authority exercising quasi-judicial function, would lose its independence to pass an independent order of assessment. In the said judgment, the Honourable Apex Court has held as follows:-

No doubt in terms of the circular letter issued by CBDT, the Commissioner or for that matter any other higher authority may have supervisory jurisdiction but it is difficult to conceive that even the merit of the decision shall be discussed and the same shall be rendered at the instance of the higher authority who, as noticed herein before, is a supervisory authority. It is one thing to say that while making the orders of assessment the assessing officer shall be bound by the statutory circulars issued by CBDT but it is another thing to say that the assessing authority exercising quasi-judicial function keeping in view the scheme contained in the Act, would lose its independence to pass an independent order of assessment.

ii) In Dinshaw Darabshaw Shroff vs. Commissioner of Income Tax, Central (cited supra), it has been held that the Inspecting Assistant Commissioner, who is the superior officer of the Income Tax Officer making the assessment, claimed the right to put questions to the assessee and that procedure was held to be grossly irregular by the Bombay High Court. The following passage in the said judgment is extracted hereunder:-

It would be as sensible to suggest that a high court judge can sit in a Subordinate Judges Court, not as a spectator only, but as an active participant, and can direct the trial Judge, as a Judge subordinate to the High Court, how to conduct the trial.

In the present case, no higher authority interfered with the adjudication proceedings like the Inspecting Assistant Commissioner interfered with the case relied on by the petitioner. Hence, the said case has no relevance to the issues involved in this case.

iii) In Mahadayal Premchandra v. CTO (cited supra) also the Assessing Authority did not pass the impugned order on its own, but he followed the dictates of its higher authority. The same was disapproved by the Apex Court. Hence this judgment is also not applicable.

iv) In State of UP v. Maharaja Dharmander Prasad Singh (cited supra) also the authority exercised his quasi-judicial power being influenced by the dictation of others. The same was disapproved. The following passage in the judgment is extracted hereunder:-

The authority cannot permit its decision to be influenced by the dictation of others as this would amount to abdication and surrender of its discretion. It would then not be the authority''s discretion that is exercised, but someone else''s. If an authority "hands over its discretion to another body it acts ultra vires". Such an interference by a person or body extraneous to the power would plainly be contrary to the nature of the power conferred upon the authority. De smith sums up the position thus:

The relevant principles formulated by the courts may be broadly summarised as follows. The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case.

Here in this case, there is no allegation that the second respondent, the adjudicating authority, has exercised its discretion at the dictates of other authority. Hence, the judgment relied on by the petitioner is not applicable.

v) In K.S. Shivji & Co. Vs. Joint Commercial Tax Officer, Esplanade Division, Madras (cited supra) also the assessing officer failed to act independently and he acted as per the direction of the Superior authority. The same was disapproved by the Court. The following passage from the said judgment is extracted hereunder:-

We need hardly observe that the assessment proceedings are quasi judicial in nature and therefore the assessing authority has an independent duty to carefully scrutinise the materials for assessment and satisfy himself, thoroughly uninfluenced by any direction of superior officers, and assess the tax payable on that basis. The assessing authority, in this case, has obviously failed to do his duty.

The said judgment cannot be applied to the facts of this case as there is no such allegation that the second respondent is conducting adjudication proceedings as dictated by any superior authority.

17. The next submissions of the learned counsel for the petitioner is that the adjudication proceedings suffer from bias due to the presence of Investigation Officer and re-examination of witnesses by the Investigation Officer. I failed to understand as to how the presence of Investigation Officer in the cross-examination proceedings and re-examination of witnesses by the Investigation Officer would be described as bias causing prejudice to the petitioner.

18. The learned counsel for the petitioner stated that the Investigation Officer collected statements from a witness commencing from 07.00 p.m. on 05.06.2006 and ended at 02.30 hours on the next day. The next witness was examined for half an hour from 2.30 a.m. on 06.12.2006. Hence, such an Investigation Officer shall not be allowed to be present before the adjudication authority for conducting re-examination of witnesses.

18.1 I am not able to appreciate the submissions made by the learned counsel for the petitioner. If the petitioner has any grievance about the alleged irregular investigation, the same could be advanced before the second respondent and he could not ask on that pretext the exclusion of Investigation Officer in the adjudication proceedings. The following Judgments relied on by the learned counsel for the Petitioner in this regard has no application to this case.

i) In Rattan Lal Sharma v. Managing Committee, Dr. Hari Ram (Co-Education) Higher Secondary School, (Cited supra), it has been held that the departmental proceeding was vitiated for flagrant violation of principle of natural justice and charge No. 12 was sought to be proved by Shri Maru Ram himself who appeared as a witness before enquiry committee although he was one of the members of enquiry committee. The Apex Court further held that the enquiry committee that consists of Mr. Shri Maru Ram could not decide the issue without bias. The Apex Court further held that No person shall be a judge in his own cause. I am not able to understand how the same could be applied here.

ii) In Tilak Chand Magatram Obhan v. Kamala Prasad Shukla and Ors. (cited supra), the order of removal was set aside, when it was found that the Principal-member had a strong bias against the delinquent. In the said case, the respondent teacher was suspended from service and was charge-sheeted and an enquiry committee was appointed including the Principal of the School as a Member. Based on the finding of the said committee, the teacher was removed. It was found that the Principal was deeply biased against the teacher. The Principal had given notice to the delinquent for initiating defamation proceedings against him. It was alleged that his presence in the committee vitiated the atmosphere for a free and fair trial. Hence, the said judgment could not be applied to the present case. The relevant passage of the said judgment is extracted hereunder:-

Where one of the members of the Enquiry Committee has a strong hatred or bias against the delinquent of which the other members know not or the said member is in a position to influence the decision-making, the entire record of the enquiry will be slanted and any independent decision taken by the appellate authority on such tainted record cannot undo the damage done. Besides where a delinquent is asked to appear before a committee of which one member is deeply hostile towards him, the delinquent would be greatly handicapped in conducting his defence as he would be inhibited by the atmosphere prevailing in the enquiry room. Justice must not only be done but must also appear to be done.

iii) In Cantonment Executive Officer and another v. Vijay D. Wani and Ors. (cited supra), three members of the enquiry committee that found the respondent guilty were forming part of the board that considered the report of the Committee and confirmed the same. In those circumstances, the Supreme Court has held as follows:-

Therefore, there was a legitimate apprehension in the mind of the respondent that the three members of the committee who were inquiring against the respondent and found him guilty were interested to see that their report should be confirmed by the Board and this seriously prejudiced and biased the process of decision making him guilty.

Thus judgment has no application to the facts of this case.

iv) In Institute of Chartered Accountants of India v. L.K. Ratna, (cited supra), action was taken against a Chartered Accountant. In that case, the disciplinary committee, consists of the President, Vice President and three members of the Council, has rendered a finding. The members of the disciplinary proceedings participated in the council proceeding, when the same came before the council for consideration of the report of the committee. The same was disapproved by the Apex Court. Hence, the said judgment has no application to the facts of the present case.

19. The last submission of the learned counsel for the petitioner is that the Investigation Officer and the Adjudication Officer shall not be one and the same. In that case, the adjudication proceedings is vitiated. He relied on the following judgments in this regard.

i) Shamlal Sen Pvt. Ltd. V. Collector of Customs reported in 2000 (125) E.L.T. 405 (Cal.)

ii) Orkay Silk Mills Limited and another Vs. M.S. Bindra and others,

iii) Jeevan Diesels & Electricals Ltd., v. Commissioner of Central Excise, Pondicherry reported in 2006 (203) E.L.T. 629 (Tri-Che.)

iv) Bansiwala Iron and Steel Rolling Mills v. Commissioner of Central Excise, Jaipur-II, reported in 2010 (262) E.L.T. 859 (Tri-Del)

20. At the out set, the submission has no basis. Here the Adjudication Authority is totally different from the Investigation Officer. In fact, if the Investigation Officer did not participate in the proceedings, then the petitioner could make such an allegation that the Adjudicating Authority acted as prosecutor and judge to himself. In the judgments relied on by the petitioners the investigation Authority also acted as Adjudicating Authority. Therefore, the same was disapproved by the Court. Hence those decisions have no application to the facts of the present case. For the afore-said reasons, the writ petition is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.