(2006) 07 DEL CK 0020

In the Delhi High Court

Case No : Writ Petition (C) No. 9243, 9314 and 9325 of 2006

Santosh Kumar Garg APPELLANT

Vs

Union of India (UOI) and The Commissioner of Central Excise RESPONDENT

Date of Decision : 07-07-2006

Acts Referred:
Central Excise (Amendment) Rules, 2001 — Rule 25, 26
Central Excise Rules, 1994 — Rule 209, 209A
Constitution of India, 1950 — Article 226

Citation : (2006) 131 DLT 91 : (2008) 11 STR 417

Hon'ble Judges : T.S. Thakur, J;S.N. Dhingra, J

Bench : Division Bench

Advocate : Tanushree Sinha, for the Appellant; P.P. Malhotra, ASG, for the Respondent

Final Decision : Dismissed

Judgement

Shiv Narayan Dhingra, J.—These three writ petitions under Article 226 of the Constitution of India have been filed challenging the legality of an order of the Customs Excise and Service Tax Appeal Tribunal dated 12.4.2006 whereby the Tribunal has directed pre deposit of a sum of rupees two crores by each one of the petitioners as a precondition for hearing the appeals against the order of Commissioner, Central Excise dated 28th October, 2005. Vide this order the Commissioner had imposed a penalty of Rs. 21 crores on petitioner Devi Das Garg, Rs. 25 crores on petitioner Rakesh Kumar Garg and Rs. 21 crores on petitioner Santosh Kumar Garg under Rules 209 and 209A of Central Excise Rules, 1994 and Rules 25 and 26 Central Excise(2) Rules, 2001 and Central Excise Rules 2002. Apart from imposing penalties on these petitioners by this order, the Commissioner had also raised a demand of Central Excise Duty amounting to Rs.33, 20,03,239/- against M/s Amar Jyoti Packers and imposed an equivalent amount of penalty u/s 11 AC on M/s Amar Jyoti Packers.

2. The brief facts leading to imposition of penalties and raising of demand of

excise duty are as under.

3. All the three petitioners namely Shri Devi Dass Garg, Shri Rakesh Kumar Garg and Shri Santosh Kumar Garg were in the business of manufacturing pan masala and ''gutkha'' under a partnership firm M/s Sonal India products at Mathura. Pan masala and Gutkha were being manufactured under four different trademarks viz Raj Darbar, Rahat, Raj Tilak, Rustam. They had applied for registration of above trademarks in their names and were marketing pan masala and gutkha in pouches having above trademark. They also had an office in Delhi at G-3/4, Model Town. One Mahesh Kumar Gautam was working as Poojari of the petitioners at a temple'' at the residence of these petitioners and was getting a remuneration of Rs.2000/- to Rs.3000/- per month. The three petitioners entered into a franchise agreement for manufacturing and marketing of Pan Masala and Gutka in above trade-names with pujari Mahesh Kumar Gautam, who had allegedly formed a proprietory firm namely M/s Amar Jyoti Packers. This firm ostensibly set up a pouch packing unit at 223, Village Budhpur, Post Office Alipur for manufacturing of pouches of pan masala and gutkha in trade names of Rajdarbar, Rahat, Raj Tilak and Rustam. In the franchise agreement entered into by three petitioners as partner of M/s Sonal India Products with Mahesh Kumar Gautam, their Pujari, it was stated that they were unable to manage properly and to sell their goods namely pan masala sada and gutkha under the registered trademarks and copyright throughout the country and for this purpose the franchise was being given to Mahesh Kumar Gautam, who was interested in getting the license to use their trademarks. This agreement was entered on 13.4.2000 and was effective from 1.4.2000.

4. On receiving an information of large scale evasion of excise duty, a raid was conducted by excise department on 20.10.2000 at following premises viz

(i) M/s Amar Jyoti Packers, 223, Village Budhpur, P.O. Alipur, Delhi-36,

(ii) M/s Narsi Foods(P) Ltd, 53/42, Shiv Mandir Road, Alipur, Delhi-36

(iii) M/s Surya Traders, 20 Killa Road, Village Jindpur, Delhi,

(iv) D-1/2, Model Town, Delhi and

(v) C-36, Mahendru Enclave, Opposite Model Town-II Bus Stop, Delhi.

5. In the course of search and seizure, it was found by the Department that a large scale evasion of excise duty was being done by M/s Amar Jyoti Packers and discovered which facts showed that Pujari Mahesh Kumar Gautam, proprietor of M/s Amar Jyoti Packers, was only a front man of petitioners. He had no capacity to invest capital and to install the factory in question and had no funds to purchase the machinery of his own and the entire show of M/s Amar Jyoti Packers was being run by the petitioners. His statement was recorded and in his statement, he admitted that he was being used by the petitioners as a front man. The entire work of packing pouches of Gutka and Pan Masala in different trade names was being done in the factory called Amar Jyoti Packers, under the

supervision of the petitioners and he was only being asked to sign certain papers. He had no money to invest and all investment was made by petitioners. At the time of raid, one Vinod Kumar Bansal was found at the premises of M/s Amar Jyoti Packers. He introduced himself as an authorized signatory of Mahesh Kumar Gautam and also as accountant of the firm. He also stated that he was working under the instructions of the petitioners. At premises of Amar Jyoti Packers, 20 pouch packing machines were found working at the time of raid. Each machine was having manufacturing capacity of 200 pouches per minute. Six more such machines were lying in the tool room for repairs. Apart from these machines, 5 ovens, 2 pouch sealing machine, 1 mixer, 2 supari slitters and 2 supari cutters were found installed in the factory premises. One oven and one pouch sealing machine in dismantled state were also found lying in the factory premises. The officers also recovered a pocket diary belonging to one Dinesh Kumar, working as a typist in the factory. Statement of Vinod Bansal showed that about 35 workers were working in the factory. Registers were checked and it was found that daily production and clearance of goods was either not being entered or was being incorrectly entered in the Form-IV and RG-I register. The consumption of raw materials was found not entered in Form-IV register in respect of 18th, 19th and 20th October, 2000, though consumption of raw material and production of pouches was going on. It was also disclosed that earlier a unit named M/s Krishna Packers was operating from the same premises which was also doing the same work and most of the machines installed in M/s Amar Jyoti Packers were purchased from M/s Krishna Packers.

6. Search of M/s Narsi Foods Pvt. Ltd., revealed 3 packing machines for packing of 3.5 gms pouches, one machine for sealing of pouches of 20 gms and one machine for sealing of containers of 100 gms were found installed and working. Each machine had capacity of manufacturing 65 pouches per minute. At the premises pan masala with the brand name ''Narsi Gold'' was being manufactured. Petitioners Shri Rakesh Garg and Shri Devi Das Garg were stated to be the two directors of the company.

7. At the factory premises of Surya Traders it was found that this unit was processing raw materials such as supari(betelnut), illaichi(cardamom), kattha(catechu), chuna(lime), menthol and perfumes used in the manufacturing of pan masala and gutkha. Mr. Manoj Bansal, Manager was present at the time of visit and he stated that the processed raw materials was being exclusively supplied to M/s Amar Jyoti Packers and M/s Narsi Foods in gunny bags. The records were resumed by Central Excise Officers and stock position was prepared in panchnama. Mr. Manoj Bansal in this statement stated that Shri Sunil Kumar Agarwal was the proprietor of the factory. There were three sheds in the factory. In two sheds, four sieving machines for supari, 12 supari cutting and grinding machines and one conveyer system was found apart from stock of Supari. There were 60 daily wagers working in the factory engaged in cutting and grinding of supari, katha, illachi, chuna and tobacco etc. Mr. Bansal stated that the entire transaction with Narsi Foods and Amar Jyoti Packers used to take place in cash.

Statement of Dev Kumar Sharma, Accountant of M/s Surya Traders was recorded. He used to look after the sale and purchase of goods. He stated that head office of the company was situated at D1/2, Model Town-III, Delhi and the owners of the company were Gargs i.e. petitioners. Mr. Rakesh Garg was the resident of Model Town. The goods used to be dispatched through local tempos and all the invoices/challans for dispatch of the said goods were issued and signed by him. On the challans only ''katha and supari'' used to be recorded, instead of cut/grinded/mixed supari, katha, chuna and illaichi.

8. Statements of Pujari Mahesh Kumar Gautam were recorded on 26.4.2002, 4.11.2003 and 12.3.2004 Statements of Vinod Bansal, accountant and authorized signatory were recorded on seven occasions from 21.10.2003 to 5.3.2004 Excise Department also recorded statements of other persons involved namely, DK Sharma, accountant of M/s Surya Traders and Sunil Aggarwal so-called owner of Surya Traders.

9. From all the statements and the documents and circumstances, Excise Department came to the conclusion that all the three petitioners were actually running the entire show of Amar Jyoti Packers and Surya Trading. Mahesh Kumar Gautam and Sunil Kumar Aggarwal were only name lenders and front men. The entire operation was being done clandestinely to evade excise duty. No record of purchase of raw material was being maintained by Surya Traders. All payments were being made to Surya Traders in cash. The correct record of production of pouches at Amar Jyoti Packers and Narsi Food was not being maintained and consumption of raw material was also not being maintained correctly and large amount of production and sale was going on unrecorded, to evade excise duty. The assessment of production of pouches from 1.4.2000 till the time manufacturing continued, was done on the basis of the capacity of machines installed, number of working days and working hours per day, labour employed, raw materials consumed etc. and a show cause notice was served upon S/Sh. Pujari Mahesh Kumar Gautam the so called proprietor of M/s Amar Jyoti Packers, Sunil Kumar Aggarwal alleged owner of Surya Traders, Dev Kumar Sharma, accountant in Surya Traders and Vinod Kumar Bansal, Accountant and Authorized Signatory of M/s Amar Jyoti Packers by the Assessing Commissioner (AE), Central Excise on 24.5.2004 The show cause notice runs into 77 pages and gives all minute details of the entire search done, documents recovered, statements recorded and conclusions arrived at. It also gave the details of the assessment of raw material that would have been consumed, details of excise duty clandestinely evaded by M/s Amar Jyoti Packers and M/s Narsi Food Pvt. Ltd. Production calculations and excise duty calculation charts were attached with the show cause notice. These charts show that production calculations were done on the logical base of the number of employees working and the working capacity of machines, taking into account the number of working days as per the muster roll of the factories. A detailed order was passed by the Commissioner, Central Excise on 28.10.2001 as to how the evasion of excise duty was done and how the three petitioners were squarely responsible for the evasion of excise duty and why the

penalties, as stated in para-1 above, were imposed upon the petitioners.

10. Learned counsel for the petitioners argued that the Tribunal while passing order of pre deposit had not taken into consideration the fact that the statements made by Mahesh Chand Gautam were retracted by him and there was no other proof linking the petitioners with M/s Amar Jyoti Packers. The penalties have been wrongly and illegally imposed upon the petitioners and, Therefore, the Tribunal should not have passed an order of pre-deposit of Rs.2 crores for each petitioner. It was also argued that the reason for imposing such a high amount of penalty on the petitioners, as noted by the Commissioner, was the richness of the petitioners. The Commissioner has taken into account the various properties of the petitioners and fact that the petitioners had become rich in a short span. He pleaded that this was no ground for imposing penalty and gave example of Mr. Dhirubhai Ambani stating that he had started business on a bicycle and had become one of the richest man in India. So, the richness of a person should not be considered as a reason to attract heavy penalty.

11. On the other hand, Learned Addl. Solicitor General appearing for UOI, drew our attention towards the huge amount of excise duty evasion running into several crores and the clandestine manner in which a Poojari of the petitioners and another known person were used as front men to do this evasion. Mr. P.P. Malhotra, Ld. ASG, stated that this was a fit case where the State should have prosecuted the petitioners and he wondered why the prosecution had not been done. He submitted that against the penalties of Rs. 21 crores, Rs. 25 crores and Rs. 21 crores respectively, the Tribunal had asked for a pre deposit of paltry amount of Rs. 2 crores each only. The Tribunal had not adequately protected the interest of revenue and there was no scope for interference by this Court.

12. During the arguments, we had asked the petitioners as to how much amount they were willing to pre deposit and we were told that the petitioners were willing to pre deposit Rs. 1 crore each.

13. In the proceedings under Article 226 of the Constitution challenging the order of pre-deposit, we are not required to go into the merits of the evidence collected by the Excise Department and to arrive at a conclusion about the clandestine evasion of excise duty and the role of petitioners compelling Excise Commissioner in imposition of penalties on the petitioners. A perusal of order of the Commissioner, Excise shows that he has dealt with all the facts and considered all the documents which were found during the search and the statements recorded by the Excise Department and we need not dwell upon those aspects. As far as argument of petitioners'' counsel about retraction of statement by their Pujari is concerned, it would be noted that although Mahesh Kumar retracted his statement made before officers of excise department but he has not retracted the basic facts that he had no money to purchase machinery and establish factory and that he was a Pujari at the ''in house'' temple of the petitioners earning Rs.2000/- to Rs. 3000/- per month. It was admitted during arguments that Mahesh Kumar Gautam is a Pujari of the petitioners and was

earning hardly Rs. 3000/- per month.

14. Counsel for the petitioners had argued that the Tribunal has unreasonably imposed a condition of pre-deposit of Rs. 2 crores on each petitioner, it was quite a high amount for hearing the appeal and amounted to denying the right of appeal.

15. This court while exercising its powers under Article 226 of the Constitution does not act as an appellate court. It exercises only supervisory powers and while exercising this power, court cannot go into the merits of the decision taken by the Tribunal and it can only look into the decision to ensure that the decision has been arrived at in accordance with the procedure prescribed by law and in accordance with the principles of natural justice, wherever applicable. It is undisputed that the Tribunal had given hearing to the petitioners before passing an order and after giving hearing and considering all the facts before it, the Tribunal had passed an order of pre deposit of Rs. 2 crores. The power of Tribunal to ask for pre-deposit is undoubted. It is for the Tribunal to consider as to what is the right quantum of pre-deposit taking into account the facts of each case. The order shows that the Tribunal had taken into account all the facts and then exercised discretion of asking quantum of pre-deposit. This court while exercising powers under Article 226 of the Constitution cannot substitute its own discretion in place of the discretion of the Tribunal. This court can interfere only if the order is perverse and not based on any evidence or has been passed on extraneous considerations. Supreme Court in H. B. Gandhi v. Gopi Nath and Sons has laid down the limitation of judicial review. High Court can interfere under Article 226 of the Constitution only if the action of the Tribunal is unfair or unreasonable or it defies the principle of natural justice or it violates any statutory provision and not otherwise.

16. We had gone through the franchise agreement placed on record. The date of agreement is 13.4.2000 while it is effective from 1.4.2000. In the agreement, the three petitioners, who are experienced businessmen have shown themselves incapable of managing the production and sale on all India basis and a Pujari, who had no experience of business except, Pooja business, takes upon himself the challenge of manufacturing and marketing Pan Masala and Gutka all over India, when he admittedly had been earning only Rs. 2000/- to Rs. 3000/- per month. It is not that a Pujari, being Brahmin cannot enter into the realms of business, but the scale at which business had been started and factory established coupled with his admitted financial position are very strong circumstances taken into consideration by Tribunal while passing order.

17. We find that the Tribunal has acted very reasonably, rather had shown a lot of leniency in favor of the petitioners in ordering less than 10% of the penalty as pre deposit. We find no ground to interfere in the order of the Tribunal specially when there are allegations of large-scale clandestine evasion of excise duty to the tune of more than Rs. 33 crores by M/s Amar Jyoti Packers and prima facie involvement of the petitioners is reflected from all the facts which have been

collected by the Revenue Authorities. There is no scope for interference by this Court in the order of the Tribunal. The writ petitions merit dismissal and are hereby dismissed. We are, however, inclined to extend the period for making of the pre deposit by two months from the date of the order. We accordingly direct that in case the predeposit is made within two months from today, the petitioners shall be entitled for seeking revival of their appeals before the Tribunal, for being heard and disposed of on merits afresh. No costs.

