(2002) 07 BOM CK 0086

In the Bombay High Court

Case No : Writ Petition No. 3067 of 1987

Simplex Mills Co. Ltd. APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 23-07-2002

Acts Referred:

Central Civil Services (Pension) Rules, 1972 — Rule 9(2)
Central Excises and Salt Act, 1944 — Section 35B

Citation : (2003) 2 ALD(Cri) 133 : (2002) 4 ALLMR 365 : (2003) 153 ELT 528

Hon'ble Judges : J.P. Devadhar, J;H.L. Gokhale, J

Bench : Division Bench

Advocate : N.C. Parekh, instructed by M. Hiralal Co, for the Appellant; K.R. Chaudhari, instructed by H.D. Rathod, for the Respondent

Judgement

H.L. Gokhale, J.—The facts in this writ petition have brought on record the disturbing state of affairs in the Excise Department. It is seen that against an order-in-original passed by an Assistant Collector of Excise, two conflicting orders in appeal are passed by the same Collector of Excise (Appeals) for reasons best known to him. No action is taken by the superior officers when they came to know of it and on the top of it, even in the High Court the information required is produced most reluctantly, obviously with a view that no serious action is taken against the concerned officers.

2. Mr. Parekh has appeared for the Petitioner assessee. Mr. Chaudhari appears for the Respondents, i.e. Union of India and the Excise Officers.

3. The 1st Petitioner is a public limited company engaged in the business of textiles. The 2nd Petitioner, one Shri Rameshwarlal Saboo is the Company Secretary of the 1st Petitioner. This petition is concerning the issue of proper classification of a certain fabric manufactured by the 1st Petitioner for the purposes of levying the excise duty under the Central Excise Tariff Act, 1985 and the consequent levy of duty under the Additional Duties of Excise (Goods of Special Importance) Act, 1957. Amongst the fabric manufactured by the 1st

Petitioner, there are fabrics known as Rayon Woven Fabrics. It is the case of the Petitioners that these fabrics are separate and distinct from Tyre Cord Fabric'' of Viscose Rayon. According to the Petitioners, these fabrics are made of man-made filament rayon which are woven and which are not subjected to any process. It is their case that they fall under Heading 5408 of the Schedule to the Central Excise Tariff Act and are not liable for any additional excise duty. As against that, the stand of the Department was that they fall under the category ''Tyre Cord Fabric'' of Viscose Rayon and they fall under Heading 5902.30.

4. After the Petitioners filed their classification list with respect to the concerned product, the Respondent No. 2 Assistant Collector of Central Excise, held that the goods manufactured by them correctly fall under Tariff Heading 5902.30 as Tyre Cord Fabric and not the category in which the Petitioners had classified. He, therefore, levied additional duty at the rate of Rs. 2/- per kg. as prescribed in the Tariff Schedule by his order dated 23rd July, 1986.

5. Being aggrieved by this order, the Petitioners filed an appeal on 15th September, 1986 being Appeal No. PPM-1220/BI-121/87. During the pendency of that appeal, the present petition was filed to challenge the above order-in-original. This court by its order dated 16th October, 1987 directed the Collector of Central Excise (Appeals) to decide the appeal within two weeks. The then Collector of Central Excise (Appeals) one Shri P.P. Mittal heard that appeal and decided it on 27th October, 1987 and confirmed the original order dated 23rd July, 1986. The present petition was, thereafter, amended to challenge this appellate order. However, this court by its order dated 11th December, 1987 granted liberty to the Petitioners to file an appeal to the CEGAT against the above order dated 27th October, 1987. That appeal before the CEGAT came to be decided on 23rd September, 1996 and the appeal came to be dismissed.

6. It so transpired that when the petition reached for final hearing, by an affidavit sworn by above referred Rameshwarlal Saboo on 7th January, 2002, a xerox copy of a certified copy of the order dated 24th November, 1988 passed by the above referred Collector of Central Excise (Appeals) Shri Mittal was produced before this court. As per that order, the original order dated 23rd July, 1986 passed by the Assistant Collector was set aside and the matter was remanded back to him once again to issue show cause notice and grant hearing and pass a speaking order.

7. When this state of affairs was seen by the court, it was noted that against the order-in-original, there were two appellate orders. The first one, as noted earlier, was 27th October, 1987 passed by Shri Mittal, the then Collector, Central Excise (Appeals) and the other one was dated 24th November, 1988 passed by the very same Mr. Mittal which was produced along with the affidavit of Mr. Rameshwarlal Saboo. In view of this development, a question came up as to which order-in-appeal will hold the field. Different Division Benches of this court, therefore, passed various orders and asked the Respondents to explain as to how this has happened. These orders were passed from time to time on 9th January, 2002,

16th January, 2002, 27th February, 2002, 4th April, 2002, 19th April, 2002 and 12th June, 2002. Affidavits were filed by the Respondents to explain as to what steps they had taken in this behalf. One Mr. A.C. Buck, Commissioner of Central Excise filed affidavits on 26th February, 2002, 17th April, 2002, 18th April, 2002 and lastly he filed an affidavit on 10th July, 2002 and placed on record the correspondence with the authorities in Delhi. Now when we saw the second order, it was noted that it was attested by one Mr. Bhalchandra Shantaram Ambeskar, then Superintendent of Central Excise. The signature of the Appellate Authority was as follows :- ''Sd/- (P.P. Mittal) - Collector of Excise (Appeals) Bombay''. After an inquiry, the Respondents placed on record the affidavit of Mr. Mittal and Mr. Ambeskar. As far as Mr. Mittal is concerned, it is to be noted that in spite of having been informed, he did not remain present in this court and the matter was adjourned for his convenience. Ultimately the above affidavit was tendered which is affirmed in Delhi. Mr. Mittal stated in his affidavit that having seen the photocopy of the order dated 24th November, 1988, it did not bear his signature. He however did not say as to how such an order could be passed, nor did he express any surprise on issuance of such a second order. All that he stated in para 5 of his affidavit was ''In the absence of original appeal file in question, it is not possible to say as to how and under what circumstances, order dated 24th November, 1988 was passed''. As against this, Mr. Ambeskar stated in his affidavit that he had certified the true copy after verifying from the original record.

8. It is material to note that initial stand of the Respondents was that papers were not found. Thereafter it was stated that it was difficult to say as to who between the two, i.e. Mr. Mittal and Mr. Ambeskar, was responsible for issuance of the second appellate order. Thereafter, it was stated by Mr. Buck in his affidavit dated 10th July, 2002 that the Respondents did not propose any further investigation since both the officers had retired long back and since there was no loss of revenue, it may not be feasible to initiate any departmental inquiry. Ultimately when it is seen that Mr. Mittal is responsible, the relevant service rule is relied to justify no action.

9. At this stage, it is relevant to note that under the order of 23rd July, 1986, the burden on the Petitioners was to the tune of Rs. 8,09,794.16. Prayer (b) of their petition sought refund of this amount together with interest at 18% per annum. Still it was stated in the affidavit of Mr. Buck that there was no pecuniary loss and since there was no loss to the revenue, it may not be feasible to initiate any departmental inquiry. In the circumstances, this court was constrained to pass one more order on 11th July, 2002 asking the Respondents to inform clearly as to whether any such second order in November, 1988 was passed or whether it was a fabricated order. It is at that stage that some notings were brought to the notice of the court. First an affidavit was filed by one Mr. B. Nanda, Chief Commissioner of Central Excise affirmed on 17th July, 2002 and a file of the investigation report was placed before the court. Later on, in view of the order passed by the court, another file was brought to the notice of the court and now

a further affidavit has been filed by Mr. Buck affirmed on 23rd July, 2002. To this affidavit, the notings made in the year 1989 have been annexed.

10. From these notings, it is very clear that such an order dated 24th November, 1988 had been passed by Mr. Mittal. In fact, what is interesting to note is that after knowing the fact that such an order was passed, it was recommended by the then Superintendent (Tribunal) and the Assistant Collector (Tribunal) in January, 1989 that as the order-in-appeal is a de novo, the same may be accepted. Thereafter there is a further noting of 28th September, 1989 that if agreed, the Assistant Collector may be informed to keep the matter pending till the decision of CEGAT. Under this noting, there is a further noting which is as follows :-

"We may bring this matter to the notice of the Collector (Appeals) and inform the Asstt. Collector to decide the matter on hearing CEGAT decision."

This is signed by the then Superintendent (Tribunal) on 3rd October 1989, the Assistant Collector (Tribunal) one Mr. Inder Singh on 3rd October, 1989 and the Additional Collector one Mr. Khadtare on 4th October, 1989 approving the draft. In the affidavits filed by the Respondents from time to time, it is stated that the concerned officers Mr. Mittal as well as the Superintendent Mr. Ambeskar have since retired, and now nothing further can be done. In fact, from amongst various officers who have signed these notings, though many of them have retired, two of them, i.e. Assistant Collector (Tribunal) Mr. Inder Singh and the then Additional Collector Mr. A.D. Khadtare are still in service.

11. In the affidavit of Mr. Buck filed on 23rd July, 2002, the relevant service rule has been annexed which is Rule 9 of the Central Civil Services (Pension) Rules. In view of the provision of Rule 9(2)(b)(ii), as far as a retired person is concerned, he cannot be proceeded with respect to an event which took place more than 4 years before such institution of the inquiry. Mr. Mittal has retired in 1993. However, it is clear that in 1989, that the Respondents were aware that this Mr. Mittal had passed two orders which were contrary to each other. Earlier he confirmed the demand under the order of the Assistant Collector, which created a burden of over Rs. 8 lakhs on the Petitioners and subsequently the very Mr. Mittal passed a second order allowing the appeal and remanding the matter to the Assistant Collector directing him to hold inquiry de novo. It is material to note that the same lawyer had appeared for the Petitioners before him. When this fact is brought to the notice of the Respondents by the Petitioners themselves, the Respondents have taken no action. The two officers, who were the senior most officers at the relevant time, i.e. Mr. Inder Singh and Mr. Khadtare, did not propose any action whatsoever. Probably they thought that nothing need be done. We are told that Mr. Inder Singh is presently Joint Commissioner at Kandla and Mr. Khadtare is Commissioner at Tiruchirapalli.

12. The above narration shows a very sorry state of affairs as far as the functioning of the Respondents are concerned. Firstly, one officer has passed two

different contradictory orders giving a benefit to a particular party for reasons which are quite clear for one to understand. This having been brought to the notice of the authorities concerned, they have kept quiet about it. Even as far as the present court proceedings are concerned, all the relevant papers were kept back from the court and they were placed from time to time only in view of different orders passed by the court. The entire attempt was to close the Chapter and to point out that nothing wrong has happened and since there is no pecuniary loss and since the officers concerned have retired, nothing need be done. We do not approve of this approach on the part of the Respondents. Inasmuch as these two officers, viz. Mr. Inder Singh and Mr. Khadtare, are senior officers, it is necessary that the Central Board of Excise and Customs must examine as to whether there was any dereliction of duty on their part at the relevant time and if so what action be taken. The Board must also examine as to whether any action can be taken against Mr. P.P. Mittal or he is entitled to the benefit of Rule 9(2)(b)(ii). In the event the Board comes to the conclusion that he is entitled to the benefit of the rule, the Board will examine as to whether to plug such loopholes any amendment of the rule is desirable and if so whether it should move the Central Government for necessary amendment. It is for the Board to take its own decision and if so convinced, take appropriate action in accordance with the principles of natural justice. We have only recorded what has transpired in this court and on the basis of the material, which is brought to our notice. Our observations are only prima facie observations. This is only to bring the state of affairs to the notice of the Board. This does not mean a finding one way or the other against Mr. Mittal or the two superior officers.

13. It is stated by Mr. Buck in his affidavit that the photocopies of the two appellate orders conflicting with each other were made available to Mr. Mittal. It is interesting to note that Mr. Mittal in his affidavit states that having perused the two orders passed by him, he is not in a position to say as to how and in what circumstances the second order was passed. Now normally when a second order in substitution of an earlier one is passed, the second order ought to be a self-explanatory one. What is material to note is that in the second appellate order passed by Mr. Mittal, there is no reference at all to the earlier order, as to why he was passing this second appellate order in the teeth of the first appellate order and as to whether any review was sought by the appellant or otherwise. This inadequacy in the order ought to have been noted by his superiors when the second appellate order was brought to their notice way back in the year 1989 and that is how the entire conduct of Mr. Mittal in passing the second appellate order and the two superior officers Mr. Inder Singh and Mr. Khadtare not looking into the matter carefully becomes a serious one. Not only this but they authorised the acceptance of the second appellate order. The Collector (Appeals) is exercising a quasi-judicial function and the citizens will lose faith in the fairness of the system if orders are passed in such manner and the superior officers overlook their serious breach. At that point of time the conduct of Mr. Mittal could have been looked into and now the conduct of these two officers will

have to be looked into, and perhaps also that of the one who is handling this matter, namely Mr. Buck in not making the papers immediately available to the court and taking different stands from time to time. We would like the Board to examine and find out as to why the files were not quickly forthcoming and why they were required to be called from time to time by passing different orders and in that also, if they are of the opinion that any officer is responsible for shielding Mr. Mittal, it will be expected of the Board to take necessary action against the officer.

14. Having noted this particular aspect, as far as the main controversy is concerned, we have noted that against the first order-in-appeal passed by Mr. Mittal, the Petitioners had moved CEGAT and CEGAT has dismissed their appeal. As against that, in the notings which are now annexed to the affidavit of Mr. Buck affirmed on 23rd July, 2002, it is recorded by the then Assistant Collector (Tribunal) on 13th January, 1989 as follows :-

"As the order-in-appeal is de novo, we may accept the same."

Mr. Parikh, learned Counsel for the Petitioners, therefore, submits that although the first order-in-appeal is confirmed by the CEGAT, it was in fact given up by the Respondents themselves way back in the year 1989 and therefore, the first order-in-appeal does not survive at all. He also points out that a Misc. Application had been filed by the Petitioners on 21st June, 1996 after coming to know about the second order-in-appeal passed by Mr. Mittal and praying that in view thereof, appropriate order be passed. It is in spite of this fact being on record that the CEGAT has passed the order on 23rd September, 1996 confirming the earlier order-in-appeal and without referring to the second order passed by Mr. Mittal in appeal. It is apparent that such a second order-in-appeal would not have been passed unless the Petitioners were interested in obtaining such an order. However, Mr. Parikh is fair enough to state on instructions that the Petitioners are not insisting on the second order being maintained. We are also of the view that in view of the fact that the earlier order-in-appeal was holding the field, there could not be a second order-in-appeal by the same officer against the same order-in-original. We, therefore, hold that the second order passed on 24th November, 1988 is a nullity and is inoperative.

15. Mr. Choudhari, the learned Counsel for the Respondents, has also taken instructions from the officers who are present in court i.e. Mr. Buck, Commissioner of Central Excise, Mr. B. Nanda, Chief Commissioner of Central Excise and Mr. Negi, Additional Commissioner of Central Excise, and made a statement that as far as the order passed by CEGAT confirming the first order is concerned, they are leaving it to the court to pass appropriate order. Mr. Parikh submits that the Petitioners have not been given a proper hearing before CEGAT. Now, it is seen from the record that the Petitioners produced the second order-in-appeal before the CEGAT with their application of 21st June, 1996. The departmental representative was heard, but not the representative of the Petitioners and then the order was passed by CEGAT confirming the first order-in-

appeal. As held by us, the second order- in-appeal was bad in law, but the Petitioners had to be heard with respect to the legality of the first order-in-appeal. That is necessary from the point of view of natural justice as well. In the circumstances of the case, we deem it fit that the order passed by CEGAT confirming the first order-in-appeal ought to be set aside. Accordingly we set aside the order dated 23rd September, 1996 passed by CEGAT confirming the first order passed by Assistant Collector and restore the appeal to CEGAT. We make it clear that this does not mean any expression on merits or validity of the first order-in-appeal dated 27th October, 1987 which alone now holds the field. We expect the CEGAT to hear and decide the revived appeal on merits and expeditiously and preferably by the end of December, 2002. Both parties will apply and get the matter transferred to the Bombay Bench of CEGAT and the Tribunal is expected to hear and decide it by the end of December, 2002.

16. Prothonotary and Senior Master of this Court to send a copy of this order to the Member Secretary (Personnel) of the Central Board of Excise and Customs for action on their part. We direct the Member Secretary (Personnel) to file a report in this court by 30th September, 2002 as to what decision the Board has taken and what steps it is proposing to take.

17. The petition is accordingly disposed of though for the aforesaid purpose only it will be placed before the concerned Bench of this Court for directions on 1st October, 2002.

18. Parties to act on an authenticated copy of this order which will be made available to them.

