(2009) 05 AHC CK 0291

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 1090 of 2009

Som Aromatics APPELLANT

Vs

Union of India and another RESPONDENT

Date of Decision : 07-05-2009

Acts Referred:

Central Excise Rules, 2002 — Rule 25, 26
Central Excises and Salt Act, 1944 — Section 11A(1), 11AC

Citation : (2009) 05 AHC CK 0291

Hon'ble Judges : Amitava Lala, J and Shyam Shankar Tiwari, J

Final Decision : Dismissed

Judgement

Amitava Lala, J.—This writ petition has been made by the petitioner challenging the order dated 30th March, 2009 passed by the Commissioner, Customs and Centraf Excise, Noida. The operative portion of such order is quoted hereunder:

"(i) I, hereby, confirm the demand of Central Excise duty amounting to Rs. 52, 76, 44, 354.00 [Rs. Fifty Two Crore Seventy Six lakh Forty FourThousand Three Hundred and Fifty Four only] against M/s. Som Aromatics, Noida [Noticee No. 1], short paid by them during the period October 2006 to August 2007, under the proviso to Section 11A(1) of the Central Excise Act, 1944, as worked outinAnnexureA& B (Rs. 48, 87, 02, 237.00 + Rs. 3, 89, 42, 117.00) annexed to the Show Cause Notice.

(ii) I hold that interest is chargeable on the above mentioned amount from them under Section 11AB of the said Act.

(iii) As M/s. Som Aromatics, Noida (Noticee No. 1), has already paid amount of Rs. 61, 63, 517.00 (Rs.48, 13, 400.00 and Rs. 13, 50, 117.00) vide Ch. No. 655036 dt. 27.8.2007, Ch. No. 655037 dt. 31.8.2007 and Cheque No. 655084 dt. 17.10.2007, 1 hereby appropriate the same towards above said amount of central excise duty.

(iv) I, hereby impose penalty of Rs.52, 76, 44, 354.00 [Rs. Fifty Two Crore

Seventy Six lakh Forty Four Thousand Three Hundred and Fifty Four only] upon M/s. Som Aromatics, Noida (Noticee No. 1), under Section 11AC of the said Act read with Rule25 of the Central Excise Rules, 2002.

(v) I, hereby impose penalty of Rs. 3, 00, 00, 000.00 {Rs. Three Crore only] on ShriAtuI Kumar Agarwal, Partner of M/s. Som Aromatics, Noida, (Noticee No. 2), under Rule26 of the said Rules for his alleged involvement in evasion of duty by Noticee No. 1.

(vi) I hereby impose penalty of Rs. 70, 00, 000.00 [Rs. Seventy Lakhs only] on Shri Nissar Hussein, Partner of M/s. Som Aromatics, Noida, [Noticee No. 3], under Rule26 of the said Rules for his alleged involvement in evasion of duty by Noticee No. 1.

(vii) I hereby impose penalty of Rs. 60, 00, 000.00 [Rs. Sixty Lakhs only] on Shri Vinod Kumar Bansal, Manager and authorized signatory of M/s. Som Aromatics, Noida, {Noticee No. 4}, under Rule 26 of the said Rules for his alleged involvement in evasion of duty by Noticee No. 1.

The''amount adjudged above shall be paid forthwith by the respective noticees."

2. Mr. Shashi Nandan, learned Senior Counsel duly assisted by Mr. Ashok Kumar, learned Counsel appearing for the petitioner, contended before this Court that an order was passed by a Division Bench of this Court on 25th March, 2009 in Civil Misc. Writ Petition No. 863 of 2009 (Mis. Som Aromatics v. Union of India and another) allowing the petitioner to crossexamine the witnesses. However, certified copy of the order was obtained by the petitioner only on 1 st April, 2009. The petitioner wanted to obtain adjournment even before that day due to nonavailability of certified copy of the order particularly when the High Court was pleased to pass the order in presence of the contesting parties, but no adjournment was granted by the concerned Commissioner. After obtaining such certified copy, the same was actually placed before the Commissioner on 2nd April, 2009 but all were in vain. A copy of the ante dated order of the Commissioner dated 30th March, 2009 was communicated to the petitioner on 2nd April, 2009 itself. The petitioner has contended that the Commissioner has consciously passed this order ignoring the order of the High Court which will be reflected from two paragraphs of the order of the Commissioner. Such two paragraphs are quoted hereunder:

"16.4 On 26.3.2009, Shri Anurag Mishra, Advocate of Mis. Som Aromatics appeared for P.M. He submitted a written letter and intimated that they have filed a writ petition bearing No. 863(T) of 2009 before Hon''ble High Court, Allahabad against verbal denial by CCE, Noida regarding their request for crossexamination. He intimated that the Hon''ble High Court while disposing the Writ Petition on 25.3.2009, directed CCE Noida to pass an appropriate order on the request of the noticee on the issue of crossexamination. Accordingly, he requested to pass an appropriate order against their above said request made earlier."

"18.3.1 find that, Advocate of M/s. Som Aromatics, Noida when appeared for P.H. on 26.3.2009, he submitted a written letter and intimated that they have filed a writ petition bearing No. 863(T) of 2009 before Hon''ble High Court, Allahabad against verbal denial by CCE, Noida regarding their request for crossexamination. He intimated that the Hon''ble High Court while disposing the Writ Petition on 25.3.2009, directed CCE Noida to pass an appropriate order on the request of the noticee on the issue of crossexamination. Accordingly, he requested to pass an appropriate order against their above said request made earlier. I observe that during the course of said personal hearing, advocate of M/s. Som Aromatics were informed to file the copy of said order by 26.3.2009. In this case sufficient opportunity of personal hearings has been given to M/s. Som Aromatics, Noida. Moreover, on the written request of the Noticee company adjournment of personal hearing was allowed more than three times. Thus, it was intimated to them that P.H. fixed for 26.3.2009 is the last one. As per case record, I observe that the M/s. Som Aromatics has failed to submit a copy of Hon''ble High Court order against their W.P., as claimed by them. Thus, I am not inclined to give them more time on this issue and would like to decide the case on the basis of available evidences including above said request made by them."

3. Mr. S.P. Kesarwani, learned Counsel appearing for the respondents, has contended before this Court that the order is an appealable order. Therefore, if the petitioner has any grievance, the same can be raised before the appellate forum. By joining issue therein, Mr. Shashi Nandan contended that when the order is procedurally defective due to aforesaid fault, there is no bar to the petitioner to invoke the writ jurisdiction of the Court for the purpose of redressal of grievance in spite of having an alternative forum for adjudication. He further said that in the above circumstances why the petitioner will be compelled to prefer an appeal on condition of making any predeposit when the order is apparently defective in nature.

4. On the other hand, Mr. Kesarwani contended before this Court that if the letter and spirit of the order of the High Court is being followed by the authority and no prejudice is being caused to that extent, the order impugned cannot be said to be assailable on account of alleged violation of principle of natural justice. By showing paragraph11 of a three Judges'' Bench judgment of the Supreme Court reported in AIR 1983 SC 603 (Titaghur Paper Mills Co. Ltd. and another. State of Orissa and another) Mr. Kesarwani submitted that under the scheme of the Act, there is a hierarchy of the authorities before which the petitioner can get adequate redress against the wrongful acts complained of. It is well recognized that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. Therefore, wrongful act and/or liability cannot be segregated but it will be considered by the appellate forum in its totality. This case has been followed by a three Judges'' Bench of the Supreme Court in the judgment reported in AIR 1985 SC 330 (Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Ltd. and others) in paragraph3. Even by following the aforesaid

judgment i.e. Titaghur Paper Mills Co. Ltd. (supra) the Supreme Court further held that Article 226 of the Constitution of India is not meant to short circuit or circumvent statutory procedures. In some of the cases for some reasons the alternative remedy provided by the statute are bypassed by the writ Court, but the Supreme Court cautioned by saying that "surely matters involving the revenue where statutory remedies are available are not such matters".

5. So far as other aspect is concerned, Mr. Kesarwani further relied upon paragraph12 of a three Judges'' Bench judgment of the Supreme Court reported in 1983 E.L.T. 1486 (S.C.) (Kanungo & Co. v. Collector of Customs, Calcutta and others), wherein it has been held as follows:

"The complaint of the appellant now is that all the persons from whom enquiries were alleged to have been made by the authorities should have been produced to enable it to crossexamine them. In our opinion, the principles of natural justice do not require that in matters like this the persons who have given information should be examined in the presence of the appellant or should be allowed to be crossexamined by them on the statements made before the Customs Authorities. Accordingly we hold that there is no force in the third contention of the appellant."

6. On the other hand, Mr. Shashi Nandan has relied, like before, upon the judgment reported in 2000 (122) ELT 641 (SC) (Swadeshi Polytex Ltd. v. Collector of Central Excise, Meerut) to establish that not allowing crossexamination is, in effect, violation of principle of natural justice.

7. According to us, if we make a conjoint reading of the Kanungo & Co. (supra) and Swadeshi Polytex Ltd. (supra), we shall be able to ascertain that right to crossexamine is not inherent right of an assessee but depending upon the facts and circumstances of each case. Therefore, we cannot hold and say that by disallowing the petitioner to crossexamine, the authority concerned has violated the principle of natural justice. Moreover, Swadeshi Polytex Ltd. (supra) has categorically held with regard to conclusion of the tribunal on the specific case that there was a denial of principle of natural justice, meaning thereby the tribunal held that in that particular case violation of principle of natural justice was there,

which cannot be held to be a settled principle applicable everywhere irrespective of any factual situation. We have considered the same in the earlier occasion and we have dismissed the writ petition, which is reflected from our order dated 25th March, 2009 passed in Mis. Som Aromatics (supra), which is as follows:

"The petitioner has contended before this Court that it has made an application for crossexamining the witnesses, whose statements have bee''n taken behind the back and referred in the reply to the show cause notice dated 30th July, 2008. Mr. VB. Upadhyaya, learned Senior Counsel appearing for the petitioner, contended before this Court relying upon the judgment of the Supreme Court reported in 2000 (122) E.L.T. 641 (SC) (Swadeshi Polytex Ltd. v. Collector of

Central Excise, Meerut) that not allowing crossexamination is, in effect, violation of the principle of natural justice. Mr. S.P. Kesarwani, learned Standing Counsel has relied upon an order of this Court dated 18th December, 2008, which is as follows:

"The petitioners contended before this Court that only four witnesses were examined and for the remaining seven witnesses opportunity of crossexamination were not given. However, the petitioners have given the reply to the show cause notice on 4th December, 2008.

Learned Counsel appearing for the respondents contended that the writ petition is based on apprehension, which has been pleaded in paragraph 21 of the writ petition and premature in nature. According to us, it is true to say that the writ petition is apprehensive in nature and premature too. Therefore, we cannot entertain the writ petition. Hence, the writ petition is dismissed without imposing any cost. In any event, if prejudice is caused to the petitioners on the basis of the point which has been agitated, it is open to the petitioners to take the plea before the appropriate authority for adjudication."

We are of the view that we cannot deviate from our order but when the petitioner has contended that prayer of the petitioner has been refused verbally and on affidavit it is saying so that appropriate application is made for the purpose, we only record that the authority concerned will consider such application in accordance with law.

Thus, the writ petition is dismissed, however, without imposing any cost."

8. However, when the earlier writ petition was filed, we had directed the authority to consider the application to that extent and the authority failed to do so accordingly which, in effect, is a procedural defect. More so the propriety demands that such type of authority should not ignore the judicial order of the highest Court of the State. We, therefore, deprecate the stand taken by the Commissioner concerned but when we see from the order impugned that question, which has been raised hereunder, has been substantially considered, we cannot allow to bifurcate the procedure and merit, one for the writ Court and the other for the tribunal. Hence, we dispose of the writ petition with the direction upon the petitioner to prefer an appeal before the appellate forum taking all the points therein inclusive of procedural impropriety, to have the disposal. However, question of procedural impropriety as preliminary question will be considered at first.

9. No order is passed as to costs. Hon''ble S.S. Tiwari, J. I agree.

