

Agarwal Industries Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jan-05-1990

Reported in : (1990)LC250Tri(Mum.)bai

Appellant : Agarwal Industries

Respondent : Collector of Central Excise

Judgement :

1. The present Reference Application, filed under Section 35G of the Central Excises and Salt Act, seeks a reference to the High Court of Judicature at Bombay, over the Order No. 1522-23/88 WRB dt. 10.10.88 of this Tribunal in Appeals Nos. ED(T)(BOM.) 55/81 and E/123/87-Bom. on the following 14 points : (1) Whether in the facts and circumstances of the case, the levy of penalty is invalid? (2) Whether in the facts and circumstances of the case, the Tribunal seriously erred in relying on no evidence or irrelevant evidence or inadmissible evidence or partly relevant and partly irrelevant evidence? (3) Whether the onus of proof was wrongly placed on the shoulders of the Applicants when it was for the Department to prove the case against the applicants to the hilt? (4) Whether the Tribunal seriously erred in relying on the evidence of the witnesses in examination-in-chief, when they had realised from the same in cross-examination? (5) Whether the Tribunal had flouted the principles of Criminal Jurisprudence in throwing the burden on the applicants to prove their innocence? (6) Whether the Tribunal seriously erred in ignoring vital piece of evidence in the form of expert opinion of SASMIRA on flimsy grounds? (7) Whether the Tribunal erred in interpreting

electric bills and certificate of SASMIRA? (8) Whether the Tribunal erred in ignoring the evidence of the witnesses support- ing the case of the applicants? (9) Whether the conclusion to which the Tribunal came is such as no reasonable person could come? (10) Whether in the facts and circumstances of the case, the Tribunal had been prejudiced by simultaneously disposing of another appeal by common order? (11) Whether the Tribunal erred in interpreting the letter of Dy.

Assessor and Collector (Octroi) regarding 'R' forms, when there is no rule to support the claim? (12) Whether the Tribunal seriously erred in relying on 'Crystal Picture' note book when the author of the same had admitted that he had inflated the figures of production at the instance of Rathod, who had admittedly grudge against the applicants? (13) Whether in the facts and circumstances of the case, the Tribunal failed to realise that the 'Crystal Picture' note book pertained to a period of less than one month and to come to the conclusion from the same that there was excess production of 46 lakhs L. Mtrs? (14) Whether the Tribunal was justified in relying on 'Crystal Picture' note book when there is no evidence to co- relate production of goods lying in stock as per RG-1? 2. The proceedings were initiated against the present applicants by the Central Excise Department, in two sets, one on the ground that on 20.11.75, a motor Tempo MRF 3923, intercepted by the Excise Officers was found to be transporting 56 bundles of processed fabrics from the factory of the appellants, which, though was accompanied by the gate pass, had no corresponding debit entry made in the RG-1 Register maintained by the applicants. The second one was initiated on the ground that on intensive verification of the stock and the Registers of the applicants firm, it was revealed that they had received 4662451.16 L. Mtrs of gray silk fabrics for processing but had accounted for only 287689.00 L. Mtrs, and as such 4474762.15 L. Mtrs of fabrics was removed after process, without payment of duty. Two separate notices to show cause were therefore issued and the matters were adjudicated upon.

On conclusion of adjudication proceedings the processed fabrics seized from the tempo was ordered to be confiscated, but the same was already got released, pending the proceedings, on execution of a bond, and hence recovery of Rs. 25,000/- being the bond amount was ordered. The appellants were also imposed

with a personal penalty of Rs. 15,000/-.

Appeal No. ED(T) (BOM.)55/81 related to the said order. In the second proceedings besides confirming the duty demanded for the fabrics removed without the payment, the appellants were imposed with a personal penalty of Rs. 3.00 lacs. Appeal No. E/123/87 related to the same.

3. The applicants had initially preferred Revision Application to the Central Board of Excise & Customs, which rejected the same.

4. The records show that both the appeals before the Tribunal were argued together, and have been disposed of by the common order referred to above. Both the appeals have been rejected and orders of the adjudicating authorities have been confirmed.

5. Heard Shri V.R. Bhatia, the learned advocate for the applicants. He submitted that the order passed by the Tribunal, deserves to be referred to the High Court as several points of law that have arisen therein. As all the points urged by Mr. Bhatia are dealt with in detail hereinafter, in order to avoid duplication, we do not deem it necessary to reproduce them here.

6. Mr. C.P. Arya, the learned SDR, on the other hand, submitted that all the points urged by the applicants are factual points, and that no reference need be made to the High Court. For this he relied upon the decision reported in 1988 (35) ELT 671 (Tri.).

7. From what has been submitted by Mr. V.R. Bhatia, the learned advocate for the applicants, during the hearing of the Reference Application, the issues involved, on which he seeks the reference to the High Court, can be identified and summarised as under : (i) Whether in the facts and circumstances of the case, the imposition of penalty was invalid? (ii) Whether the Tribunal has misdirected itself by placing reliance on inadmissible/partially admissible evidence, by ignoring/overlooking certain evidence having material bearing on the points at issue, and which could have assisted the Tribunal in arriving at a just conclusion? (iii) Whether the Tribunal has drawn the conclusion which no reasonable person

would come to? (iv) Whether the Tribunal has erroneously shifted the burden on the applicants to prove their innocence and as such violated the basic tenets of criminal jurisprudence? (v) Whether the Tribunal was prejudiced on account of simultaneous hearing of both the appeals, and consequent thereto, the appellants have been denied a fair deal? 8. Mr. V.R. Bhatia, the learned advocate for the applicants, attempted to take us through the whole evidence on record of the matters. His attention however was drawn to the statutory provisions of Section 35G of the Central Excises and Salt Act, whereunder, reference to the High Court is permissible only on the points of law. Mr. Bhatia, then submitted that each one of the point raised in the Reference Application, is a point of law, and a reference to the High Court has to be made. To substantiate his said submission, Mr. Bhatia referred to and relied upon several judicial pronouncements.

9. Relying upon the decision of the Rajasthan High Court in Jaipur Metals and Electricals Ltd v. Commissioner of Income Tax reported in 97 ITR 721 Mr. Bhatia submitted that when the point for determination is a mixed question of law and fact, treating the findings of fact by the Tribunal on final, its decision, as to legal effect of those findings, is a question of law which can be reviewed by the Court of Law. In deciding the said case, the facts before the Rajasthan High Court were rather peculiar - An assessee had in his Income Tax Return filed in Sept. 1956 assessed his estimated income at Rs. 50,000/- and repeated the same in his Returns filed on 14th December, 1956. However, subsequently by 31st December he got Rs. 40,000/- from some unexpected source. His income at the final assessment in March 1957 was assessed at Rs. 97,470/-. However, in the proceedings under Section 18A(9) of the Income Tax Act, the Tribunal confirmed the penalty on the ground that the assessee knew the correct position by 31st December 1956, and could have revised the estimates, and had observed that "the sequence of events establish that the estimate filed on 13th of September 1956 ceased to be an honest estimate". It was in view of these circumstances that the Rajasthan High Court took the matter in reference.

10. Mr. Bhatia then referred to the decision of the Supreme Court in Lalchand Bhagat Ambica Ram v. Commissioner of Income Tax reported in 37 ITR 288, where it is held that when a court of fact arrives at its decision by considering

material which is irrelevant to the inquiry or acts on material partly relevant and partly irrelevant and it is impossible to say to what extent the mind of the court was affected by the irrelevant material used by it in arriving at its decision, a question of law arises. Reading of the facts and circumstances of that particular case, it however transpires that what has weighed with the Supreme Court is the fact that the Tribunal was influenced by the suspicions, conjectures and surmises which were freely indulged by the Income Tax Officers. Following observation of the Supreme Court is most significant: "This conclusion of the Tribunal could only be arrived at on the basis that the entries in the books of accounts in regard to the Rokur and the balance in Al-mirah were correct and represented the true state of affairs, in spite of the interpolations and subsequent insertions which had been made to bolster up the true case." 11. In re: Rama Datta Sita Ram of Basti 15 ITR 61 cited by Mr. Bhatia, the Allahabad High Court has laid down the guidelines as to the circumstances under which reference to the High Court can be made under Section 66(2) of the Income Tax Act and in that particular case, the High Court has entertained the Reference, amongst others, on the ground that the inference drawn by the Income Tax Officers was not of the nature that a reasonable man would draw. The facts before the said High Court, however were to the effect that an assessee had one Anomat Khata, since long, and for several years assessments were being made without any suspicion, and the said Anamat Khata was brought into prominence only after the order of assessment by the officer for the particular year, was reversed by the higher authority. The court felt that the approach of the officers was vindictive, and the inferences drawn contrary to the finding given during the earlier assessment year that the Anamat Khata was not open to any suspicion. In *Dirajlal Girdharilal v. Commissioner of Income Tax* 26 ITR 736, yet another decision cited by the learned advocate for the applicants, the Supreme Court has held that when the decision is arrived at by considering material which is irrelevant, to the enquiry or by considering material which is partly material and partly irrelevant, or bases the decision partly on conjectures, surmises and suspicion and partly on evidence, the same becomes an issue of law. The facts and circumstances before the Supreme Court under which the Supreme Court, interfered with the finding were that the Tribunal had, to a considerable extent drawn upon its own imagination and had made use of number

of surmises and conjectures, by identifying the Hindu Undivided Family and the Firm, merely because the one and the same individual managed the affairs of both. In spite of clear indication to the contrary, the Tribunal also had come to the conclusion that the property inherited was converted into stock in trade, and used as trading capital.

13. Mr. Bhatia also relied upon the decision of the Supreme Court in Commissioner of Income Tax v. Anwar Ali, reported in 76 ITR 696, where the Supreme Court has interfered with the order of the Tribunal when the Tribunal, not adopting the explanation given by the assessee, had drawn the conclusion that the amount involved was income, and has further held that the assessee was guilty of suppression and liable to penalty under Section 28(1)(c) of the Income Tax Act. In the opinion of the Supreme Court, mere rejection of the explanation by itself did not prove the department's charge, and that the department ought to have led some evidence to prove the amount as income. Even in the opinion of the Supreme Court, however, hollowness in the explanation, in itself was a good evidence, but something more was required to bring home the charge, when proceedings under Section 18(1)(c) were in the nature of penal proceeding.

14. Considering the ratio of all these decisions, indicate that, when the decision of the Tribunal is based on no evidence, or on mere conjectures and surmises, or that the Tribunal has overlooked certain basic documents and that has misdirected itself, then the point of law arises. Significantly it may be noted that in the concluding portion of its judgment in Commissioner of Income Tax v. Anwar Ali (supra), the Supreme Court has held that in every case, totality of the circumstances have to be considered.

15. Mr. Bhatia, has pleaded applicability of all these judicial pronouncements to the facts of the impugned order by submitting that: (i) The Tribunal has erred in interpreting electric bills and certificates of SAS-MIRA. (ii) The Tribunal has ignored the evidence of witnesses supporting the case of the applicants.

(iii) The Tribunal has erred in interpreting the letter of Dy.

Assessor and Collector (Octroi) regarding 'R' form.

(iv) The Tribunal has erred in relying upon "Crystal Picture" note book.

16. Before examining, whether prima facie, the points require consideration for the purpose of enabling us to refer the matter to the High Court under Section 35G of the Central Excises and Salt Act, it may be observed that this Tribunal is a final authority on facts and no appeal against its order is provided for. Reference is provided only on the point of law, but in ascertaining whether any point of law exists or not, care has to be taken to see that under the pretext of raising a point of law, the matter is not taken to the High Court even on question of facts. From the judicial pronouncements referred to and relied upon, it transpires that the questions involved in each one of the said decisions pertained to drawal of conjunctures, not based on any material evidence on record. If, from the record, it is clear that the Tribunal has applied its mind to all the material evidence brought on record, and has reached to a conclusion which can be reasonably drawn, after considering the totality of the circumstances, no reference need be made under Section 35G of the Act, merely because the findings given and reasons adopted in accepting or rejecting some documents are not accepted by the party. Even in the case, where some other conclusion may prima facie appear probable, on appreciation of facts, no reference to the High Court is called for, if the conclusion drawn by the Tribunal is reasonable, and based on rational reasonings, and is arrived at by considering totality of circumstances. The judicial pronouncements cited also do not contemplate the same. Any laxity in the approach could virtually convert the provisions of Section 35G into those of providing regular appeals over the decision of the Tribunal.

17. While examining the different points raised by the applicants, it may be noted that all the points relate to the proceedings against them regarding clandestine removal of processed fabrics without payment of excise duty.

18. As regards the contention of error in interpreting the electric bills and the certificate from SASMIRA, it may be noted that the department, in an attempt to establish that the electricity consumed during the relevant period, indicated that machinery was run for much longer time than was required to run for manufacture of the fabrics shown in their record to have been manufactured. The learned

advocate for the applicants submitted that based on the units of electricity shown to have been consumed, the applicants had procured a certificate from SASMIRA, as regards the maximum production that can be had, but the Tribunal has failed to consider the same from its real perspective.

19. The Tribunal has, in para 11.1 of the impugned order discussed this evidence by mentioning that the certificate from SASMIRA was obtained after a period of two years, and that the same did not indicate the condition of the machinery as it existed at the relevant time. The Tribunal has also categorically observed that it was not possible to draw a conclusion that the certificate covered all the machineries.

When the Tribunal has considered the said evidence, and has rejected the evidenciary value thereof, on reasons assigned for the same, the same cannot be taken to fall within the ratio of the judicial decisions to make it a point of law. It is purely an appreciation of the evidence simplicitor, which the Tribunal has jurisdiction to do.

20. The learned advocate for the applicants however laboured hard to impress upon us that the Tribunal has relied upon the evidence of the witnesses as was available in the statement and has ignored their version in the cross-examination. The learned advocate went to the extent of arguing that the statements were recorded in the absence of the applicants and as such they ought to be totally ignored and what was stated in the cross-examination alone ought to be considered. Apart from the fact that argument so advanced goes contrary to the set principles of appreciation of evidence in the legal proceedings, as it is the totality of circumstances, as emerging out on appreciation of what the witness has stated as a whole, both in examination-in-chief and cross-examination has to be connivent, here, the Tribunal has considered the material evidence in paras 11.5 and 11.6 of the order.

Merely because, there is no categorical mention as to why the version given in cross-examination is not accepted, cannot lead to infer that the Tribunal has not applied its mind. The evidence of both the material witnesses has been discussed in extenso. Submission made by the learned advocate, while arguing the present

application, merely indicates that the portion of evidence of these witnesses as accepted by the Tribunal was not palatable to them. This however cannot give rise to any point of law.

21. The next point argued by the learned advocate for the applicants is that the Tribunal has misinterpreted the letter of the Dy. Assessor and Collector (Octroi) as regards 'R' form. In the submission of the learned advocate, 'R' forms cannot prove the factum of processing. From what has been discussed by the Tribunal in para 11.3 of its order it appears that the Tribunal has taken the same, as merely corroborative evidence to the other evidence on record. The letter as it stands has been read, and no point is made out by the learned advocate to show that it has been misinterpreted in a way as to make it a point of law.

22. In the submission of the learned advocate, the Tribunal has erred in relying on the 'Crystal Picture' note book, when by adducing some positive evidence, the applicants have established that the entries in the note book was not correct. Plea raised by the applicants was that the figures shown therein were intentionally inflated by the employer at the initiation of one Mr. Rathod, who intended to put the applicants into difficulty, as the said Mr. Rathod was catering some illwill against them. The learned advocate submitted that despite the evidence led to prove that the figures were not correctly reflected, the Tribunal has taken the contrary view, ignoring the evidence led in defence. What the learned advocate possibly intended to convey was that the defence theory ought to have been accepted in toto. The Tribunal, and in that case, all Judicial or Quasi-Judicial Authority, while adjudicating upon any point at issue, has to consider and weigh the probabilities by rival contentions raised by both the contesting parties and has to arrive at its own judicious consideration as to which one is more probable, and which, in the light of other corroborative circumstances available on record, is more acceptable.

The Tribunal has, in the instant case, dealt with the issue exhaustively in the order and has arrived at a particular conclusion whereunder it has found the defence theory not acceptable, and has relied upon the said Crystal Picture note book as it stands. Here is not the case where rejecting the explanation furnished, the Tribunal has drawn any inference unwarranted under the law. The Crystal Picture

note book does show figure of higher production, than the one shown elsewhere for the purpose of excise duty. Secondly, it is not solely on this point that the final conclusion is drawn. The same has provided evidence to lead to a particular conclusion, but the conclusion is drawn on also considering other evidence.

23. In our view, therefore, what the Tribunal has done is, only appreciation of facts and assessment of the rival claims. The learned advocate has not been able to point us out, that there has been any irrational or uncalled for inference drawn so as to make the same as "point of law" envisaged under the judicial decisions cited by him. To reiterate, mere rejection of the defence theory and acceptance of the prosecution theory cannot give rise to any point of law.

24. The contention raised by the learned advocate in this regard, therefore, cannot be accepted. We, thus see no justifiable ground existing, to refer the matter to the High Court on this count.

25. The learned advocate for the applicants has also contended that the burden of proof has been wrongly shifted on the applicants and relied upon the decision of the Supreme Court in Commissioner of Income Tax v. Anwar Ali (supra) to plead that the point of law exists. Here however are not the proceedings under the Criminal Law, where the entire burden lies on the prosecution to prove the guilt of the accused beyond all reasonable doubt. Even there also, if the accused raises some specific plea, the burden lies on him to establish the same to reasonable probability. Here, the proceedings are quasi-judicial and even if taken as a quasi-criminal, on the ground that question of imposition of penalty is involved, then also with documents seized and evidence collected the department has put forward a case, and the applicants, in order to dislodge the same, has come forward with specific case, which they are required to establish. This point is duly dealt with in para 9 of the impugned order. There, under the circumstances, does not appear any ground to hold that the Tribunal has committed any fundamental error in law, so as to warrant any reference to the High Court.

26. The other point urged by the learned advocate is that the applicants have been prejudicially affected on account of joint hearing of both the appeals. From the record, it appears that the learned advocate then appearing for the appellants has

not only not raised any objection, but has on the contrary, argued both the appeals simultaneously, and on account of that, both the appeals have come to be disposed of by common judgment. The applicants have not attempted to show at this stage that the facts were contrary. Further from the dealing of both the appeals by the Tribunal, there does not appear any ground to suspect that the Tribunal is prejudiced against the applicants. On the contrary, both the matter appear to have been dealt with on their own merits.

27. Considering all these factors, and also the arguments advanced by the learned advocate, it clearly emerges out that by taking recourse to some of the judgments of the Supreme Court and the High Courts, the applicants desire to take up the matter before the High Court, for reassessment of the factual position. The provisions of Section 35G of the Central Excises and Salt Act, however, do not permit the same.

28. The application, under the circumstances merits no consideration and is therefore rejected.

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