

Gobald Textiles Vs. Collector of Central Excise

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Court : Chennai

Decided On : Feb-23-1993

Reported in : 1993(66)ELT559(Mad)

Judge : Venkataswami, J.

Appeal No. : W.P. No. 8391 of 1989

Appellant : Gobald Textiles

Respondent : Collector of Central Excise

Judgement :

ORDER

1. This writ petition is filed for the issue of a writ of certiorarified mandamus to call for the records relating to the Order of the first respondent dated 20-9-1987 and the orders of the second respondent dated 31-5-1988 and 14-2-1989, and to quash the same, and for a consequential direction to refund a sum of Rs. 7,000/- collected from the petitioner pursuant to the impugned order of the first respondent.

2. Brief facts relating to this writ petition are the following :-

The petitioner, a private limited company, is manufacturing and selling various kinds of yarn. On 10-6-1986, the officials of the first respondent visited the petitioner's business premises and inspected the factory. After such inspection, the

officials of the first respondent came to the conclusion that there was a shortage of 245.95 kgs. of yarn in respect of 34 counts yarn and an excess of 88.70 kgs. of yarn in respect of 40 counts yarn. On the basis of the above conclusion, a sum of Rs. 554.65p was levied as excise duty for excess and shortage of yarn noticed on that date. On the basis of the shortage found on the date of inspection and also on the basis of the shortage found on the date of inspection and also on the basis of a statement given by the Manager of the petitioner's company, the first respondent calculated the excess of yarn escaped from excise duty respectively for two years and imposed a duty of Rs. 28,154.09p by an order dated 20-9-1987.

3. Aggrieved by the order of the first respondent, the petitioner preferred an appeal to the second respondent. The second respondent, by a detailed order, while confirming the order of the first respondent, dismissed the appeal on 31-5-1988. Subsequently, the Reference Application filed by the petitioner before the second respondent was also dismissed on 14-2-1989. Instead of moving this court for a Reference as provided under Section 35-G(3) of the Central Excises and Salt Act, 1944 (hereinafter referred to as 'the Act'), the petitioner has filed this writ petition, challenging the order of the first respondent and orders of the second respondent, as mentioned above.

4. Mr. K. Jayachandran, learned Additional Central Government Standing Counsel, raised a preliminary objection as to the maintainability of the writ petition contending that after failing to persuade the second respondent to make a reference to this Court under Section 35-G(1) of the Act, the petitioner should have resorted to the effective alternative remedy provided under Section 35-g(3) of the Act and without availing that regular statutory, equally efficacious, remedy, the act of the petitioner in moving this court under Article 26 of the Constitution of India cannot be sustained.

5 Mr. G. Masilamani, learned Senior Counsel appearing for the petitioner, while admitting the facts as narrated above, however, submitted that the failure to invoke the alternative remedy is not always fatal to move this court under Article 226 of the Constitution of India if the petitioner is able to establish the error apparent in the orders impugned. In support of his submission, he relied on a Division Bench

judgment of this court in K. S. Shivji & Co. v. Joint Commercial Tax Officer, Explanade Division II, Madras reported in 16 S. T. C. 769. He also relied on the following decisions :- Guita and company v. Sales Tax Officer, Etawah reported in 13 S. T. C. 591, Jhagru Shaw and Others v. Commissioner of Commercial Taxes and Others reported in 17 S. T. C. 130 and M/s. Jammu Metal Rolling Mills v. The Assessing Authority reported in 1971 T.L. R. 689.

6. I have considered the rival submissions. In the view I propose to take, it is not necessary for me to go into the merits of the case.

7. Undoubtedly, as contended by the learned Senior Counsel for the petitioner, the existence of alternative remedy is not always a bar to move this court under Article 226 of the Constitution of India provided the aggrieved party is able to establish that there is error apparent on the face of the records. Therefore, let us now find out whether there is any error apparent on the face in the impugned orders.

8. While dismissing the Reference Application, the second respondent Tribunal has observed as follows :-

'On consideration of the submissions made by the learned Counsel and the learned D. R., it is seen that the points raised are points on which, from a perusal of the Tribunal's order it is clear that the Tribunal had arrived in its finding on these issues on the basis of an analysis of the evidence on record and it is well settled by the pronouncements of the Supreme court that when the Tribunal's finding is based on an appreciation of evidence in regard to facts in a case, no point of law would.... therefrom unless it is shown that it is perverse or arbitrary.

'This is so, even if based on the same evidence, a different conclusion could have been possible. In this case, the Tribunal had considered the statement of Shri Jayaprakash, Manager of the applicant firm for 17 years wherein he had referred to the practice that was adopted in the matter of weighment by the applicant firm and also the fact that there was no retraction from the statement of the Manager. The Tribunal had further taken into consideration other evidence in the shape of advertisement of the applicant declaring the weight of the packing material as 3.4 kgs. The Tribunal had further confirmed that there was ground for sustaining the

charge of suppression by the applicant by observing. 'The plea of the learned Consultant that the Departmental Officers had been regularly visiting the appellant's premises and should be presumed to be in the know of the things cannot be accepted, because the plea has not been probalised much less established as per law. In the result, no point of law arises out of the Tribunal's order and the reference application is rejected.'

From the above extract, it is clear beyond doubt that the Tribunal has deeply gone into the facts and arrived at certain conclusions based on the evidence available before it. That being the position, even if this Court considers that the appreciation of evidence by the Tribunal was not correct, even then, while exercising the jurisdiction under Article 226 of the Constitution of India, this Court will not substitute its finding in the place of the findings of the Tribunal, Therefore, there is absolutely no question of error apparent on the face of the order/s impugned in this case to justify the invocation of the writ jurisdiction of this Court instead of moving this court under Section 35-G(3) of the Act. Incidentally, it may be mentioned that if the petitioner had moved this court under Section 35-G(3) of the Act, that would have been heard by Division Bench of this court. In *Sharma Trolly Manufacturers v. Customs, Central Excise and Gold (Control) Appellate Tribunal* reported in : 1987(30)ELT317(All) , a Division Bench of the Allahabad High Court, under Similar Circumstances, had held as follows:-

'An order was passed by the Collector Central Excise, Kanpur against the petitioner on 29-2-1979. It preferred an appeal before the Central Board of Excise and Customs, New Delhi on 18-4-1979. The appeal was dismissed on 31-12-1979. Thereafter, the petitioner filed the revision under Section 36 of the Customs and Excise Act. After the revision had been filed by the petitioner, the Central Excise Act was amended. By this amendment, Section 35-G was inserted under which the Tribunal could send a reference tot he High court if it was satisfied that the case involved question of law. Before the Tribunal, the petitioner raised a number of grounds which are enumerated in paragraph 10 of the writ petition. The application was rejected on 4th April, 1986. Thereafter instead of filing an application under sub-section (3) of Section 35 of the Central Excises and Salt Act, the petitioner filed the present writ petition and obtained a stay order. The

petitioner's counsel was informed on the last occasion that the writ petition was not maintainable. The time was sought for converting the writ petition into application for reference, but this has not been done, since a specific remedy for filing an application for reference is provided in the Central Excise Act, this writ petition is not maintainable and is liable to be rejected on that ground.

The writ petition is rejected and the interim stay order given on 23rd April, 1986 is withdrawn.'

Therefore, in the circumstances of the present case, I uphold the preliminary objection raised by the learned counsel for the respondents, and accordingly dismiss the writ petition. No costs.

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