

A and K Industries Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : May-14-1990

Reported in : (1991)LC786Tri(Delhi)

Appellant : A and K Industries

Respondent : Collector of Central Excise

Advocate for Pet/Ap. : Shri. J.S. Agarwal

Judgement :

1. Undaunted by the consequences that failure to comply with the Stay Order dated 25-5-1984 passed by this Tribunal in terms of Section 35F of the Central Excises and Salt Act, 1944 may entail the dismissal of the appeal, the appellants have again requested for modification of the said Stay Order dated 25-5-1984.

(i) By Order-in-Original No. 46/83 dated 21-12-1983, the Collector of Central Excise, New Delhi inter alia demanded a duty of Rs.1,86,184.72 under Rule 9(2) of the Central Excise Rules, 1944 and also imposed a personal penalty of Rs.40,000/- upon the appellants.

Against that order the appellants filed their present appeal. Under Section 35F, the appellants were required to deposit the amount of duty demanded and the penalty levied, but instead, the appellants moved their application in terms of the Proviso to the said Section 35F for dispensing with the requirement of such deposit along with their appeal. The said application was registered as Stay Application No.

E/Stay/406/84-D and after hearing both the parties the Tribunal vide its Stay Order No. 117/1984-D dated 25-5-1984 directed the appellants to deposit Rs.40,000/- in cash and execute a bond to the satisfaction of the Collector for the remaining amount of duty and penalty, with a bank guarantee for the balance of the duty amount only within 6 weeks from the date of the order making it clear that failing which the appeal will be liable to rejection in terms of Section 35F of the Central Excises and Salt Act; (ii) The appellants did not comply with the said Stay Order and instead they moved their application dated 16-7-1984 for modification of the stay order by dispensing with the requirement of the pre-deposit of the amount of Rs. 40,000/- and furnishing the bank guarantee as required in terms of the said stay order dated 25-5-1984. This was rejected by the Tribunal vide its Misc. Order No. 109/84-D dated 30-8-1984 after hearing the parties; (iii) Against the said order dated 30-8-1984 of the Tribunal the appellants filed their Civil Appeal No. 4327/84 before the Apex Court, which was dismissed by the Court vide its Order dated 30-11-1984; (iv) Still the appellants did not deposit the amount of duty and penalty levied as aforesaid and instead almost after a lapse of about 9 months moved their another application in Sept. 1985 again seeking waiver of the condition of pre-deposit and also for staying the recovery. When this application was taken up for hearing the learned Counsel for the appellants did not press the stay application and requested to withdraw the same, whereupon he was permitted to withdraw the application and the same was dismissed by the Tribunal vide its Order No. S/206/85-D dated 12-9-1985 as withdrawn; (v) Thereafter the appellants again filed their application on 27-9-1985 for the relief of waiver of pre-deposit of duty and penalty and for stay of recovery, which was heard at length and ultimately dismissed by the Tribunal vide its Order No. M-134/85-D dated 4-10-1985; (vi) Still the appellants did not deposit the amount of duty and penalty levied. Instead the appellants moved another application dated 19-11-1985 for permission to allow the appellants to deposit some percentage of duty and penalty amount adjudged as due which was rejected by the Tribunal vide its Order No. S-3/86-D dated 2-1-1986 after hearing both the parties; (vii) Still the appellants did not deposit any amount and observed silence and the appeal remain pending in the Tribunal during all these long years and ultimately 10-7-1989 was fixed for hearing of the appeal and accordingly a notice of hearing was issued to the appellants directing

them to send the compliance report of the stay order before the date of hearing. However, on 10-7-1989 the case was adjourned at the request of the Counsel for the appellants to 18-8-1989 and again to 31-8-1989. On 31-8-1989 the Counsel for the appellants requested for a short adjournment on the ground that he proposes to file another Misc. Application for modification of the interim order and the case was adjourned to 29-9-1989. Meanwhile the appellants filed their application dated 15-9-1989 for waiver of the pre-deposit of the amount of duty demanded and penalty levied by modifying the said stay order dated 25-5-1984. The parties were heard and the said application was dismissed by the Tribunal vide its Misc. Order No. M-150/89-D dated 12-10-1989 and the case was listed for hearing on 9-4-1990; and (viii) On that date 9-4-1990 the departmental representative requested for the dismissal of the appeal in terms of Section 35F of the Central Excises and Salt Act, 1944 as the appellants did not comply with the said stay order dated 25-5-1984 passed by the Tribunal. The Bench agreed to that submission, but before doing so thought it proper to give 15 days notice to the appellants to show cause as to why their appeal be not dismissed for non-compliance of Section 35F of the Central Excises and Salt Act, 1944 and the case was ordered to be listed on 2-5-1990 for this purpose.

The appellants still did not comply with the said stay order and instead in answer to the said show cause notice the appellants in their reply dated 26-4-1990 again requested for the waiver of the pre-deposit of the amount of duty and penalty levied.

3. At the time of hearing of the said show cause notice and its reply it was contended by Shri J.S. Agarwal, learned Counsel for the appellants that the appellants have a strong prima facie case in their favour on merits as for a subsequent period i.e. 29-7-1982 to 16-2-1985 the authorities concerned have themselves held the product as non-exisable and therefore, the Revenue has come in appeals to this Tribunal, which bear No. (i) E/2590/84-D and (ii) E/246/85-D and the same are still pending. He submitted that the 3rd appeal for the period 18-10-1984 to 16-2-1985 is also pending with the Collector of Central Excise (Appeals), New Delhi bearing No. I-CE/App/Review/DLH/89. He further submitted that while dismissing their earlier application for waiver of the requirement of the

pre-deposit of the amount of duty demanded and penalty levied by modifying the said stay order dated 25-5-1984 passed by the Tribunal, the Bench in its Order No. M-150/89-D dated 12-10-1989 also took note of the observations made by the Apex Court in their Order dated 30-11-1984 to the effect that "We are afraid the appeal having been dismissed by the Tribunal, it is not for us to make any such direction". He submitted that after taking note of the said observations the Bench further observed that "the appellant should approach the Supreme Court for suitable directions on the basis that the appeal is yet pending before this Tribunal and that there was nothing that this Tribunal could do further in the matter....The matter has reached conclusion and there is nothing that could be done in the matter unless the order of the Supreme Court in CA 4327/1984 dated 30-11-1984 is modified". After submitting so he stated that the appellant again filed their Special Leave Petition before the Hon'ble Supreme Court for modifying their earlier Order dated 30-11-1984 and the Supreme Court thereupon passed the following order on 12-2-1990.

"We have heard Mr. S.K. Dholakia, learned senior counsel for the petitioner and considered the Special Leave Petition. It appears that in the order dated 30th November, 1984, this Court had observed inter alia, 'We are afraid, the appeal having been dismissed by the Tribunal, it is not for us to make any such direction.' It appears that the aforesaid observation was made by this Court in the said order under this apprehension. The appeal before the Tribunal had not been dismissed. We clarify that position. The special leave petition is disposed of." 4. Shri J.S. Agarwal, learned Counsel for the appellants also cited the following case law Assistant Collector of Central Excise v. Dunlop India Ltd., 1985 (19) ELT 22 (SC) Union Carbide India Ltd. v. Union of India, 1986 (24) ELT 169 (SC) Bhor Industries Ltd. v. Collector of Central Excise, 1989 (40) ELT 280 (SC) (5) Tube Products of India. v. Union of India, 1989 (41) ELT 400 (Mad.) 5. In reply Smt. Vijay Zutshi, learned JCDR vehemently contended that since admittedly the appellants have not complied with the said stay order dated 25-5-1984 till date the appeal should be dismissed for non-compliance under Section 35F of the Central Excises and Salt Act, 1944 irrespective of the fact that the identical issue is pending before the Tribunal in two appeals filed by the department as referred to by the learned Counsel for the appellants as aforesaid.

6. We have considered the submissions. At the outset it may be stated that at the time of hearing, to a query from the Bench about the effect of the Apex Court order dated 30-11-1984, whereby the appeal of the appellants filed against the stay order dated 25-5-1984 was dismissed by the Supreme Court, Shri J.S. Agarwal, learned Counsel for the appellants submitted that the stay order being an interlocutory order may be modified if subsequent events emerge out and since in the instant case the fact that for the subsequent period the departmental authorities themselves held that the goods in question was not excisable goods, the stay order may be modified. In other words his submission was that by 2 order-in-appeal for the subsequent period i.e.

to say Order-in-Appeal No. 475/CE/DLH/84 and 476/CE/DLH/85 both dated 25-8-1984 the Collector (Appeals) held that the goods in question was not excisable goods and against these orders the department has filed its two separate appeals numbers E/2590/84-D and E/246/85-D before the Tribunal which are pending and thus in such a situation the contention of the appellants in the instant appeal that the goods in question was not excisable goods should prima facie be accepted and therefore, the requirement of pre-deposit of the duty demanded and the penalty levied by the impugned order be dispensed with by modifying the said stay order dated 25-5-1984 passed by the Tribunal. He added that the constraint felt by the Bench in its Order No. M-150/89-D dated 12-10-1989, wherein it was stated that in view of the Supreme Court's observations made in its order dated 30-11-1984 inter alia to the effect that "We are afraid, the appeal having been dismissed by the Tribunal, it is not for us to make any such direction", is now over as the Supreme Court itself by its Order dated 12-2-1990 has clarified that the appeal before the Tribunal had not been dismissed.

7. We have considered the submissions. As regards the contention that the Tribunal has power to modify its Stay Order dated 25-5-1984 and dispense with the requirement of pre-deposit of the entire amount of duty and penalty levied, we do not agree. It is true that the stay order being in the nature of interlocutory order may be modified if it can be shown that new ground(s) have subsequently emerged, but the instant case is not a case, where the interlocutory order passed by the Tribunal remained in the domain of the Tribunal, it had travelled to the Apex

Court and confirmed by it in Civil Appeal No.4327/84 vide Order dated 30-11-1984. The said Appeal was dismissed by the Apex Court by a detailed order inter alia observing as follows "According to its plain language, S. 35F of the Act confers on the Tribunal discretion to dispense with the deposit of duty demanded or penalty levied if it were satisfied that the making of such deposit would cause undue hardship to the appellants. In such an event, the Tribunal may dispense with the making of such conditions as it may deem fit to impose so as to safeguard the interests of revenue. The impugned order passed by the Tribunal under S. 35F is essentially of an interlocutory nature and this Court in an appeal under S. 35L cannot interfere with such an order. It was for the Tribunal to lay down the conditions on which waiver of pre-deposit and stay of realization should be granted and any failure to comply with the conditions must entail dismissal of the appeal".

8. In the aforesaid circumstances, in our considered opinion it will operate as res judicata in its subsequent application before the Tribunal. To the rule that the general principle of res judicata (though not the expressed terms of Section 11, Civil P.C.) applies to quasi-judicial decisions of the competent authority under the Act, there cannot be and should not be any dispute. The decisions rendered in *Sat Pal v. Sudarshan Lal*, AIR 1972 Delhi 295 and *Allahabad Bank v. R.S.A. Singh*, AIR 1976 ALL. 447 are available for this proposition, if at all any authority is required. Recently in the case of *Ramsarup v. Pyaredas*, AIR 1974 Patna 153 it was held that when an interlocutory order is confirmed by a High Court in revision it operates as resjudicata in a subsequent regular appeal against the decree.

9. Even assuming with the learned Counsel for the appellants that the Tribunal can modify its order and dispense with the requirement of the pre-deposit of the full amount of duty demanded and penalty levied, we find no reason to modify the said stay order. The contention of Shri J.S. Agarwal that the applicants have a good prima facie case in view of the fact that for the subsequent period the authorities concerned themselves held that the goods similar to the present one in the instant appeal are not excisable vide two orders-in-appeal both dated 25-8-1984 and that the same fact could not be brought to the notice of the Bench earlier, it may now be taken into consideration, we are afraid is against the facts of the case. The contention of the learned Counsel for the appellants that the said orders in appeals

both dated 25-8-1984 were not cited before the Bench earlier is belied by their earlier application dated 19-11-1985 moved by the appellants themselves, which was moved for waiver of pre-deposit. The number of the said application is E/Stay/1275/85-D. In paragraph 4 of the said application the appellants had not only referred to the said orders but also extracted a portion of it. For ready reference the said averments are reproduced below "4. That the applicant has otherwise very good chances to succeed in the said appeal on merits, as the applicants main stand in the appeal is that he is not liable to pay any duty on the intermediate product, which he makes viz. Bias-cut-cloths which is the intermediate product in the manufacture of Tapes. This has been held by the learned Collector of Central Excise (Appeals) Delhi vide his order-in-original No. 154-CE/Apl/DLH/84 dated 25-8-1984. The relevant portion of the aforesaid order given by the learned Collector of Central Excise is reproduced below for ready reference 'The cut and rounded material with increased tensile strength is not commercially known or sold product and therefore cannot be considered as an excisable goods.' Thereafter the Central Excise Department went in appeal against the aforesaid order, of learned Collector of Central Excise, which is pending before this learned Tribunal and no stay on the operation of the orders of learned Collector has been given in the said appeal filed by the Department." 9A. It is amusing to note that after referring as aforesaid in the aforesaid application the appellants requested that they are willing to deposit some percentage of the duty demanded and penalty subject to the discretion of the Bench. The said application was heard at length and by Order No.S-3/86-D dated 2-1-1986 it was rejected. It is intriguing to note that while moving the subsequent application the appellants while stating the history of the case did not refer to the said application dated 19-11-1985 and the said Order dated 2-1-1986 passed thereon by the Bench. At the time of hearing also neither party drew our attention to the said application and the Order which is very much available on the record. Under these circumstances to say that the aforesaid contention is a new one is not factually correct. It may be stated that the observation made by the Apex Court in its Order dated 30-11-1984 was with reference to the prayer of the appellants therein that for time to comply with the orders of the Tribunal passed under Section 35F. While disposing of this prayer the Apex Court observed that the appeal having been dismissed by the

Tribunal, it is not for the Court to make any such direction as could be seen from the following observations made by their Lordships in the said Order - "...It was for the Tribunal to lay down the conditions on which waiver of pre-deposit and stay of realization should be granted and any failure to comply with the conditions must entail dismissal of the appeal.

Learned Counsel for the appellants however prays for time to comply with the orders of the Tribunal passed under S.35F. We are afraid, the appeal having been dismissed by the Tribunal, it is not for us to make any such direction." 10. Here it may be added that after the dismissal of their appeal as aforesaid on 30-11-1984 by the Apex Court the appellants vide their application dated 19-11-1985 as referred to above informed the Bench that they are ready to deposit some percentage of the duty demanded and penalty levied subject to the discretion of the Bench. This request was not acceded to by the Tribunal vide its Order dated 2-1-1986. Still the appellants did not deposit any amount and instead they started moving fresh applications one after another. This conduct of the appellants also speaks a volume against them. Thus, we reject the explanation given by the appellants in reply to the show cause notice issued by the Tribunal to show cause as to why their appeal be not dismissed for non-compliance of the Stay Order in terms of Section 35F of the Central Excises and Salt Act, 1944. Since, admittedly the appellants have not complied with the Stay Order, though it was passed as back as in 1984, the appeal has become liable to be dismissed under Section 35F in view of the law laid down by the Apex Court in the case of Naveen Chander v. Collector of Customs and Central Excise, AIR 1971 SC 2280 = 1981. (8) ELT 679 (S.C.). Here it may be also added that as extracted above the Apex Court in its Order dated 30-11-1984 passed in Civil Appeal No.4327 of 1984 filed by the appellants against the Stay Order dated 25-5-1984 passed by the Tribunal had expressly stated that "it was for the Tribunal to lay down the conditions on which waiver of pre-deposit and stay of realization should be granted and any failure to comply with the conditions must entail dismissal of the appeal.

11. Since before dismissal of the appeal we have already issued a show cause notice to the appellants to show cause as to why the appeal be not dismissed for non-compliance and heard them also and find no reason to modify our Stay Order

dated 25-5-1984, we have no alternative but to dismiss the appeal for non-compliance of the Stay Order dated 25-5-1984 under Section 35F of the Central Excises and Salt Act, 1944. We order accordingly.

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