

(2000) 02 KAR CK 0043
In the Karnataka High Court
Case No : Civil Petition No. 526 of 1999

The Commissioner of Central Excise, Bangalore	APPELLANT
Vs	
Jindal Aluminium Limited, Bangalore and another	RESPONDENT

Date of Decision : 07-02-2000

Acts Referred:

Central Excise Rules, 1944 — Rule 209A

Citation : (2000) 71 ECC 409 : (2000) ECR 569 : (2000) 122 ELT 645 : (2000) ILR (Kar) 3271 : (2001) 3 KarLJ 450 : (2000) 3 KCCR 72 SN

Hon'ble Judges : V.K. Singhal, J; T.N. Vallinayagam, J

Bench : Division Bench

Advocate : Sri Ashok Harnahalli, for the Appellant; Sri Rajesh Chandra Kumar, for the Respondent

Judgement

T.N. Vallinayagam, J.—The Revenue by this petition, have raised the following three questions arising out of the order of the Central Excise, Gold (Control) Appellate Tribunal dated 3-7-1998:

"1. Whether the order of Adjudicating Authority which is confirmed by the Tribunal is passed in violation of principles of natural justice?

2. Whether the appeal is liable to be dismissed for non-joinder of M/s. Arya Central Transport Company Limited as respondent?

3. Whether the Tribunal has erred in holding that the 1st respondent had not removed the goods clandestinely from the factory premises?"

2. According to the Revenue, the respondent being a manufacturer of aluminium extrusions removed the goods from their factory without paying the Central Excise Duty. The officers of the Central Excise Department searched the premises of the first respondent and M/s. Arya Central Transport Company Limited. On the basis of those documents found from transporter it was found that the first respondent is transporting the goods without documentation and without payment of duty in collusion with M/s. Arya Central Transport Company Limited.

Show-cause notice was issued on 24-4-1995 for recovery of Rs. 99,05,802/-. A show-cause notice was also issued to M/s. Arya Central Transport Company Limited for imposition of penalty under Rule 209-A of the Central Excise Rules, 1944. The Commissioner of Central Excise dropped the proceedings against the first respondent as well as the transporter. Revenue being aggrieved by the order of the Commissioner filed an appeal before the Tribunal only against first respondent and cross-objections were also filed by the first respondent. No appeal was filed against the order passed by the Commissioner dropping the proceedings under Rule 209-A against the transporter. The Tribunal considered the various documents which were seized from the premises of the first respondent. Statements of the various persons of transporter were also taken into consideration. Various affidavits were filed by the employees of the first respondent and even the question of non-application of mind by the Commissioner for any mala fide was also examined. The finding which has been recorded by the Tribunal is that the evidence against the assessee is totally incredible and is required to be rejected on more than one ground. One of the reasons which was considered by the Tribunal was that the M/s. Arya Central Transport Company Limited was not made party to the appellate proceeding. It was observed that the evidence of M/s. Arya Central Transport Company Limited is being used to allege clandestine production and removal of goods by the assessee and that the quantum of their clearance has been dropped and the evidence of M/s. Arya Central Transport Company Limited having been brought on record and by not making them a party, the appeal against the respondent is not maintainable and the appeal is required to be dismissed.

3. The other ground taken by the Revenue was that there was gross violation of the principles of natural justice inasmuch as the Collector did not allow to depute some officer to defend their case nor he had given reasonable opportunity to them. This contention was rejected as baseless and frivolous. It was observed that the revenue knew their case better. They had made thorough investigation in the respondent's factory and not an iota of evidence had been found against them. They had produced all the registers, record. They had filed affidavits. There was no examination of a single witness or seizure of goods to show clandestine removal of goods or sale of such goods. It is the duplicate challans of the transporter, on the basis of which the alleged clandestine removal of the goods is being attempted to be proved. This is against the principles known in law. The aspect pertaining to clandestine removal has been laid down in the judgment rendered by the Tribunal in the case of 1989 (39) ELT 655 , wherein it has been held that the Revenue cannot proceed even on the basis of private note book maintained by labourers containing unauthenticated entries and overwritings has been held to be not dependable record to establish clandestine removals unless the same is supported by other evidence such as raw materials consumed, goods actually manufactured and packed. In the case of 1990 (45) ELT 104 , it has been held that irregularities in the maintenance of RG 1 Register cannot be a conclusive evidence of clandestine removal of goods. It was held

that the whole discrepancy appeared to be the result of erroneous methods adopted by the appellants for making entries in the Register. Although plausible explanation has been provided by them the department has not investigated further and proved by cogent evidence that explanations were patently improbable. There is no positive evidence to prove the alleged clandestine removal which is based merely on assumption. The Tribunal while coming to this conclusion relied upon the following judgments:

- (a) Amba Lal Vs. The Union of India (UOI) and Others, ;
- (b) B. Lakshmichand Vs. Government of India, ;
- (c) M. Koyakutty Vs. Collector of Customs and Central Excise and Others, ;
- (d) Harchand Vs. Additional Collector of Customs and Others, .

Therefore, the Tribunal has laid down that the law in regard to clandestine removal is well-settled that for the purpose of clandestine removal the burden is very heavy on the Revenue to show that the assessee had unaccounted balance in the input registers or transferred the inputs without maintaining separate register and manufactured the goods, which flows out from the use of excess electricity bills and unaccounted production of finished product and removed such goods by way of sales to parties. In this case, it was strongly contended that the Revenue has not found any evidence to support their case nor have they recorded statement of any of the employees of the M/s. JAL or their dealers to the effect that there was manufacture or receipt of goods which are unaccounted and removed without payment of duty or without gate pass. On the other hand, the respondents have produced enormous evidence in the nature of purchase of inputs from public sector undertakings. The records have been duly certified and as per records, their production has been 98% which is totally accounted for and duly certified by the Chartered Accountant and further certified by the Superintendent of Central Excise. In the absence of any evidence worth the name that the appellants have manufactured and cleared goods clandestinely it is totally beyond comprehension that even, if there is suspicion the same cannot be used as there was total and complete investigation by the Revenue and they found nothing on record against the assessee.

4. The other contention regarding maintenance of duplicate challan, percentage of manufacturing loss etc., were also examined and ultimately the Tribunal came to the conclusion that the Collector after thorough examination of the record has come to the conclusion that no evidence was available to prove that extra quantity was transported from Bangalore to Delhi. The order passed by the Collector was upheld.

5. It may be observed that whenever any document is seized from the premises of the 3rd party, then it is sufficient that such a person is called by the department as a witness in order to prove the authenticity of the document. If any penal action is to be taken, the provisions of Rule 209-A are to be applied

and he has to be made a party only to that limited extent. For fixing the liability of the duty in respect of the documents recovered from the premises of the 3rd person, the requirement of law is to make the assessee aware of such document which are to be used against him and it is not necessary that the person from whom the documents are recovered should be made party.

6. Submission of the learned Counsel for the Revenue is that the Tribunal was not justified in coming to the conclusion that the appeal itself is not maintainable as the transporter was not made a party. The other contention which is raised is that the Tribunal itself should have examined and should have reappraised the evidence or should have granted a reasonable opportunity to the Department so that the principles of natural justice could have been complied with.

7. Arguments of both the learned Counsels for the parties heard.

8. So far as the first question is concerned, it may be observed that it is not necessary in all cases the person from whose premises, the documents are seized should be made as a party in the proceedings. The Commissioner who initiated the proceeding against the transporter issued the show-cause notice under Rule 209-A of the Central Excise Rules. The very purpose of the said rules is to penalise when any person who is transporting, removing, depositing, keeping, concealing, selling or purchasing, under this rule it has to be established by the Revenue that the said person believes or has reason to believe that the goods are liable for confiscation. It is in these circumstances that penalty could be levied not exceeding three times the value of such goods or Rs. 5,000/- whichever is greater. If the Department comes to the conclusion that it cannot be established before the Tribunal, that the transporter had the knowledge or has reason to believe that the goods are liable to confiscation then it would be a futile exercise to make the transporter as a party. The evasion of duty stands on a different footing which was challenged by way of appeal before the Tribunal. The observation of the Tribunal therefore to the extent that the appeal is not maintainable in respect of the alleged evasion of duty is not in accordance with law. But this question has become academic in view of the finding on the second question and therefore, the Revenue is not entitled for the relief on that ground.

9. In respect of the second point it is submitted that the documents which were recovered from the transporter were in respect of the excisable goods on which the duty was clandestinely evaded. Firstly, we may observe that the question as to whether there is evasion of duty is basically a question of fact. It is not the case of the Revenue that the order passed by the Collector or the Tribunal is perverse. No question is framed on that point.

10. On the application submitted by the Revenue, it was observed by the Tribunal that:

"On a careful consideration of the submissions of both the sides, we notice that the main grievance of the Revenue in the appeal was pertaining to violation of principles of natural justice and the same had been noted in the final order.

Regarding the matter pertaining to clandestine removal of goods, the Commissioner in his detailed findings had noted that there was no production in excess of what was required in the statutory registers and there had been no procurement of raw materials and electricity bill and consumption clearly tallied with the registers. The Revenue had not produced any semblance of evidence even at the time of investigation that there had been seizure of goods nor witness statement of any employees and or any shortage of raw materials or excess of final goods or any receipt of money from any customers. There was not an iota of evidence of any nature to show that there was clandestine removal. The allegation in show-cause notice itself clearly indicates that it was not a case, where the department could have found any evidence in the matter. The case was built on duplicate challans maintained by the transporter. The Tribunal had clearly explained that these challans were duplicate challans and no separate goods had been removed, in terms of those challans and they had been verified and co-related with the gate passes and it was found that the original and duplicate tallied including the details and particulars pertaining to the goods Designated to the various places up to Delhi. There were no two lorry numbers recorded in the lorry challans of the same goods. Therefore, the Revenue's contention on clandestine removal of goods was raised on wrong premises and non-appreciation of lorry challans as stated and held by the Commissioner and confirmed by the Tribunal. There was not an iota of evidence to show the production of goods unaccounted by suppression or by removal of goods by suppression in clandestine manner. Therefore, the Tribunal rejected the appeal of the Revenue after a detailed consideration of every piece of evidence on record. The Revenue had been given full opportunity, even before the Tribunal to show as to whether there was any clandestine removal of goods. The Revenue has availed of the opportunities before the Tribunal. They could not produce any evidence, other than those relied in the show-cause notice to show any production of goods. The Chartered Accountant's certificate had been certified by the Superintendent of Central Excise to show that the production was 99% and, therefore, the Tribunal was fully satisfied about the correctness of the findings and about the frivolous appeal filed by the Revenue on the basis of no evidence at all. Therefore, the Tribunal's final order is not only correct, but it does not give rise to any question of law for reference to the Hon'ble High Court. This application therefore, appears to be filed merely as an empty formality without any due seriousness of appreciation of the case, which was decided by the Commissioner of Central Excise".

11. After a finding of fact is recorded by the Tribunal after due consideration of the evidence before it, this Court will not interfere in its jurisdiction u/s 35-G. The finding based on inferences drawn from the facts of the case is purely a question of fact. Even if the finding is recorded without any supporting evidence, it could be challenged on the ground of perversity. The finding cannot be said to be based on suspicion, conjecture or surmises. The finding on question of fact is open to attack as erroneous in law when there is no evidence to support. If the

finding of fact is not challenged, it is binding even on the High Court. In Commissioner of Income Tax, Orissa Vs. Orissa Corporation (P) Ltd., , it was held by the Apex Court that the conclusion of the Tribunal based on some evidence on which the conclusion can be arrived at, no question of law would arise. In the case of Commissioner of Income Tax, Punjab Vs. Indian Woollen Textile Mills, , it is held by the Apex Court that it is not open to the High Court to discard the Tribunal's finding on a question of fact, even if on a review to the evidence the Court may arrive at a different conclusion.

12. As observed above, though we are of the view that the appeal could not have been dismissed, for non-joinder of M/s. Arya Central Transport Company Limited, but that question being academic, the Tribunal has recorded a finding that there is no violation of principles of natural justice and that the first respondent had not removed the goods clandestinely from the factory premises.

13. In Indian Woollen Textiles Mills case, supra, it was pointed out that it is not open to the High Court to discard the Tribunal's finding on a question of fact, even if on a review of the evidence the Court might arrive at a different conclusion.

The Tribunal is the sole arbiter as to the credibility of testimony and the acceptance by it of some explanation.

14. Even, the appraisalment of evidence is not a question of law. In SREE MEENAKSHI MILLS LIMITED Vs. COMMISSIONER OF Income Tax, MADRAS., , it was observed by the Apex Court that when once there is evidence and a conclusion has been reached on appreciation of such evidence, the decision is turned upon the weight to be attached to the evidence. Such material which consists of the assessee's own words and nothing else. It is the existence of the evidence and not the adequacy of the evidence on which the Tribunal has to support its conclusion. Sufficiency or otherwise of evidence is a pure question of fact. In support of violation of principles of natural justice, the Adjudicating Authority observed that the Revenue had made thorough investigation and there was no examination of certain witnesses or seizure of goods. It was for the Adjudicating Authority to have cross-examined the persons who have filed the affidavit. The Department and the Adjudicating Authority cannot be considered differently. This besides, the fact that other than the duplicate challan of the transporter, nothing was with the Revenue against the assessee and that duplicate challan was interpreted as not containing any excisable article clandestinely removed from the factory of the first respondent. This was purely the finding of fact.

15. In these circumstances we are satisfied that no case is made out. Accordingly, the application is dismissed.