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Court : Punjab and Haryana

Decided On : Apr-07-1999

Reported in : 1999(66)ECC631; 1999LC578(P& H); 2000(118)ELT8(P& H); (1999)122PLR424

Judge : Jawahar Lal Gupta and; N.K. Agrawal, JJ.

Acts : Central Excise Act, 1944 - Sections 9, 13, 14, and 18

Appeal No. : Civil Writ Petition No. 1647 of 1999

Appellant : Sunil Gupta

Respondent : Uoi and ors.

Advocate for Def. : Mr. Satish Aggarwal and; Mr. Rajesh Gumber, Advs.

Advocate for Pet/Ap. : Mr. Ashok Aggarwal, Sr. Adv. and; Mr. Rajesh Bindal, Adv.

Judgement :

Sh. Jawahar Lal Gupta, J.

1. Is a Central Excise Officer debarred from arresting a person without a warrant despite the fact that he has reasons to believe that the person is liable to be punished under the Central Excise Act, 1944 This is the short question that arises

for consideration in these two writ petitions. Learned counsel for the parties have referred to the facts in CWP No. 1647 of 1999. Those may be briefly noticed.

2. The petitioner is the Managing Director of M/s. GCUL Limited. This company has its registered office in village Khandsa, District Gurgaon. It is engaged in the manufacture and export of terry towels. The petitioner claims that 'the company is a 100% Export Oriented Unit.' It is 'exempted from paying the Central Excise Duty on the terry towels being manufactured and exported ......'

3. Till July 1996, Mr. S. K. Aggarwal was working as the General Manager of the Company. He was looking after the day to day affairs and was 'the authorised signatory as far as the Central Excise Act, 1944 ...... is concerned.' He worked as General Manager till July 1996. After that, Mr. Sandeep Aggarwal was authorised by a resolution dated July 12, 1996. A copy of the resolution has been produced as Annexure P. 1 with the writ petition. The petitioner alleges that the copy of the resolution was 'duly communicated to the persons concerned in the respondent-department for their information, record and necessary action at their end.' He was 'in no way connected with the day-to-day functioning of the company and basically was only looking after the marketing operations ..... and usually remains abroad for about six months in a year for the purpose of securing orders and also ensuring the payments for the materials already supplied .....' It has been averred that during the year 1997-98, the company had earned foreign exchange to the tune of Rs. 19 crores. During the current year till the filing of the petition, the company had earned about Rs. 31 crores in foreign exchange.

4. On July 8, 1978 (sic), the factory premises of the company were searched. The books of account etc. were seized. Even though an 'evasion of the Central Excise Duty to the tune of Rs. 40 crores' was alleged, yet 'no show cause notice ...... has been issued to the company.' According to the petitioner, Mr. S. K. Aggarwal had indulged in certain 'mala fide activities alongwith Shri Umesh Chander Verma, Store Incharge' and managed 'some inward raw material from certain firms situated in the States of Gujarat and Maharashtra.' Shri Sandeep Aggarwal had taken over from Shri S. K. Aggarwal. However, 'on allurement from Shri Umesh Chander Verma, Store Incharge, Shri Sandeep Aggarwal, Director (works) also fell

prey to the same attitude of destroying the company by indulging into the issuance of the receipt of raw material on the papers only by issuing form CT-3 and possibly for obtaining undue gain for themselves.' The petitioner states that 'the allegations are that the entire raw material which was supposed to have been received in the factory premises of the company was diverted elsewhere with the active connivance of the officers of the Central Excise Department.' After the search and seizure, the petitioner, Mr. Sandeep Aggarwal and Mr. Umesh Chander Verma, Store Incharge, were called by the respondent authorities. The statement of the petitioner was recorded in the months of September, October and November, 1998. Even the statements of the other persons were recorded. The petitioner complains that 'the respondent authorities are bent upon to (sic) arrest him on account of the alleged evasion of Central Excise Duty.' A copy of the notice dated November 19, 1998 issued by the Intelligence Officer has been produced as Annexure P. 7. This order was issued 'in view of ex parte order dated 14.10.1998 in Criminal Misc. No. 27364-M of 1998 passed by Hon'ble Court ......' The petitioner claims that he has been joining the investigation. He had appeared before the authorities whenever he was called. M/s. Sandeep Aggarwal and Umesh Chander Verma had been arrested and bailed out. Even M/s. Sandeep Aggarwal and Umesh Chander Verma had stated that 'the petitioner is not connected with the alleged evasion of Central Excise Duty in any way ....' These two persons had been kept in 'custody for a period of sixty days .....' Fearing arrest, the petitioner had applied for the grant of anticipatory bail before this Court. On December 11, 1998, Criminal misc. application No. 33792-M of 1998 was dismissed inter alia with the following observations :-

'I do not subscribe to the arguments raised by the learned counsel for the petitioner. There are very serious allegations against the petitioner which require that custodial interrogation of the petitioner is necessary in the public interest. Resultantly, the bail application is hereby declined. Let intimation of dismissal of this bail application be sent to the Director General of Anti Evasion, Central Excise, R. K. Puram, New Delhi.

Sd/-

R. L. Anand,

December 11, 1998

Judge.'

5. The petitioner maintains that he is not 'running away from the investigation ...... and is willing to cooperate with the departmental authorities.....' He maintains that if 'the working of the unit is disturbed in the manner it is sought to be done by the respondents, then the real sufferers would be the large number of share-holders, the financial institutions, about 700 persons who directly or indirectly are earning their livelihood while working for the company ....'

6. The company was served with a demand-cum-show cause notice dated August 22, 1998 asking it to deposit a sum of Rs. 1,83,865/-. A reply was filed. Vide order dated January 7, 1999, the levy of duty of Rs. 1,83,865/- was confirmed. The company had deposited the amount under protest. It is further alleged that the respondent department 'got a sum of Rs. 10,50,000/- deposited from the company without issuing any show cause notice, demand notice or determination of the amount .... by illegally stopping the consignments for exports'. He further alleges that he is being unnecessarily dragged into litigation and apprehends that 'he shall be arrested by the Central Excise authorities whenever he goes there since an evasive notice to that effect has already been issued.' According to the petitioner, 'even a perusal of notice Annexure P. 7 .... does not disclose a wisper about the recording of any reasons whatsoever'. There is nothing on the basis of which the respondents may 'come to a conclusion that the petitioner can be punished under the provisions of the Act.....'In this situation, the petitioner submits that his liberty cannot be curtailed. It is alleged that all the records have already been taken into custody by the authorities. He has already joined the investigation. His statements have been recorded. He is not liable for any evasion. His arrest is, thus, not required.

7. A Civil Writ Petition No. 1255 of 1999 had been filed on behalf of the company. However, it was withdrawn with liberty to file a fresh petition on the same cause of action. Thus, the present writ petition has been filed. The petitioner prays inter alia

that the respondent-authorities be directed 'not to take any coercive method ...... for the recovery of the alleged evasion of Central Excise Duty without issuing a show cause notice notice' and that they be restrained 'from arresting' him.

8. A counter affidavit has been filed by Mr. Sandeep Srivastava, Assistant Director. It is averred that 'the petitioner is concerned in evasion of Central Excise Duty to the tune of Rs. 40 crores approximately as detected so far'. Investigations are in progress. These are at a crucial stage. The conduct of the petitioner has been non-cooperative. He has 'avoided answering important queries.' A complaint 'for non-compliance of summons had to be filed against the petitioner before the court of competent jurisdiction at Delhi. After hearing, the court took congnizance of offences and passed orders summoning the petitioner on 4.3.1999'. The petitioner as Managing Director of the company is responsible for the conduct of its business.

9. On July 2, 1998, the officers of the Directorate General of Anti-evasion had searched the premises of M/s. Baroda Textile Limited, Karam Nagar, Ahmedabad. Having come to know of the raid, 'Shri Sandeep Aggarwal, Director of M/s. GCUL Limited directed Shri Umesh C. Verma to destroy all relevant records by putting fire in the factory premises. The record was put to fire on 2nd/3rd July, 1998 and destroyed.' On investigation, 'it has been found that M/s. GCUL are selling their finished goods in the domestic market for which they have not paid any Central Excise Duty and have not obtained requisite valid permission and thereby evaded Central Excise Duty.' It is further alleged that 'on detailed investigation, it has been found that they had forged the signatures of the Inspector, Central Excise and provided fake rewarehousing particulars which has resulted in diversion of huge quantity of polyester texturised yarn to domestic market as the same never reached M/s. GCUL Limited. As a result of this illicit and illegal diversion, large quantum of revenue has been evaded ...' It has been admitted that the petitioner had deposited a sum of Rs. 10.5 lacs vide challan dated October 21, 1998. A show cause notice dated February 12, 1999 had been issued demanding Central Excise Duty of Rs. 16,32,161/-. The respondents maintain that in the voluntary statement tendered under Section 14, the petitioner had stated that he was 'the over-all Incharge of M/s. GCUL Limited ......' In a subsequent statement, it was

stated that 'no major decision of the company could be taken without his permission ....' The respondents maintain that 'fraud and evasion of duty has taken place because of a policy decision of the company, as adopted by the Managing Director and Director and not because of day to day affairs.' Details have been given to show that 'there is no scope for the petitioner to plead ignorance.' It has been admitted that 'S/Shri Sandeep Aggarwal and Umesh C. Verma were arrested and they could get bail only after expiry of 60 days as the department could not file prosecution because of the pendency of investigation and particularly, because of non-availability of the petitioner and others.' According to the respondents, the petitioner is absconding. He is neither available at his residence nor in his office/factory. He has not joined enquiries in spite of the service of repeated summons. The allegation that the respondents are harassing the petitioner has been denied. It is further alleged that he has 'committed offences as defined in Sections 9 and 9AA of the Central Excise Act, 1944.' On these premises, the respondents maintain that the writ petition be dismissed.

10. The petitioner filed a rejoinder to which a counter was filed on behalf of the respondents.

11. Counsel for the parties were heard. On behalf of the petitioners, it was contended by Mr. Ashok Aggarwal and Mr. O. P. Goyal, Senior Advocates that offences under Section 9 of the Central Excise Act, 1944 are non-cognizable. Thus, no arrest could be made by any officer of the Central Excise Department without obtaining a warrant from a competent court. Counsel referred to the various provisions to submit that the arrest and search had to be carried out in accordance with the provisions of the Code of Criminal Procedure. It was further contended that wherever the Parliament wanted to permit arrest without warrant, a specific provision had been made as in Section 26(d) and Section 27 of the Act. The claim made on behalf of the petitioners was controverted by the counsel for the respondents.

12. It is apt to notice certain provisions of the Act. It provides for the levy and collection of Excise Duty. Section 9 prescribes the offences and the penalties therefor. Contravention of the provisions of the Act or any rules made thereunder,

evasion of the duty, removal of excisable goods in violation of the provisions of the Act, are some of the offences described in Section 9. These are punishable 'with imprisonment for a term which may extend to 7 years and with fine', if the leviable duty exceeds Rs. 1 lac. In any other case, the punishment can be 'imprisonment for a term which may extend to three years or ..... fine or ..... both.' Provisions of Sections 9A, 13, 14 and 18 deserve to be noticed in extenso. These are as under :-

'9A. Certain offences to be non-cognisable. - Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), offences under Section 9 shall be deemed to be non-cognisable within the meaning of that Code.

13. Power to arrest. -

(1) Any Central Excise Officer duly empowered by the Central Government in this behalf may arrest any person whom he was reason to believe to be liable to punishment under this Act.

(2) Any person accused or reasonably suspected of committing an offence under this Act or any rules made thereunder, who on demand of any officer duly empowered by the Central Government in this behalf refuses to give his name and residence, or who gives a name or residence which such officer has reason to believe to be false, may be arrested by such officer in order that his name and residence may be ascertained.

14. Power to summon persons to give evidence and produce documents in inquiries under this Act. -

(1) Any Central Excise Officer duly empowered by the Central Government in this behalf shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making for any of the purposes of this Act. A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person

summoned.

(2) All persons so summoned shall be bound to attend, either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and to produce such documents and other things as may be required :

Provided that the exemptions under sections 132 and 133 of the Code of Civil Procedure (5 of 1908) shall be applicable to requisitions for attendance under this section. (3) Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code (45 of 1860).

18. Searches and arrests how to be made. - All searches made under this Act or any rules made thereunder and all arrests made under this Act shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1898 (5 of 1898), relating respectively to searches and arrests made under that Code.'

13. A perusal of the above provisions shows that Section 9A introduces a fiction. As a result, the offences under Section 9 are deemed to be non-cognizable. Section 13 authorises 'any Central Excise Officer duly empowered by the Central Government in this behalf' to 'arrest any person whom he has reason to believe to be liable to punishment under this Act.' This provision embodies a substantive power and authorises the competent officer to arrest any person if he has some reason to believe that the person is liable to be punished under the Act.

14. Section 14 authorises the competent Central Excise Officer 'to summon any person' whose attendance is considered necessary. Such a person can be asked to give evidence, produce a document or any other thing in the enquiry which is being conducted by the competent authority. The officer can even issue summons directing the persons to produce documents or other things. A person who has been summoned is bound to attend and to 'state the truth....' The proceedings conducted by the authorised officer are 'judicial.' A person can tell a lie. However, he does so only at his own peril. A breach of the obligation invites the wrath of law.

It constitutes an offence under Section 193.

15. It is apparent that the proceedings conducted by an officer of the Central Excise are vitally different from the investigation by a police officer. It is implicit that a person who is making a statement before a Central Excise Officer can be called upon to sign the statement. On a combined reading of Sections 13 and 14, it is clear that an officer of the Central Excise is not a mere police officer. He is different. He is even more. A substantive power to arrest has been conferred on him under Section 13. The proceedings conducted by him are judicial. The person who is interrogated is bound to state the truth.

16. The main argument of the counsel for the petitioners was that despite the provisions of Section 9, it has been provided in Section 9A that the offences 'shall be deemed to be non-cognizable .....' Section 18 requires that arrests 'made under this Act shall be carried out in accordance with the provisions of the Code of Criminal Procedure .....' Thus, no arrest can be made by an officer of the Central Excise except by following the procedure applicable to the cases involving non-cognizable offences under the Code of Criminal Procedure. Is it so

17. In terms of the provisions of Section 2(c) of the Code of Criminal Procedure, a cognizable offence is one 'for which ...... a police officer may ..... arrest without warrant ...' Similarly, according to Section 2(1), a non-cognizable offence is that 'for which ..... a police officer has no authority to arrest without warrant.' Despite the fact that punishment for offences under Section 9 can extend to imprisonment for seven years, these are deemed to be non-cognizable within the meaning of Code of Criminal Procedure, 1898. When the provision is literally construed, the implication is merely that a police officer shall not be able to arrest a person who has committed an offence under Section 9 without a warrant. However, the provision does not say that an 'Excise Officer shall be debarred from arresting a person who has committed an offence under Section 9 without a warrant.' Section 9A merely imports the provision of Section 2(1) of the Code of Criminal Procedure into the Act and imposes a restriction on the power of the police officer. The authorised officer of the Central Excise being different from a police officer, such an embargo has not been placed by the Parliament on him. Otherwise, the

legislature could have clearly said that no person who has committed an offence under Section 9 shall be arrested without a warrant by any one. It does not say so. The omission is not without significance.

18. In our view, Section 13 embodies a substantive power. It confers the power to arrest. The procedural safeguards have been protected by Section 18. This provision merely regulates the exercise of power under Section 13. It only provides that the searches and arrests under the Central Excise Act 'shall be carried out in accordance with the provisions of the Code of Criminal Procedure .....' In other words, an officer of the Central Excise shall make the arrest in the manner laid down in Section 46 of the Code of Criminal Procedure. He 'shall actually touch or confine the body of the person to be arrested.....' In case of resistance, the officer of the Central Excise 'may use all means necessary to effect the arrest.' The persons arrested 'shall not be subjected to more restraint than is necessary to prevent his escape.' Similarly, a search shall be carried out in accordance with the procedure laid down in Section 100. If the person of a lady has to be searched, it shall be done 'by another woman with strict regard to decency.' Two or more independent and respectable inhabitants of the locality shall be called upon to be present. The search shall be made in their presence and 'a list of things seized in the course of such search ..... shall be prepared ......' In a nut shell, the procedural protection contained in the Code of Criminal Procedure has been guaranteed even in case of arrests and searches under the Central Excise Act, 1944. No more.

19. Mr. Ashok Aggarwal, counsel for the petitioner in CWP No. 1647 of 1999 contended that wherever legislature wanted to authorise the search and arrest without a warrant, it has specifically provided for it. Counsel referred to the provision in Section 26(d) and contended that by necessary implication, the competent officer could not make an arrest without a warrant in any other case. Is it so

20. Chapter IV of the Central Excise Act deals with cases where 'excisable goods are carried by sea.' Section 24 provides that 'when any excisable goods are carried by sea in any vessel other than a vessel of the burden of 300 tons and upwards, the owner and master of such vessel shall each be punishable with

imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both.' Thus, transport of excisable goods by vessels other than those with a burden of 300 tons or more has been made punishable for the owner and master of the vessel. Section 25 embodies the exceptions to this provision. Section 26 provides for stoppage and search of vessels as also for the arrest of the owner or master. According to the scheme of the Act, the carrying of excisable goods except in a specified category of vessels by sea has been made punishable. Officers authorised by the Central Board of Excise and Customs as distinguished from those authorised by the Central Government are competent to enter and search the vessel. They can ask for documents, seize the vessel and make the arrest. It is no doubt true that the provision specifically provides for arrest without a warrant. However, we cannot read it to mean that clause (d) of Section 26 symbolises some sort of a departure from the general law. In our view, the provision contained in clause (d) makes explicit what is implicit in Section 13. Similar is the position in Section 27.

21. Learned counsel for the petitioners contended that the offences under Section 9 are not only non-cognizable but even after arrest, the Central Excise Officer has to forward the arrested person to either the officer Incharge of the nearest police station or to an officer of the Central Excise who can send him to a Magistrate. The arrested person is required to be admitted to bail under Section 20.

22. These are post-arrest matters. The concerned officer is entitled to act according to law and the facts of each case. As at present, the basic issue before the Bench is - Is an arrest without warrant barred On an examination of the provisions, we are of the view that it is not so. We, accordingly, answer the question posed at the outset against the petitioners. We hold that an officer of the department of Central Excise who has been duly authorised by the Central Government is not debarred from arresting a person without a warrant when he has reason to believe that the person is liable to be punished under the Central Excise Act, 1944.

23. Counsel for the petitioners had referred to the decisions in Shri Venkataramana Devaru and others v. State of Mysore and others AIR 1958 SC

255 and State of Bihar and another v. Shri P. P. Sharma and another, AIR 1991 SC 1260 to contend that the provisions of a statute have to be harmoniously construed. There is no quarrel with this proposition. However, on a harmonious construction, we are of the view that the power under Section 13 is not curtailed by Section 18. In fact, Section 18 is merely procedural. Thus, the competent officer is not required to obtain a warrant before he is able to arrest a person in exercise of powers under Section 13.

24. Counsel for the respondents had referred to certain decisions to indicate that a police officer and an officer of the Central Excise belong to different categories. On behalf of the petitioners, it was contended that persons of the Central Excise are vitally different from those under the Railway Property (Unlawful Possession) Act, 1966. It may be so. We do not consider it necessary to go into the different provisions of different Acts.

25. In view of the above, we hold that the contention of the counsel for the petitioners that no arrest can be made without a warrant, cannot be accepted. Consequently, it is rejected. It may also be noticed that in CWP No. 1647 of 1999, the petitioner had prayed for an anticipatory bail. The learned Single Judge had rejected his prayer inter alia with the observation that in the facts and circumstances of the case, custodial interrogation was necessary.

26. No other point was raised.

27. In view of the above, we find no ground to interfere. Resultantly, we dismiss both the petitions. The parties are, however, left to bear their own costs.