(1989) 04 BOM CK 0064

In the Bombay High Court

Case No : Appeal No''s. 227 and 285 of 1989 in Writ Petition No. 202 of 1989

Swan Mills Limited APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 27-04-1989

Acts Referred:

Central Excise Rules, 1944 — Rule 10, 173
Central Excises and Salt Act, 1944 — Section 11, 11A

Citation : (1989) 25 ECR 18 : (1989) 44 ELT 601

Hon'ble Judges : P.B. Sawant, J;H.H. Kantharia, J

Bench : Division Bench

Judgement

Sawant, J.—Appeal No. 227 of 1989. - Appeal admitted. Mr. Dhanuka waives service on behalf of the respondents.

Appeal No. 285 of 1989. - Appeal admitted Mr. Andhyarujina waives service on behalf of the respondents.

Appeals called our for hearing forthwith.

2. These two Appeals arise cut of the interlocutory order passed by the learned Single Judge on February 14, 1989 in Writ Petition No. 202 of 1989. The petitions is filed by the Swan Mills Limited who are the Appellants in Appeal No. 227 of 1989 against the Union of India and who are the Appellants in Appeal No. 285 of 1989. Both the Swan Mills as well as the Union of India are aggrieved by the impugned order. Hence their respective appeals.

3. Top appreciate the contentions, be may briefly narrate the facts leading to the appeals. It appears that Messrs Swan Mills, the petitioners in the original petition and the Appellants in Appeal No. 227 of 1989 had filed a petition in this Court in the year 1979 challenging the levy of excise duty on the cotton fabrics manufactured and processed by them. In that petition, an interlocutory order came to be passed whereunder pending the hearing and final disposal of the petition, among other things, the Superintendent, Central Excise, was permitted

to assess the differential excise duty and additional duty in respect of the cotton fabrics manufactured by the petitioners and processed by them and to issue demand notice in respect of such differential duty on the processed fabric and the fabric in grey stage but to keep the recovery of the amount in abeyance till the final disposal of the petition, provided the petitioners furnished a Bank Guarantee. He has directed by the High Court, after duly following the procedure under Rule 173-I of the Central Excise Rules, 1944, the Superintendent, Central Excise, determined the duty and passed assessment orders and also issued demand notices from time to time, pending the petition. These orders were never challenged and became final. The petitioners furnished bank guarantees. The petitioners thereafter failed and the amount due under the demand notices became due for realization. The Union of India therefore became entitled to encash bank guarantees.

4. However, it appears that thereafter the petitioners preferred an appeal to the Supreme Court and the Supreme Court in the said appeal passed an interim order on December 9, 1983 in the following terms :

"Pending the hearing and final disposal of the Appeals, we direct that in so far as past, dues are concerned, the Appellants shall pay 50 per cent of those dues in cash and shall furnish Bank Guarantees to the satisfaction of the authorities concerned in respect of the remaining 50 per cent. If the Bank Guarantees have already been furnished in the High Court, those Bank Guarantees will be kept alive from time to time to the extent of 50% provided that in pursuance of the order which we are passing to-day the remaining 50 per cent has been paid in cash. 50 per cent of amount which is required to be paid in cash, will be paid within three months form today and the remaining 50 per cent within three months thereafter. In so far as future payment is concerned, the Appellants shall furnish Bank Guarantee to the satisfaction of the authorities concerned in respect of the disputed portion and shall pay the undisputed portion of duty within 15 days of the date on which demanded. The dispute in these appeals relate to the differences between the ultimate price which they charge from the consumer and the value of the job work done by the Appellant.

Hearing of the appeals is expedited."

5. Ultimately the Supreme Court dismissed the petitioner''s appeal on November 4, 1988 and directed, inter alia, as under :

"In the result, the Appeals preferred by the Union of India are allowed and the judgment of Gujarat High Court under Appeal is set aside. The Appeals preferred by the processors against the judgment of the Bombay High Court and the Writ Petition filed by the processors directly in this Court are dismissed. There will, however, be no order as to cost in the appeal and the Writ Petitions.

The Union of India and its authorities shall be entitled to recover the amounts due by way of arrears of excise duty and shall be entitled to take necessary steps to seek the enforcement of the Bank Guarantees, if any, for the recovery of the arrears".

6. It is clear form the aforesaid order that the Union of India thus became entitled to recover the amount due under the said notices and also to take necessary steps to seek enforcement of the Bank Guarantees. The amount due for the period from August, 1979 to December, 1983, was Rs. 2,73,71,000/- and for the period January, 1984 to November, 1984, was Rs. 1,12,85,404.74. In respect of the first amount, the petitioners had given bank-guarantee in favour of this Court and in respect of the latter amount the Bank Guarantee was given only to the extent of Rs. 94,62,000, but directly in favour of the Revenue. The Revenue encashed the latter Bank Guarantee pursuant to the order of the Court. Thus the entire duty for the first period and an amount of Rs. 18,25,000/- for the later period still remained to be paid. In respect of the first period the authorities have in addition issued also notices u/s 11A of the Central Excise Act; whereas in respect of the later period only the assessment orders and demand notices are issued and no notices u/s 11A have been issued.

7. It is on these facts that the petitioners have filed the present petition contending that unless procedure u/s 11A of the Central Excise Act is followed, the respondent union of India is not entitled to recover any amount due under the assessment orders. They have prayed for appropriate reliefs in the petition. On their application for the interim relief the learned Single Judge has passed the following order :

"In the meantime, the Respondents shall not proceed to encash the Bank guarantees in respect of those amounts for which notices u/s 11A of the Excise Act have been issued without adjudicating upon the said notices.

In respect of those amounts which have been assessed on RT-12 forms submitted, further proceedings u/s 11A are not necessary, except when notices u/s 11A have already been issued.

"Bank guarantees shall be kept alive till the adjudication is over."

It is this order which is challenged in both the Appeals. The petitioner Company is aggrieved by that part of the order which states that further proceedings u/s 11A of the Act are not necessary. The Union of India is aggrieved by that part of the order which injuncts the Revenue from encashing the bank guarantees.

8. Mr. Andhyarujina, the learned Counsel appearing for the Swan Mills, the appellant in Appeal No. 277 of 1989, contends that although the assessment orders passed under Rule 173-I have become final, they cannot be executed unless a further inquiry u/s 11A of the Act is held. With respect to the learned Counsel, we cannot persuade ourselves to accept this proposition which can only be described as gravely misplaced. Such a contention presumes that Section 11A contains provisions for execution of the assessment orders passed under Rule 173-I. That is obviously not the case. Section 11A comes into the picture for assessing duties only in situations mentioned therein and is independent of the

provisions of [This should read Rule 173-I.] Section 173-I. When the assessment orders are passed under Rule 173-I, they are done so after holding an inquiry. These orders are appealable under Chapter VI-A of the Act. If the said orders are not appealed against or having been appealed against, have become final, the amount due under them has to be recovered under the provisions of Section 11 of the Act, which contains provision for executing the orders. As stated above, Section 11A is not the executing Section. In fact, the assessment orders passed u/s 11A (which are independent of the orders passed under Rule 173-I) have also to be executed ultimately under the provisions of Section 11 of the Act.

Mr. Andhyarujina in support of his contention tried to rely upon certain decisions. The first decision relied on is of the Supreme Court reported in Collector of Central Excise, Baroda Vs. Kosan Metal Products Ltd., . We find that there is nothing in that decision to support his contention. The facts narrated in the said decision show that a notice was issued to the assessee-Company requiring it to show cause as to why the excise duty should not be recovered from it under Rule 10 of the Central Excise Rules as it then existed and as to why the penalty should not be imposed on it under Rule 173-I. The notice was issued on the ground that the respondent Company cannot eligible to set off the duty under a certain notification under which the set off was claimed. In reply, the assessee-Company contended that the said notice under Rule 10 had not been issued to it within time and that there had been no fraud, collusion or willful mis-statement, etc. on its part and that it had correctly availed of the off duty. The main question, therefore, which fell for consideration in that case was whether proper notice had been issued u/s 11A. On the facts of the case, it was held that a proper notice under the section had not been issued. Thus the case fell u/s 11A. It was not a case of an assessment order under Rule 173-I which had become final.

The next decision relied on by Mr. Andhyarujina is that of the Kerala High Court reported in 1978 E.L.T. (66) Good Shephard Rubber Company, Palghat v. Inspector of Central Excise, Palghat & Others. Here again the imposition of duty was on account of short-levy and, therefore, it is not the provisions of Rule 173-I which were attracted but of the then Rule 10 (corresponding to present Section 11A) which were attracted. The third decision relied on by Mr. Andhyarujina is an interlocutory order dated January 23, 1979 passed by the learned Judge of this Court in Writ Petition 1988 The Standard Mills Co. Ltd. v. Union of India & Others. In that case the question was of interpretation of an order passed by the Supreme Court on April 28, 1988 which has nothing to do with the present case. By the order the Supreme Court had directed that where notices u/s 11A of the Act were not issued, the Revenue would be entitled to do so and that the Revenue should not pass orders pursuant to these notices without giving an opportunity to the assessee to make a representation against the proposed order. The Revenue had further takes a stand the since the assessment was sought to be made provisionally, no opportunity was necessary to be given to the assessee. It is in those circumstances that an ad-interim injunction was granted against the Revenue restraining it from proceedings further with the assessment without giving an opportunity to the assessee. It is this order which was further confirmed by the Division Bench in an appeal preferred by the Revenue. We do not see how these decision have any relevance to the facts of the present case.

9. Shri Andhyarujina no doubt tried to make much of the fact that for the amount due for the period from August, 1979 to December, 1983, the authorities concerned had in fact issued notices u/s 11A and, therefore, he contended that unless the proceedings u/s 11A are completed, no amount due for that period should be recovered. If we are right in the view that we have taken above, it is clear that once the assessment orders made under Rule 173-I had become final, there was no need to issue notices u/s 11A. If the authorities have, in spite of this, issued notices also u/s 11A for the recovery of the amount due under the said assessment orders, they have indulged in an exercise which is not warranted by law. However, merely because the authorities have under a mistaken view of the law or otherwise, issued notices u/s 11A, there is no reason why the Revenue should be prevented from collecting the amount due under the assessment orders which have already become final. Hence as far as the part of the order passed by the learned Single Judge which prevents the respondent Union of India from encashing the Bank Guarantees in respect of those amounts for which notices u/s 11A have been issued without adjudicating upon the said notices is concerned, the same, according to us, cannot be sustained and the injunction has to be vacated. There is no reason why the Revenue should be deprived of that amount even pending the unnecessary inquiry u/s 11A. In any case, this being an interlocutory stage, The Revenue can encash the Bank Guarantee and if and when the petitioner succeeds, the revenue may be asked to refund the amount with suitable directions.

10. Mr. Dhanuka stated that without prejudice to the Revenue''s contention that the notices and proceedings u/s 11A are not necessary in the present case, the Revenue has no objection to complete the proceedings under that section where notices under the section have been issued, though wrongly, and they would complete the said proceedings as early as possible.

In the circumstances, we find no merit in Appeal No. 227 of 1989 and dismiss the same.

11. Since we are of the view that there is no need to adopt further proceedings in the same matter u/s 11A, there is no reason why the Revenue should be prevented from encashing the bank guarantees for which they have become entitled to, years ago. We, therefore, allow Appeal No. 285 of 1989 filed by the Union of India and set aside that part of the impugned order. The Union of India therefore will be entitled to encash the bank guarantees notwithstanding the fact that notices u/s 11A have been issued and they are pending adjudication.

12. The above views are our prima facie views in the matter and expressed only for the disposal of the present appeals which are against the interlocutory order.

13. Mr. Andhyarujina appearing for the appellants in appeal No. 227 of 1989

prays for stay of the present order or to maintain status-quo. In the view which we have taken we see no reason to accede to this prayer as we have already observed in the order in question that if the petitioners-appellants succeed in the petition, the Court can always give a direction to the Union of India to refund the amount within such time as it may direct and even with interest, if any, if they are so entitled. As against this, we find that the Union of India cannot live on Bank Guarantees as has been often observed by the Supreme Court itself. What is more, as has been pointed out in the order, the Union of India has been deprived of the amount for several years now and no prejudice whatsoever will be caused to the petitioners-appellants, since their moneys are always secured with the Government. We, therefore, reject the application for stay.

14. The Prothonotary and Senior Master will take steps to encash the Bank Guarantees within two weeks from today and pay the amount to the Union of India. The Prothonotary to act on the minutes of this order.