

Rubicon Vs. Collector of C. Ex.

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Court : Kerala

Decided On : Feb-28-1989

Reported in : 1989(22)LC269(Kerala); 1989(44)ELT401(Ker)

Judge : T.L. Vishwanath Iyer, J.

Acts : [Central Excise Act, 1944](#) - Sections 35B, 35E and 35F; Central Excise Rules - Rule 173

Appeal No. : O.P. No. 7085 of 1988

Appellant : Rubicon

Respondent : Collector of C. Ex.

Disposition : Petition allowed

Judgement :

T.L. Vishwanath Iyer, J.

1. Petitioner firm is a small scale industrial unit engaged in the manufacture of tread rubber. As a small scale unit, they claim exemption from payment of duty under the Central Excises and Salt Act, 1944 (the Act, for brevity) under notifications issued by the Central Government from time to time.

2. On 9-8-1984, the first respondent issued notice alleging that the petitioner's factory was kept under surveillance and subsequently inspected by the Superintendent of Central Excise on 13/14-2-1984, which resulted in seizure of incriminating documents and the recording of a statements from Balan, the foreman of the factory. The documents seized and the statement recorded from Balan disclosed that the production in the factory far exceeded the limit of exemption under the notifications of the Central Government during the three years, 1981-82, 1982-83 and 1983-84. On the basis of these disclosures, the Superintendent of Central Excise, Angamaly Range directed the petitioner on 16-2-1984 to take out licence under Rule 173 of the Central Excise Rules (the Rules). This was followed by the seizure on 17-2-1984 of 694.500 kilograms of tread rubber 'illegally' produced by the petitioner. A statement was recorded from Balan on that day also. The department collected further materials and recorded statements from various other persons, and issued the notice to show cause on 9-8-1984 alleging that the petitioner had suppressed production of tread rubber and clandestinely removed the goods and that they were guilty of contravention of various provisions of the Act and Rules. The petitioner had manufactured and cleared without payment of duty a total quantity of 2,29,984.500 kilograms of tread rubber of a value of Rs. 59,32,815.30 during the period 1-4-1981 to 13-2-1984. By suppressing the manufacture, the petitioner had evaded taking out of the prescribed licence and payment of duty due. The petitioner was, therefore, required to show cause why duty of Rs. 21,8030939 as also penalty should not be levied on them.

3. The petitioner objected to the proposal with contentions, which did not find acceptance with the first respondent. He passed an order of adjudication on 20-11-1986, the details of which are unnecessary for the present purpose. The petitioner challenged the order in appeal before the second respondent, namely the Appellate Tribunal, under Section 35B of the Act. The Tribunal set-aside the order on the ground that it had been passed in violation of the principles of natural justice. The matter was remitted to the first respondent for reconsideration of the issues after affording the petitioner an opportunity to cross-examine the witnesses mentioned in the list furnished by them and to pass fresh order in accordance with law.

4. After further enquiry the first respondent passed a fresh order of adjudication Ext. P5 on 26-2-1988 finding the petitioner guilty of suppression of manufacture and of clandestine removal of goods without payment of duty. Accordingly demand was made for an amount of Rs. 18,31,378.01 as excise duty, besides penalty of Rs. 2,00,000/- Penalty of Rs. 25,000/- each was imposed on the three partners and of Rs. 5000/- on an employee Mathachen. The plant, machinery, land and buildings were confiscated but option was given to redeem them on payment of Rs. 25,000/-. The tread rubber under seizure was also allowed to be redeemed on payment of Rs. 4000/-.

5. The petitioner as also the partners challenged this order in appeals before the second respondent Appellate Tribunal. The petitioner also filed an application Ext. P7 with a dual prayer to dispense with the deposit of the duty and the penalty levied as a condition for the maintainability of the appeal invoking the proviso to Section 35F of the Act, and to stay the recovery of these amounts pending the appeal. According to the petitioner, their financial position was such that insistence of the deposit will cause undue hardship to them. The Tribunal disposed of the application on 14-7-1988 by the order Ext. P8. It was stated that the various questions raised by the petitioner on the merits of the case will be gone into at the time of final disposal of the appeal, but that the petitioner stood prima facie implicated in regard to the clearance of goods without payment of duty. The Tribunal then considered the financial position of the petitioner as disclosed by the balance-sheet and found that it did not appear to be very comfortable. The departmental representative had pointed out that they cleared goods with a duty liability of about rupees three lakhs without payment of duty and that the petitioner was bound to make payment of this amount. In the circumstances the Tribunal directed pre-deposit of a sum of Rs. three lakhs on or before 30-9-1988. The Tribunal also stayed recovery of the balance amount subject to the petitioner complying with the directions for pre-deposit.

[This order of the Tribunal is seen reported at page 353 of 1988 (38) E.L.T. (Tribunal)]. The petitioner assails the order Ext. P8 as one not passed in proper exercise of the discretion vested in the Tribunal under the proviso to Section 35E of the Act.

6. Section 35F stipulates that where the decision appealed against relates to any duty demanded or penalty levied under the Act, the person appealing against the decision shall deposit with the adjudicating authority the duty demanded or the penalty levied. But the appellate authority is vested with a discretion to dispense with the deposit subject to such conditions as it may impose so as to safeguard the interests of the revenue, if it is of opinion that the deposit of the duty or the penalty would cause undue hardship to the appellant. The petitioner's submission is that after having found that their financial position was not 'very comfortable', the Tribunal was not justified in directing predeposit of rupees three lakhs by the order Ext. P8.

7. The right to appeal is not an absolute right. It is a statutory right and it can be circumscribed by conditions in the grant. The right given by Section 35B is a right with the condition imposed by Section 35F and thus a conditional right in respect of an appeal against the duty demanded or penalty levied. It is only upon fulfilment of the conditions imposed by Section 35F that the right to appeal becomes vested and exercisable by the appellant. Although there is no express provision for rejection of the appeal for non-deposit of duty or penalty, yet it makes it obligatory on the appellant to deposit the duty or penalty pending the appeal, failing which the appellate authority is fully competent to reject the appeal [See Navin Chandra Chhotelal v. Central Board of Excise and Customs, AIR 1971 S.C. 2280]. The proviso to the Section, however, gives a discretion to the appellate authority to dispense with such deposit conditionally or unconditionally in case of undue hardship. It is a matter of judicial discretion of the appellate authority [Vijay Prakash v. Collector of Custosm AIR 1988 S.C. 2010].

8. In dealing with an application invoking the discretion under the proviso to Section 35F, the appellate authority is not dealing with an application for stay. The deposit is required because it is a condition precedent for the entertain ability of the appeal. Therefore, on such an application, the question whether there is any duty admittedly due is irrelevant. The factor made relevant is undue hardship to the appellant. Even if there is any amount admittedly due, the appellate authority can dispense with the deposit of the duty and penalty as a pre-condition for entertaining the appeal, if insistence on such deposit will cause undue hardship to

the appellant. The line of enquiry is whether only undue hardship will ensue to the appellant by insistence on deposit of the duty and penalty and not whether any portion of the amount is admitted to be due or not. The latter is germane in considering an application for stay, but not while dealing with an application under the proviso to Section 35F. The distinction between the two types of applications assumes importance because while non-compliance with an order under the proviso to Section 35F entails rejection of the appeal itself, there is no such forfeiture incurred by non-compliance with the direction contained in an order of stay. The only consequence is that the assessee exposes himself to coercive process for recovery of the duty and penalty.

9. Having found that the financial position of the appellant was not comfortable, was the Tribunal justified in directing pre-deposit of rupees three lakhs for entertaining the appeal? The petitioner points out that their financial position was not very comfortable as noted by the Tribunal itself. The Government of Kerala has taken note of their financial constraints and the District Industries Officer, Ernakulam has declared the petitioner's unit as a sick unit. The balance-sheet of the petitioner produced before the Tribunal showed that they had sustained a loss of Rs. 44,832/- during the year 1986-87. They were incurring loss in the year 1987-88 as well. They had a liability of Rs. 1,14,000/- to the Kerala Financial Corporation besides an amount of Rs. 3,06,000/- to the State Bank of Travancore. Their assets were however worth only Rs. 1,51,000/-. It is evident, therefore, that the petitioner was not in a sound financial position and that deposit of the duty and penalty levied will place further stress and strain on their resources. In the light of the finding entered by the Tribunal about the financial position of the petitioner, it has to be held that the direction to pay rupees three lakhs as pre-deposit was not made in sound exercise of the judicial discretion vested in the Tribunal. The primary reason which weighed with the Tribunal in making this direction was the fact that this amount was more or less admitted to be due. In placing reliance on this factor as a relevant circumstance, the Tribunal has mis-directed itself in law. This factor is extraneous in the consideration of an application under the proviso to Section 35F, though very much relevant in dealing with a prayer for stay. The right to appeal though hedged in with a condition, is, nevertheless, a very valuable right and ought not to be denied unless no undue hardship will be caused to the

appellant by insistence on the deposit of the duty and the penalty.

10. In *U.P. Laminations v. Union of India*, 1985 (20) E.L.T. 243 a Division Bench of the High Court of Allahabad relieved a small scale entrepreneur who had difficulty in granting liquid assets for furnishing bank guarantee, as directed by the Appellate Tribunal, of the obligations on the ground that it caused undue hardship to the appellant. In *Goel v. Union of India* 1988 (35) E.L.T. 449 another Bench of the same High Court granted the benefit of the proviso to a firm which was incurring losses repeatedly. In *Uptron Powertronics v. Collector of Central Excise* 1987 (28) E.L.T. 61 the High Court of Delhi held that an enquiry into the financial difficulties of the appellant was necessary in deciding the question of undue hardship. In *re: American Refrigeration Company Ltd.* 1986 (23) E.L.T. 74, the High Court of Calcutta was dealing with an appellant who was incurring 'huge' losses. The Court held that this was also a factor to be taken into consideration in dealing with an application for dispensing with prior deposit.

11. The financial position of the appellant is thus an important and relevant factor in the consideration of undue hardship. If the appellant's finances were in the red or not comfortable, any direction to the appellant to make payment of such a substantial amount as rupees three lakhs will necessarily cause undue hardship to them having regard to their available resources. The Tribunal has committed an error of law in treating the question of admitted liability as a relevant factor, in this matter.

12. The discretion vested in the 2nd respondent has not been exercised in accordance with law. Ext. P8 has, therefore, to be quashed. On the facts and the circumstances of the case, the condition of non-deposit has to be dispensed with and the appeals have to be heard on merits.

13. The order Ext. P8 has also clubbed together an order on the prayer for stay with a direction that if the pre-deposit is made recovery of the balance duty and the penalty will stand stayed pending the appeals. This part of the order is, perhaps, justified as existence of admitted liability is certainly a factor relevant in the consideration of an application for stay. The illegality committed by the Tribunal is in directing pre-deposit of the alleged admitted amount, with the consequence of

the forfeiture of the appeal itself, in default of compliance. If this direction for deposit had been given on the application for stay, it would have been beyond challenge. Since the direction for pre-deposit is being quashed by me there is no further order as such on the prayer for stay. I feel that the interests of justice will be subserved by a direction to the Tribunal to deal with the appeals on merits with all expedition. If the Tribunal is not able to dispose of the appeals expeditiously, it will be open to the Tribunal to consider the prayer for stay made in Ext. P7 on its merits and pass appropriate orders. Till orders are passed on the prayer for stay or on the appeals, whichever is earlier, recovery of the duty and the penalty levied by the order Ext. P5 will be kept in abeyance.

14. The original petition is allowed in the manner indicated above. Ext, P8 is quashed. The Appellate Tribunal is directed to dispose of the appeals filed against the order Ext. P5 as expeditiously as possible. No costs.

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