

(2001) 11 MAD CK 0069

In the Madras High Court

Case No : Criminal O.P. No's. 16174 to 16176 of 1999 and Criminal M.P. No's. 7844, 7846 and 7848 of 1999

Swathy Chemicals Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 13-11-2001

Acts Referred:

Central Excises and Salt Act, 1944 — Section 9(1)

Citation : (2002) 139 ELT 498

Hon'ble Judges : C. Nagappan, J

Bench : Single Bench

Advocate : Habibullah Basha for C. Mani Shankar, for the Appellant; T. Sivananthan, Spl. Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

C. Nagappan, J.—The petitioner in all the petitions is one and the same and it is accused No. 1 in EOCC Nos. 167 to 169 of 1996 on the file of Additional Chief Metropolitan Magistrate for Economic Offence Cases, Egmore, Madras and it seeks to quash the proceedings in the cases in so far as it is concerned.

2. The point for determination in all the petitions is one and the same and hence they are disposed of by common order.

3. The averments in all the petitions are similar and they are summarised. The petitioner company was engaged in manufacture of Zinc Chloride and Zinc Sulphate and it closed down its manufacturing operation in 1991. The petitioner company commenced production of Zinc Sulphate during the year 1985-86 by obtaining Central Excise Licence. The petitioner had informed the Central Excise Department the detailed manufacturing process and the nature of raw material used for manufacture of Zinc Sulphate. Various clarifications raised by the Central Excise department were also clarified by the petitioner during the period 1986 to 1990. The petitioner filed classification list containing the details of the

excisable goods and the rate of duty that is sought to be claimed by it by giving the details of the exemption notification for concessional rate of duty and the petitioner has been following these procedures without fail.

The Excise Officer proposed modification of the classification list by issue of show cause notices on 15-5-1990 and August, 1990 and they were adjudicated upon on 16-9-1990 and in that order, the respondent department refrained from imposing any penalty acknowledging the fact that the petitioner had complied with the procedure prescribed under the law and had also got the classification list approved and hence there was no violation of any provisions of the Act or Rules and there was no attempt to evade payment of duty.

While so, the Commissioner of Central Excise, Madras, issued show cause notice, dated 11-4-1991, seeking to demand a sum of Rs. 25,39,125.38 towards excise duty on brass/zinc/copper ingots manufactured by the petitioner during the period 1986-1990 by denying the benefits of concessional rate of duty under various exemption notifications during the relevant time. It was alleged in the show cause notice that the petitioner had suppressed material facts and irregularly availed of concessional rate of duty under the exemption notifications with intent to evade payment of central excise duty. Accordingly, the extended period of limitation prescribed u/s 11A of the Act was invoked and the duty was demanded under Rule 9(2) of the Rules. The show cause notice also proposed to impose penalty under Rule 173Q of the Rules. The petitioner gave detailed submission before the Commissioner of Central Excise, Madras, but, he in his order, dated 29-8-1991, confirmed the demand of duty of Rs. 24,51,006.96 and also imposed the penalty of Rs. 2,00,000/- on the petitioner.

The petitioner filed an appeal u/s 35B of the Act before the Customs, Excise and Gold (Control) Appellate Tribunal, Madras (CEGAT), in Appeal No. E/SB/1203/92, challenging the order of the Commissioner both with respect to demand of duty and imposition of penalty on the ground that the petitioner had not violated any of the provisions of the Act or Rules and it had no intention to evade payment of duty. When the appeal was pending before CEGAT, Madras, the respondent filed EOCC Nos. 167 to 169 of 1996 against the petitioner u/s 9(l)(b)(i) and 9(l)(bb)(i) of the Act for the alleged contravention of Rules 9(1), 173F and Rule 52A read with 173F and 173G read with Rule 226. The complainant filed three complaints for each financial year, namely, 1986-87, 1987-88 and 1988-89, which were taken on file in C.C. Nos. 167 to 169 of 1996 respectively. The total amount of alleged evasion for the entire period was Rs. 24,51,006.96, which was the amount demanded by the Commissioner of Central Excise, Madras, for the years 1986 to 1989. The complaints were more or less reproduction of the allegations made in the show cause notice, dated 11-4-1991 and relied only upon the order, dated 29-8-1991, of the Commissioner of Central Excise, Madras. The main charges in the complaints are that the petitioner had intentionally evaded payment of Central Excise Duty to the extent of Rs. 24,51,006.96 and had allegedly contravened the various provisions of the Act and Rules, attracting

criminal proceedings under the Act, The Technical Director of the petitioner Company was named as Accused No. 2 in all the complaints.

The Additional Chief Metropolitan Magistrate, Economic Offences, Egmore, Madras, took cognizance of the offence on 19-11-1996 and issued summons to the accused. In the appeal, CEGAT, by its order, dated 9.7.1999, set aside the order of the Commissioner and also the demand for duty of Rs. 24,51,006.96 and also the penalty of Rs. 2,00,000/-. The Appellate Tribunal held that all declarations were given by the petitioner in great detail, classification lists filed and approved, subsequent queries replied by the petitioner and there was no question of any mis-declaration with an intent to evade payment of duty. It further held that the petitioner claimed exemption under notifications by explaining the grounds on which such exemption was claimed and hence the claim for exemption would not amount to mis-declaration and the petitioner followed the procedure under the Central Excise Act and Rules, including the submission of classification lists, which were approved and clearance of goods on the prescribed clearance documents and hence Rule 9(2) would not apply. Accordingly, both the duty demand and the penalty were set aside in toto. Thus, the appellate tribunal had held that there has been no suppression or mis-declaration by the petitioner and it had followed the procedure prescribed under the Act.

The allegations mentioned in the complaints are repetition of the allegations made in the show cause notice issued to the petitioner, which were subsequently adjudicated upon by the Commissioner of Central Excise and CEGAT. The duty and the penalty imposed on the petitioner by the adjudicating authority was set aside by CEGAT by its order, dated 9-7-1999. Since the complaints are only repetition of the same allegations, they are not maintainable. It will be an exercise in futility if the prosecution is allowed to proceed further. The proceedings are liable to be quashed, since there are no material to warrant or sustain the prosecution.

4. The allegations against the petitioner company in the complaints are that it had suppressed the fact that they were using imported raw-materials, namely, brass ash/zinc ash in the process of manufacture, they had wilfully made false statements in the classification lists filed by them from the year 1986 onwards regarding the use of imported raw materials, they claimed and wrongfully availed the exemptions under notifications and clearance of the goods was in violation of the Rules and thus intentionally evaded payment of Central Excise Duty for the period between 1986 to 1989. It is also stated in the complaints that the Collector of Central Excise, Madras, has adjudicated the matter and by order, dated 29-8-1991, demanded the duty evaded Rs. 24,51,006.96 from the company being the duty payable on the clearance of goods from 1986-67 to 1988-89 and he had also imposed a penalty of Rs. 2,00,000/- on the petitioner company. Based on this adjudication, the prosecution against the petitioner had been initiated on the same facts and evidence by lodging three separate

complaints for each financial year.

The petitioner preferred an appeal against the order of adjudication of the Collector of Central Excise, dated 29-8-1991, to the Customs, Excise and Gold (Control). Appellate Tribunal at Madras in Appeal No. E/SB/1203/92 and the Tribunal, by order dated 9-7-1999, set aside the order of the Collector and allowed the appeal. Thereafter, the petitioner filed the present petitions for quashing the proceedings in the cases.

5. Mr. Habibullah Basha, learned Senior Counsel for the petitioner, contended that the Tribunal has concluded that there was no mis-declaration by the petitioner with intent to evade payment of duty, its claim for exemption would not amount to mis-declaration and the petitioner has followed all the procedures under the Central Excise Act and Rules and the Tribunal has set aside the duty demand and the penalty in toto and the complaints are only repetition of the allegations made in the show cause notice and when the prosecution is based on the same set of facts and evidence, it will be unjust to require the petitioner to go through the process of prosecution in the circumstances of the case and in support of his contention, he relied on the following decisions.

In *Uttam Chand and Others Vs. Income Tax Officer, Central Circle, Amritsar*, the Supreme Court held that it would be clear from the order of the Tribunal that the assessee was the partner of the firm and the firm was a genuine firm and hence the assessee cannot be prosecuted for filing false returns and quashed the prosecution.

In *S.K. Sinha Vs. S.K. Shingal and Another*, the Delhi High Court held as follows :

"7..... A decision by the Tribunal in the proper sense of the word therefore, is a decision of a departmental authority drawn on the basis of a set of facts and evidence. The least that can be said is that if the department does not feel aggrieved of the finding of the Tribunal and accepts it as final and correct, then it has to be contented with it. I, therefore, fail to understand as to how on the same set of facts and evidence, the department can foist criminal liability upon a person about whom it has accepted that on this set of facts and evidence he cannot even be proceeded against in the adjudication proceedings. In criminal matters the degree of proof required is far more strict. If the departmental authority, has no good case, for purposes of adjudication, it cannot claim to have a good case for purposes of criminal prosecution, particularly when the prosecution is also based on the same set of facts and evidence. It will be most unjust to require the petitioner to go through the entire process of prosecution in the circumstances of this case. This might virtually amount to persecution and in my view this will amount to abuse of the process of the Court. In view of the findings of the Tribunal, there is no case against the petitioner. It is as such not legal to prosecute the petitioner of a criminal offence on this set of facts and evidence."

In the decision in *G.L. Didwania and Another Vs. Income Tax Officer and Another*, , their Lordships of the Supreme Court laid down thus.

"4. In the instant case, the crux of the matter is attracted and whether the prosecution can be sustained in view of the order passed by the Tribunal. As noted above, the assessing authority held that the appellant assessee made a false statement in respect of income of Young India and Transport Company and that finding has been set aside by the Income Tax Appellate Tribunal. If that is the position then we are unable to see as to how criminal proceedings can be sustained.

5. Mr. A. Raghuvir, learned Senior Counsel appearing for the department, submitted that the fact whether the firm is a genuine firm, still remains as a question to be resolved and, therefore, the proceedings cannot be quashed at this stage. We do not agree. The whole question is whether the appellant-assessee made a false statement regarding the income which according to the assessing authority has escaped assessment. So far as this issue is concerned, the finding of the Appellate Tribunal is conclusive. Therefore, as held in *Uttam Chand and Others Vs. Income Tax Officer, Central Circle, Amritsar*, , the prosecution cannot be sustained. Accordingly, the proceedings are quashed and the appeal is allowed."

6. Per contra, Mr. T. Sivananthan, Special Public Prosecutor for the respondent, contended that the adjudication by the Tribunal is not a bar to the criminal prosecution and the prosecution in a Criminal Court is to be determined on its own merits uninhibited by the finding of the Tribunal and he relied on the decision in *Assistant Collector of Customs v. L.R. Malwani*, reported in 1999 (110) ELT 317 (SC). The question that arose for decision in that case was as to whether the prosecution was barred under Article 20(2) of the Constitution of India as against the accused by reason of the decision of the Collector of Customs in the proceedings under the Customs Act and the Supreme Court held that the adjudication before the Collector of Customs is not a prosecution and there is no bar to the criminal prosecution and it does not amount to double jeopardy. The petitioner herein does not challenge the criminal prosecution on the ground of "double jeopardy" and the above decision will not apply to the facts of the present case.

The next decision relied on by the Special Public Prosecutor is *Santram Paper Mills Nadiad Vs. Collector of Central Excise, Ahmedabad*, . In the facts of the above case, the dispute was whether the product manufactured by the appellant was wrapping/packing paper or mill board and the appellant filed a classification list, which was approved. But, later notice was given seeking to revise the classification and it was admitted that latter trade notice was not brought to the notice of the Tribunal when it passed the order and in those circumstances, the Supreme Court held that the prosecution in the Criminal Court against the appellant shall be determined on its own merits uninhibited by the findings of the Tribunal. The facts in the above case are entirely different and the decision does

not apply to the facts of the present case.

The other decision that was relied on is State of Karnataka Vs. Sir Janakusa Jeevansa Bakale and Another, . In this case, gold in question was confiscated in a proceeding under Chapter XIV of the Customs Act and the criminal prosecution was also launched against the accused and the Apex Court held that the confiscation proceedings under Chapter XIV of the Act has got nothing to do with the criminal prosecution under Chapter XVI of the Act. The facts in the above case are different and this decision is not relevant.

7. Based on the adjudication order of the Collector of Central Excise, dated 29-8-1991, the prosecution against the petitioner has been initiated and when it is pending, CEGAT in its order, dated 9-7-1999, has rendered the following findings.

"(i) The petitioner herein had declared that they were importing zinc ash on which they were even paying countervailing duty in addition to the basic Customs Import Duty and they have declared the detailed process of manufacture and there was no suppression as alleged.

(ii) They had filed classification lists, which were approved by the authorities and therefore there was no question of mis-declaration with intent to evade duty.

(iii) The petitioner herein had claimed exemption by explaining in their letter as well as in the classification lists the grounds on which they claimed exemptions and, therefore, as held by the Supreme Court in the decision in M/s. Northern Plastic Limited Vs. Collector of Customs and Central Excise, , such claim to exemption was a matter of belief of the assessee and would not amount to mis-declaration.

(iv) The petitioner herein had followed all the procedures under the Central Excise Act and Rules, including clearance of goods on the prescribed clearance documents. There were no malafides on the part of the petitioner."

The department does not appear to have challenged the decision of the Tribunal and that has become final.

8. In view of the findings of the Tribunal, it is not legal to prosecute the petitioner on the same facts and evidence. The decisions cited by the learned Senior Counsel for the petitioner, which were referred to earlier, squarely apply to the facts of the present case. The criminal proceedings against the petitioner herein cannot be sustained and are liable to be quashed.

9. In the result, all the petitions are allowed and the proceedings in EOCC Nos. 167 to 169 of 1996 on the file of Additional Chief Metropolitan Magistrate for Economic Offence Cases, Egmore, Madras, are quashed in so far as the petitioner is concerned. Connected Crl. M.P. Nos. 7844, 7846 and 7848 of 1999 are closed.