

(2005) 12 MAD CK 0043

In the Madras High Court

Case No : CRP No's. 4128 of 2001, 57 and 4113 of 2002 and C.M.P. No. 516 of 2002

The Assistant Commissioner of Central Excise and The
Commissioner of Central Excise

APPELLANT

Vs

Diamond Engineering (Chennai) Private Limited
The
Additional Director General, Directorate General of Central
Excise Intelligence Vs Kiran Machines and Others

Union of India (UOI) Vs Diamond Engineering
(Chennai) Pvt. Ltd.

RESPONDENT

Date of Decision : 23-12-2005

Acts Referred:

Central Excises and Salt Act, 1944 — Section 40
Civil Procedure Code, 1908 (CPC) — Section 9
Constitution of India, 1950 — Article 227

Citation : (2006) 203 ELT 193 : (2006) 3 LW 229

Hon'ble Judges : P. Sathasivam, J

Bench : Single Bench

Advocate : K. Kumar, for M. Dhandapani, Addl. Central Govt., in C.R.P. No. 4128 and 4138/2001, R. Santhanam, in C.R.P. Nos. 4113/2001 and 57/2002 and R. Muthukumarasamy, for J. Pothiraj in C.R.P. Nos. 4129 and 4138/2001 for C. Kasirajan in C.R.P. No. 4113/2001 and 57/2002, for the Appellant;

Judgement

P. Sathasivam, J.—In all the Civil Revision Petitions, the petitioners are Secretary to the Government, Ministry of Finance, Union of India and Commissioner of Central Excise, Chennai. The issue raised in all these petitions is common, they are being disposed of by the following common Order.

2. C.R.P.No. 4113/2001 is filed against order dated 25-9-2001 of the Subordinate judge, Poonamallee made in I.A.No. 1182/2001 in O.S.No.317/2001 in and by which the learned Judge allowed the said application and granted injunction restraining the respondents/ defendants therein from proceeding in terms of show cause notice No. SCN 31 /95 dated 31-8-95 and amended by addendum dated 15-9-95 pending disposal of the suit.

3. C.R.P.No. 4128/2001 is against order dated 9-8-2001 of the XV Assistant Judge, City Civil Court, Chennai made in I.A.No. 1 1797/2001 in O.S.No. 4177/2001 in and by which the learned Judge after setting the first respondent therein-Department ex parte, allowed the application granting injunction restraining the first respondentDepartment from initiating any further proceedings pursuant to the show cause notice dated 28-5-2001.

4. C.R.P.No. 4138 of 2001 is against order of the XV Assistant Judge, City Civil Court, Madras dated 9-8-2001, made in I.A.No. 12061 of 2001 in O.S.No. 4259 of 2001 in and by which the learned Judge after setting the first respondent therein-Department ex parte, allowed the application and granted injunction from proceeding pursuant to the show cause notice dated 1-3-2001.

5. In C.R.P.No. 57 of 2002, the petitioners seek to call for the plaint in O.S.No. 129 of 2001 and I.A.No. 477 of 2001 pending on the file of the Principal Subordinate Judge, Chengalpattu and strike down the plaint.

6. Heard Messrs. K. Kumar and R. Santhaman, learned Senior Central Government Standing counsel for petitioners-Department and Mr. R. Muthukumarasamy, learned Senior counsel for the contesting respondents.

7. It is seen from the materials placed the contesting respondents namely, Diamond Engineering (Chennai) Private Limited and Kiran Machines, aggrieved by the show cause notices dated 31-8-95, 15-9-95 and 28-5-2001 issued by the Central Excise Department, approached the Civil Courts by filing Civil Suits namely, O.S.No. 317/2001 on the file of Subordinate Judge, Poonamallee, O.S.No.4177 and O.S.No. 4259/2001 on the file of XV Assistant Judge, City Civil Court, Chennai and O.S.No. 129/2001 on the file of Principal Subordinate Judge, Chengalpattu. In the plaint, the respective plaintiff has raised several contentions questioning the issuance of the show cause notices on the grounds of limitation as well as their validity by pointing out various infirmities. In the first case namely, O.S.No. 317/2001, the plaintiff also filed I.A.No. 1182/2001 under Order 39, Rules 1 and 2 C.P.C. praying for an order of injunction restraining the defendants-department and their men from proceeding in terms of show cause notice dated 31-8-95 and 15-9-95. The said application was resisted by the department by filing counter. The main contention of the department urged before the Court below is that the suits are not maintainable, since they are barred u/s 40 of the Central Excise Act, 1944. The other objection was the plaintiff can very well submit his objections to the show cause notices and depending on the order of the original authority, they can avail the opportunity of filing appeal and revision before the appellate and revisional authorities. By order dated 25-9-2001, the learned Subordinate Judge, Poonamallee, after finding that there is prima facie in their case, accepted the claim of the plaintiff, allowed the application and granted injunction restraining the department from proceeding with the show cause notice dated 31-8-95 and 15-9-95, against which the Department has filed C.R.P. No. 4113/2001.

8. Coming to the other C.R.Ps., namely, C.R.P.Nos. 4128 and 4138 of 2001, questioning the show cause notices dated 28-5-2001 and 1-3-2001, Kiran Machines have filed O.S.No.4177/2001 and 4259/2001 on the file of XV Assistant Judge, City Civil Court, Chennai. They also filed I.A.No. 11797/2001 and 12061/2001 praying for an order of injunction restraining the Department from proceeding with the show cause notice dated 28-5-2001 and 1-3-2001 respectively. The plaintiff/petitioner has raised similar contention like that raised by Diamond Engineering Private Limited in the former C.R.P (C.R.P.No. 4113/2001). Since the Department did not appear and contest the said injunction application by filing counter, after setting them ex parte, by separate order dated 9-8-2001, the learned Assistant Judge allowed the applications and granted injunction from proceeding with the show cause notices dated 28-5-2001 and 1-3-2001.

9. In the last Revision, namely, C.R.P.No. 57 of 2002, the Department seeks to strike of the plaint in O.S.No. 129 of 2001 filed by Diamond Engineering Private Limited. Here again, the Department has urged the very same contentions as stated in other C.R.Ps., particularly C.R.P.No. 4113/2001, namely, the Civil Court has no jurisdiction and the plaintiff has effective remedy by way of departmental appeal and revision.

10. Now I shall first consider the main issue namely,

i) Whether the plaintiffs are justified in approaching the Civil Courts questioning the issuance of show cause notices? and

ii) Whether the Courts below are right in allowing the Interlocutory Applications and granting injunction in favour of the plaintiffs?.

11. At the foremost Mr. K. Kumar, learned senior counsel for the Department by drawing my attention to Section 40 of the Central Excise Act, 1944, would submit that the suits as framed in all these cases are not maintainable and the Courts below ought to have rejected the plaints. Section 40 of the Central Excise Act, 1944 reads as under:

"40. Protection of action taken under the Act.-(1) No suit, prosecution or other legal proceeding shall lie against the Central Government or any officer of the Central Government or a State Government for anything which is done, or intended to be done, in good faith, in pursuance of this Act or any rule made thereunder.

(2) No proceeding, other than a suit, shall be commenced against the Central Government or any officer of the Central Government or a State Government for anything done or purported to have been done in pursuance of this Act or any rule made thereunder, without giving the Central Government or such officer a month's previous notice in writing of the intended proceeding and of the cause thereof or after the expiration of three months from the accrual of such cause."

As rightly pointed out by Mr. R. Muthukumarasamy, learned senior counsel for

the contesting respondents, a reading of the above provision shows that there is no specific bar in proceeding against the orders of the Customs officers/authorities in a Civil Court. As rightly contended, the said provision is a protection against the officers at the Central or State Government from implementing the provisions of the Central Excise Act. Though Mr. K. Kumar as well as Mr. R. Muthukumarasamy cited several decisions of this Court and the Apex Court in support of their respective claim, the fact remains that the Department i.e., petitioners/defendants have not filed separate petition under Order 7 Rule 11 (d) of C.P.C. for rejection of plaint on the ground that the suit is not maintainable in view of various provisions of the Central Excise Act. It is also not in dispute that if a specific issue regarding jurisdiction is framed, the Court is bound to decide the issue first before going into other issues while pronouncing its Judgment. This is clear from Order 14, Rule 2 (2) of Code of Civil Procedure. It is also brought to my notice by Mr. R. Muthukumarasamy, learned senior counsel for the contesting respondents, that Section 9 C.P.C. enables the Courts to try all suits of a Civil nature excepting suits of which their cognizance is either expressly or impliedly barred. According to him, in the absence of specific bar in the Act (Central Excise Act) questioning the show cause notice, the suits as laid are maintainable and the concerned Civil Courts have to decide the issue on merits.

12. As said earlier, on behalf of both sides, several decisions have been cited, including a leading judgement of the Supreme Court on the point of jurisdiction in *Dhulabhai and Others Vs. The State of Madhya Pradesh and Another*, in support of their respective claim. In the light of the order to be passed hereunder, I am of the view that it is unnecessary to refer the same in this common order for the present. As far as O.S.No. 317/2001 pending on the file of Subordinate Judge, Poonamallee is concerned, though the plaintiff has prayed for an injunction in I.A.No. 1182/2001 and the Department has filed a counter opposing the same, the learned Subordinate Judge has not framed any specific issue regarding the jurisdiction before considering prima facie case.

13. In so far as the suits in O.S.Nos. 4177/2001 and 4259 /2001 pending on the file of XV Assistant Judge, City Civil Court, Chennai are concerned, in the applications for injunction, namely, I.A.Nos. 11797/2001 and 12061/2001 respectively, admittedly, the Department did not file counter affidavit conveying their stand and they were set ex parte. Unfortunately, the learned trial Judge without giving any reason much less giving attention to the jurisdictional aspect, particularly taking note of the failure on the part of the Department in filing counter, passed a non-speaking order and granted ex parte injunction. Inasmuch as the respondents/defendants are none-else than the Central Government Department, I am of the view that the trial Court ought to have granted one more opportunity before setting them ex parte and thus committed an error in granting ex parte order of injunction without assigning any reason. In other words, I am satisfied that the order of the XV Assistant Judge does not disclose any reason, particularly whether it has focussed its attention on the point of

jurisdiction and whether a prima facie case is made out and balance of convenience is found in granting injunction in favour of the petitioner/plaintiff. Courts have repeatedly held that merely because the respondent/defendant is absent, interim order cannot be granted without considering and satisfying itself with regard to the plaint averments. The recourse adopted by XV Assistant Judge cannot be accepted.

14. Coming to the last case i.e., O.S.No. 129 of 2001 on the file of Prl. Subordinate Judge, Chengalpattu, the plaintiff has furnished necessary details how the suit is maintainable irrespective of remedy by way of filing objection to the show cause notice and further remedies by way of appeal and revision. As said earlier, the Department has not filed separate application under Order 7 Rule 11 (d) of C.P.C. questioning maintainability of the suit and without doing so, they straight away filed Revision, viz., C.R.P.No. 57 of 2002 for striking down the plaint under Article 227 of the Constitution of India.

15. On going through the averments made in the plaint in O.S.No. 317/2001, the order passed by the Sub Court, Poonamallee in I.A.No. 1182/2001 dated 25-9-2001, the ex party non-speaking order of the learned XV Assistant Judge, City Civil Court, Chennai in I.A.Nos. 11797/2001 and 12061/2001 dated 9-8-2001 as well as the plaint averments in O.S.No. 129/2001 of Sub Court, Chengalpattu, I am of the view that it is not desirable for this Court to go into the jurisdictional issue in these Revision Petitions. It is not in dispute that only in C.R.P.No. 57/2002, the Department has prayed for striking down the plaint in O.S.No. 129/2001 of Sub Court, Chengalpattu. In other Revision Petitions, the Department mainly challenges the order passed in the Interlocutory Applications. In such circumstances, particularly taking note of the rival contentions raised relating to jurisdiction with reference to the provisions of the Act as well as judicial pronouncements of this Court and the Apex Court, it is but proper for the respective Courts to frame specific issue relating to jurisdiction and try the same after affording opportunity to both parties. Though the Court is expected to consider all issues both of law and of fact, in view of the serious objections raised by the Department, I am of the view that while framing issues pertaining to the claim made in the suit, the respective Courts are directed to frame a specific issue relating to jurisdiction of the Court/to the suit as a first issue and after deciding the said issue (relating to jurisdiction), depending on the outcome of the said issue, they will be permitted to proceed further to decide other issues on merits. As said earlier, in view of the fact that the relevant issue relating to jurisdiction is to be specifically tried and decided by the Courts below, I am not referring to any of the decisions cited on either side, however, both parties are free to place all the relevant materials, evidence both oral and documentary, in support of their respective claim. It is needless to mention that the Courts below are duty bound to consider the same and pass a full-fledged/reasoned order supported by decisions that may be placed before them. Considering the fact that the suits are of the year 2001, the Subordinate Judge, Poonamallee, the XV Assistant Judge, City Civil Court, Chennai, and the Subordinate Judge,

Chengalpattu are directed to give priority to these suits and pass orders one way or other in accordance with law on or before 28th April, 2006, after affording full opportunity to both parties. Till such final decision being taken, both parties are directed to maintain status-quo prevailing as on date. Civil Revision Petitions are disposed of on the above directions. No costs. Consequently, connected C.M.P., is closed.