Collector of Central Excise Vs. Simplex Mills Co. Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Oct-09-1991

Reported in : (1993)(65)ELT378Tri(Mum.)bai

Appellant : Collector of Central Excise

Respondent : Simplex Mills Co. Ltd.

Judgement :
1. Invoking the provisions of Section 35G(1) of the Central Excises and Salt Act, 1944, the Central Excise Department has filed the present application seeking reference to the High Court, on the issue of law as formulated by them, pleading the same to have been arising out of this Bench's order No. 233-234/90WRB dated 18-5-1990, in appeal No. 810/90SB (WR) filed by the Respondents herein.

2. The facts relevant for the purpose are that Supdt. of Central Excise, Akola had issued a Show Cause Notice dated 5-9-1985 to the Respondents raising a demand for Rs. 8178.50 as differential duty payable for the period April 1984 to May 1985, and the Assistant Collector vide his order dated 26-11-1986 dropped the said Show Cause Notice. The Additional Collector of Central Excise, Nagpur, however, by issue of Memorandum dated 20-3-1989, issued a fresh show cause notice, raising -the said demand over again, by mentioning that the said proceedings were pending before the Assistant Collector on 27-11-1985, when the Central Excises and Salt (Amendment) Act, 1984 came into force, and by virtue of Section 8 of that Act the proceedings pending ought to have been transferred to the Collector and despite that, the Assistant Collector, who then had no jurisdiction

to hear the matter, proceeded to adjudicate upon the Show Cause Notice, and as such the order of the Assistant Collector, being without jurisdiction, was null and void, and hence the Additional Collector had reopened the matter, and the Respondents were called upon to make their submissions on the point. On completion of the hearing, the Addl. Collector passed an order whereunder he confirmed the demand. The Respondents thereupon approached the Tribunal by way of an appeal, and also filed an application seeking stay of the recovery and waiver of pre-deposit.

While advancing the submissions on the stay application, an argument was advanced as to the validity of the said impugned order, and therefore, the entire appeal was taken up for hearing, on that legal point, and after hearing the parties the Tribunal came to the conclusion that if the order passed by the Assistant Collector was, in their opinion legally defective, a remedy was to prefer an appeal to the Collector (Appeals). When the Additional Collector took upon himself to issue fresh Show Cause Notice, for reopening the case, he had to be held as having acted without jurisdiction, and without sanction of law, and hence the order of the Additional Collector was set aside.

3. The department has, contended that, an issue of law has arisen from the said order and has formulated the questions for reference to the High Court as under :- (i) Whether the adjudication order dated 26-11-1986 passed by the Divisional Assistant Collector covering the pending proceedings under proviso to Section 11A is valid when by virtue of Section 8 of the Central Excises & Salt (Amendment) Act, 1985 w.e.f. 27-12-1985 all proceedings tinder the proviso to Section 11A of Central Excises and Salt Act, 1944 pending before the Assistant Collector of Central Excise stood statutorily transferred to the Collector of Central Excise? (ii) Whether the said order of the Assistant Collector which is a nullity and is invalid in view of the said Section 8 of Central Excises and Salt (Amendment) Act, 1985 can be ignored and competent adjudicating authority pass a valid order? (iii) Whether the re-opening of the case proceedings by issue of Memorandum and the order based thereon by the Collector which includes Additional Collector who is the competent authority under the aforesaid mandatory statutory provisions of law is without jurisdiction and invalid merely because no legal authority has been

cited by the adjudicating authority in adjudication order, although the authority for re-opening is given in paras 2 & 3 of the Memorandum.

(iv) Whether there is any need to cite legal authority when a course of action taken is under the mandatory statutory provisions of law.

(v) Whether the CEGAT order is in conformity with the aforesaid legal provisions.

4. Mr. A.V. Naik, the Ld. JDR, pleaded that the order passed by the Assistant Collector was beyond the jurisdiction invested in him, and as such, the same was null and void, and had to be deemed as non-existent, and that it was open for the competent authority to ignore the very existence thereof and initiate fresh proceeding, and that the competent authority, while initiating fresh proceedings did bring it to the notice of the party. To support his contention that the order is void and was not required to be set aside, he referred to the decisions of the Supreme Court in A.I.R. 1987 SC 1005 and of CEGAT, SRB in 1989 (14) E.T.R. 598.

5. Mr. S.V. Prabhu, the P.R.O. of the Respondents submitted that the Respondents had already filed Cross Objection, and detailed submission opposing the prayer for reference made therein might be considered, and application be rejected.

6. Before appreciating the submissions made, and deciding whether any issue or question of law arises out of the order passed by the Bench, some resume of the position may be made. The Show Cause Notice dated 5-9-1985, issued by the Supdt., and adjudicated upon by the Assistant Collector raised a demand covering period April 84 to May 85, i.e. part of the demand was within the period of six months, and further, there was no allegation of suppression, fraud, mis-representation etc. Thus, though the part of demand traversed beyond the period of six months, the notice could not be read as the one issued vide proviso to Section 11A(1) of CESA, 1944, and the said authority could have confirmed the demand falling within the ordinary period of limitation prescribed, by holding that the demand for a period beyond that was hit by limitation.

Section 8 of the Central Excises and Salt (Amendment) Act, 1985 reads thus : "Transfer of certain pending proceedings. - Every proceeding under the proviso to Sub-section (1) of Section 11A of the principal Act, which is pending, immediately, before the commencement of this Act before an Assistant Collector of Central Excise and any matter arising out of, or connected with, such proceeding and which is so pending, shall stand transferred on such commencement to the Collector of Central Excise who may proceed with such proceeding, or matter from the stage at which it was on such commencement or from any earlier stage as he may deem fit: Provided that any party to the proceeding or matter may demand that before proceeding further with the proceeding or matter, he may be re-heard." Reading of the said Section makes it clear that it was only when the extended period was invoked alleging suppression, mis-statement etc. as provided for in proviso to Section 11A(1) that the pending proceedings were to be transferred. When the notice dated 5-9-1985, did not contain such an allegation, there was no need to so transfer, as in that case, the jurisdiction of the Assistant Collector did not stand ousted.

7. While re-opening the case, the Additional Collector had proceeded on the premises that the order of the Assistant Collector was beyond jurisdiction merely because the demand extended to the period beyond six months, but had overlooked the basic factual position that the notice and the adjudication conducted by the Assistant Collector did not contain any averment which ousted his jurisdiction. The entire premises on which, therefore, the Additional Collector based his conclusion was non-existent, and re-opening of the case by him was itself without jurisdiction.

8. Significantly, even while re-opening the case, while issuing the memorandum dated 20-3-1989, no allegation of fraud, suppression or mis-statement has been made. To reiterate, no such allegation existed in the earlier notice, dated 5-9-1985, which also covered same period which was within six months, and as such within the cognisance of the Assistant Collector.

9. The very premises on which the Additional Collector re-opened the case itself appeared to us as defective and in view thereof, what we have held, cannot be

said to have given rise to any question of law.

10. Further, here was not the case where the authority who initially adjudicated the matter, inherently lacked the jurisdiction. The jurisdiction to adjudicate upon the issue did remain with him, but in some special cases, where extended period of limitation was required to be invoked, he was seized of that power, and it could only be on appreciation of facts, that a proper conclusion could be drawn whether the order was beyond jurisdiction and as such a nullity, and that could be done only when the validity or legality of the same is challenged before the proper Appellate Forum vide Section 35E(2) of CESA, we have in our order observed that the authority ought to have filed an appeal before the Collector (Appeals). The order, even if null and void, has got to be nullified for the purpose of re-opening the same issue, though no such declaration may be necessary for the purpose of collateral proceedings.

11. Under the circumstances, none of the questions formulated nor any other point of law arises out of our aforesaid order, and as such, we see no justifiable ground to refer the matter to the High Court.

12. The Reference Application is therefore rejected and the Cross Objection filed by the Respondents herein is also treated as disposed of.

13. While agreeing with the conclusion arrived at by my learned brother Shri P.K. Desai that the Reference Application brought by the Revenue is to be rejected, I have viewed this from a slightly different angle.

The main objection of the Department is that the Asst. Collector by adjudicating on a show cause notice, which has traversed beyond a period of six months (though no allegation of suppression is made in the show cause notice) and finally dropping the proceedings has acted without jurisdiction in view of the statutory provisions/transferring such proceedings from the Asst. Collector to Collector. Hence, it was argued that the order of the Asst. Collector passed without jurisdiction is ab-initio null and void and is required to be ignored.

I agree with the observations of my learned brother that only such proceedings, where demand for duty is based on the allegation of suppression, fraud etc., the amendment Act contemplates transfer of proceedings pending with the Asst. Collector to Collector. Be that as it may, even otherwise, if the Asst. Collector is held to have traversed beyond his jurisdiction, it would also amount to an order passed illegally without the legal authority. In such a case, the remedy provided under the Central Excises & Salt Act is to resort to action under Section 35E of that Act. The relevant provisions contained in Section 35E(2) are reproduced below : "The Collector Central Excise may, of his own motion, call for and examine the record of any proceeding in which an adjudicating authority subordinate to him has passed any decision or order under this Act for the purpose of satisfying himself as to the legality or propriety of any such decision or order and may, by order, direct such authority to apply to the Collector (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Collector of Central Excise in his order." From the above, it is clear that even assuming that the order has been passed without jurisdiction by the Asst. Collector, the Act itself provides for getting it reversed on the basis of illegality of the order. Admittedly, this course of action has not been done and the order is allowed to stand side by side with the new proceedings initiated by the Addl. Collector on the basis of a fresh show cause notice covering the same period on the same set of facts and circumstances. In my view, when there is a statutory remedy available under the Central Excises Act, for getting any illegal order passed by the Asst. Collector reversed by the competent authority, without resorting to this course of action, fresh proceedings on the same ground could not be initiated by another authority. The illegality can be on many grounds; one ground can be on account of lack of jurisdiction. Hence, if the Asst. Collector has acted beyond his jurisdiction that order is to be construed as an illegal order and Section 35E(2) clearly stands attracted and this provision cannot be set at naught by ignoring the order already passed by the Asst.

Collector as a nullity and initiating fresh proceedings. This legal provision being clear from the Act itself, no point of law arises requiring reference to the Hon'ble High Court. Hence I agree.