Provash Kumar Dey Vs. Inspector of Central Excise and ors.

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SooperKanoon Citation : sooperkanoon.com/868547

Court : Kolkata

Decided On : Jul-14-1987

Reported in : 1988(15)ECC310,1987(31)ELT13(Cal)

Judge : Sudhir Ranjan Roy, J.

Acts : Central Excise Act, 1944 - Section 36; ;Constitution of India - Article 226; ;Central Excise Rules, 1944 - Rules 32(1), 32(2), 39 and 40

Appeal No. : C.R. 7262 (W) of 1980

Appellant : Provash Kumar Dey

Respondent : inspector of Central Excise and ors.

Advocate for Def. : Taher Ali, Adv.

Advocate for Pet/Ap. : Nani Lal Banerjee, Adv.

Judgement :

Sudhir Ranjan Roy, J.

1. The petitioner is a Trader of Biri tobacco at village Bagula Bazar in the District of Nadia and he carries on business under Central Excise Licence No. 322 of 1963.

2. The tobacco that the petitioner deals with is known as duty-paid Biri tobacco for which a Central Excise Licence had to be obtained by him.

3. In accordance with the provisions of the Central Excise Rules the petitioner purchases and transports tobacco under proper permits called T.P.1's and the tobacco so purchased and transported is stored in the licensed premises of the petitioner at No. 1094, Bagula Bazar, District Nadia.

4. On April 29, 1974 some officers of Central Excise Department visited the aforesaid licensed premises of the petitioner for the purpose of verification of stock and checking of account and permits.

5. During the said verification the officers found 70 bags of duty-paid tobacco lying in an adjacent premises, being No. 1095, as the original licensed premises was being repaired and white-washed due to the Bengali festival 'Aukshoy Tritiya1 when all the dealers generally celebrate their 'Nutan Khata' ceremony after cleaning and white-washing the shops.

6. The Central Excise Officers seized 70 bags of duty-paid tobacco of the petitioner on the allegation that the same was stored in a premises other than the licensed premises in violation of the Central Excise Rutes, 1944.

7. In his statement, which was taken by the Central Excise Officers on the spot, the petitioner explained that the seized tobacco was originally stored in the licensed premises but was temporarily removed to the adjacent room for a couple of days since the licensed premises was being repaired and white-washed on account of 'Nutan Khata' ceremony.

8. The petitioner also explained in his statement under what circumstances he was unable to maintain his account uptodate.

9. Thereafter, the respondent No. 3, the Assistant Collector of Central Excise issued a show cause notice to the petitioner alleging that the petitioner had contravened the provisions of Rules 32(1), 39 and 40 of the Central Excise Rules, 1944 inasmuch as the prescribed account was hot written upto date resulting in variation of the stock actually found and the stock shown in the E.B. J account. He was further charged with unauthorised storage of 1379.900 kgs. of Biri tobacco and 1272 kgs. of Stalk Kandi in the adjacent premises No. 1095 and also for not

having been able to prove that the seized tobacco was in fact duty paid tobacco (Annexure 'C').

10. The petitioner in his reply to the show cause notice duly explained all the relevant facts and circumstances (Annexure' 'D'). He also explained the circumstances once again when he was given a personal hearing by the respondent No. 4, the Adjudicating authority.

11. In spite of the explanation offered by the petitioner the respondent No. 4 found him guilty of violation of Rules 32(2), 39 and 40 of the Central Excise Rules, 1944.

12. During the pendency of the adjudication proceedings the seized tobacco was provisionally released to the petitioner after realising cash security of Rs. 8573.76 p. and also after obtaining a security bond.

13. Subsequently, on the basis of the findings recorded in the adjudication proceedings, the entire security deposit of Rs. 8573.76 p. was appropriated by imposing a penalty of Rs. 500/-, redemption fine of Rs. 1099.06 p. and excise duty of Rs. 6974.70 p.

14. Subsequently, another show cause notice dated September 12, 1974 was issued by the respondent No. 2, the Superintendent (Technical) Central Excise for violation of Rules 32(1) of the Central Excise Rules, 1944. The said show cause proceeding was adjudicated by the respondent No. 2 on March 24, 1975 and a penalty of Rs. 25/- was imposed upon the petitioner.

15. Being aggrieved the petitioner preferred an appeal before the Appellate authority, but the said appeal was summarily rejected as time-barred by an order dated August 22, 1977 (Annexure 'F').

16. Against the said order of the Appellate authority the petitioner filed a revision application under Section 36 of the Central Excises and Salt Act, 1944 but the said revision application was also rejected by an order dated November 30, 1979.

17. The petitioner thereafter came up before this Court for redress under Article 226 of the Constitution praying for the issuance of a writ in the nature of

Mandamus directing the respondents to rescind, recall, cancel and withdraw the impugned adjudication orders made by the Adjudicating Officer, the Appellate authority and the Revisional authority respectively and for certain other reliefs.

18. The respondents in their affidavit-in-opposition have supported the actions taken by the Central Excise Department against the petitioner. According to the respondents, the petitioner was rightly found guilty for contravention of Rules 32(2), 39 and 40 of the Central Excise Rules, 1944 since he failed to produce any evidence, documentary or otherwise, that the seized tobacco which was allegedly shifted illegally to an unlicensed premises, was actually duty-paid tobacco.

19. As regards to the second show cause notice, it is the case of the respondents in their affidavit-in-opposition that since the petitioner failed to maintain upto date accounts under the Central Excise Rules, he was rightly found guilty and a penalty of Rs. 25/- was rightly imposed on him.

20. Now, since the petitioner was found guilty for contravention of Rules 32(2), 39 and 40 of the Central Excise Rules, it may be convenient at the outset to refer to the said Rules, which are as hereunder :-

32(2) - If any person -

(a) carries or transports such tobacco without a valid permit, certificate or sale-note, or

(b) while carrying or transporting such tobacco, does not on request by an officer, forthwith produce a valid permit or certificate or sale-note, as the case may be, or

(c) enters any particulars in the certificate or sale-note in respect of any such tobacco, which are, or which he has reason to believe to be false.

he shall be liable to a penalty not exceeding one thousand rupees, and the tobacco in respect of which the offence is committed shall be liable to confiscation.

39. Declaration of premises by wholesale purchaser of unmanufactured tobacco - Every wholesale purchaser of unmanufactured tobacco for the purpose of trade or manufacture shall, at the time of applying for a licence or for the renewal thereof,

make a true declaration in respect of every store-house, work-house, room and place used or intended to be used by him, for the storing, keeping, sorting, grading, manufacturing and selling of unmanufactured tobacco or products manufactured therefrom, giving the particulars specified in the form and deliver such declaration to the proper officer; and every such store-house, room and place shall be kept, marked and numbered with the like distinguishing numbers or letters, or numbers and letters, corresponding to the description thereof in the declaration; and in default thereof all tobacco found therein shall be liable to confiscation and wholesale purchaser shall, for every storehouse, work-house, room or place not declared or not marked, or numbered be liable to a penalty which may extend to one thousand rupees.

40. Wholesale purchase may not receive unmanufactured tobacco or other unmanufactured products except under permit showing payment of duty. - Except as provided in the proviso to Sub-rule (1) of Rule 32 and in 171 no wholesale purchase of unmanufactured tobacco for the purpose of trade or manufacture and no wholesale purchaser, of other unmanufactured products from a curer shall receive into any part of his premises or into his custody or possession, any unmanufactured tobacco or other unmanufactured products, other than tobacco or other unmanufactured products imported from a foreign country, otherwise than under a valid permit granted by an officer showing that the proper duty has been paid; and every such wholesale purchasers who receives or has in his custody or possession any such goods, in contravention of this rule, shall, in respect of every such offence, be liable to pay the duty leviable on such goods, and to a penalty which may extend to two thousand rupees, and the goods shall also be liable to confiscation.

21. So far Rule 32(2) is concerned, the petitioner as per the adjudication order (Annexure 'E') was found guilty for contravention thereof since he had removed the tobacco from his licensed premises to another place without any valid permission for such transfer. In his explanation the petitioner stated that he was not aware that any such permission was actually necessary. However, since ignorance of law is no excuse the petitioner, in my view,, was rightly found guilty for contravention of Rule 32(2). As a matter of fact, Mr. Banerjee, the learned

Advocate representing the petitioner, conceded in his fairness that the petitioner had actually contravened Rule 32(2) by shifting the tobacco from his licensed premises to another place without proper permission.

22. So far Rule 39 is concerned, there can also be no doubt that the petitioner contravened the said rule by storing tobacco in an unlicensed premises. This was also conceded by Mr. Banerjee, the, learned Advocate representing the petitioner.'

23. It was, however, strongly contended by Mr. Banerjee that his client did not contravene the provision of Rule 40, which provides that no wholesale purchase of unmanufactured tobacco for the purpose of trade or manufacture shall be made otherwise than under a valid permit granted by an officer showing that proper duty has been paid.

24. According to Mr. Banerjee, the tobacco that was seized by the Central Excise Officers from the unlicensed premises, was actually duty-paid tobacco which was temporarily removed from his licensed premises since the said licensed premises was under repair.

25. Now, it is not the case of the respondents that the petitioner stored non-duty-paid tobacco in his licensed premises. As a matter of fact, when the Central Excise Officers visited the licensed premises of the petitioner, some quantity of tobacco was found there, which, however, did not tally with the accounts maintained by the petitioner. For this the petitioner was charged separately and a fine of Rs. 25/- was imposed on him. But it is not the case of the respondents that the said tobacco was non-duty-paid.

26. In this connection the specific case of the petitioner is that the seized tobacco which was found in the unlicensed premises No. 1095, was actually duty-paid tobacco which was temporarily removed from his licensed premises. Significantly, the petitioner having been found guilty for having shifted tobacco to the unlicensed premises without proper permission the fact of shifting should be deemed to have been admitted.

27. In this connection the petitioner in his written explanation (Annexure 'D') stated that he had evidence to show that the seized tobacco was actually removed from the approved premises to the temporary shed. In this connection the petitioner requested the Assistant Collector of Central Excise, who issued the show cause notice, to hold a local enquiry into the matter and' to examine the witnesses as may be produced by him.

28. The adjudication order (Annexure 'E') shows that as per the request of the petitioner there was further verification. In that connection the Adjudicating Officer made the following observations in his order :-'It appears from the enquiry report and also from the written statement of Shri Dey that the shifting of the tobacco in question was made but on that material date of verification the tobacco was not in existence. It cannot, therefore, be stated that the tobacco which was transported under the T.P. 1 in question was the same which was seized. Shri Dey owner of the tobacco was asked to produce the seized tobacco which was taken release provisionally but he could not do so'.

29. From the aforesaid observations it is clear that shifting of the tobacco from the licensed to the unlicensed premises as alleged by the petitioner, was found correct on verification. However, the only difficulty which appears to have been faced by the Adjudicating officer, was that the seized tobacco could not be found for verification in order to come to the conclusion that the said tobacco was the same as was transported by the petitioner under the T.P. 1 in question. From this, it appears, that had the seized tobacco been found to be the same as was initially stored in the licensed premises of the petitioner, the petitioner would have been exonerated from payment of further excise duty on the seized tobacco, since the tobacco initially stored in the unlicensed premises was duty-paid tobacco.

30. It may be recalled here that after the seizure the tobacco was initially left in the custody of the petitioner and was subsequently released in his favour on furnishing cash security as well as executing a bond. Under the bond the petitioner was duty bound to produce the tobacco before the Adjudicating officer whenever called but being a perishable commodity, the petitioner sold away the entire stock without retaining the same for further production in terms of the bond executed by him,

And this appears to be the reason why the Central Excise authorities could riot verify whether the seized tobacco was the same as was said to have been shifted from his licensed premises.

31. Unfortunately, however, this does not appear to be a valid reason because it appears from the seizure list that at the time of the seizure of the tobacco as many as 8 samples were drawn and that being so, the Central Excise authorities could have very well made the necessary verification with reference to the said samples. There can be no doubt that the samples were drawn with the sole object of verification of the seized tobacco and, therefore, when it was found that the seized stock released in favour of the petitioner was not Available for verification, proper verification could have been made with reference to the samples already drawn. Strangely, however, this does not appear to have been done.

32. On the other hand, the petitioner, as it appears, could establish that it was his duty-paid tobacco which was removed from the licensed to the unlicensed premises. This could have been very well controverted by the Central Excise authorities by examining the samples drawn and if such examination was not done, the petitioner cannot be blamed.

33. It is true that for Contravention of the relevant rules the seized tobacco became liable to confiscation and since it was ultimately not so available for confiscation on account of its being disposed of by the petitioner after release, a redemption fine was imposed and realised in lieu of the confiscation.

34. The main question is whether the tobacco seized from the unlicensed premises was duty-paid tobacco or not. According to the petitioner, it was his duty-paid tobacco having been shifted from his licensed premises temporarily. This shifting was proved by him to the satisfaction of the Central Excise authorities and that being so, no further duty can be' charged on the said tobacco. It was, however, open to the Central Excise authorities to prove by examining the samples that the tobacco seized was not the same as was actually shifted from the licensed premises but for unknown reasons this opportunity was not availed of.

35. Incidentally, the seizure was made on 29-4-1974 and the tobacco was released to the petitioner on 15-7-1974 on his executing a bond and furnishing cash security. The adjudication proceedings were concluded in 1976. It is quite likely that had the tobacco been retained by the petitioner for such a long time, it might have perished. Under such circumstances, if the petitioner actually disposed of the tobacco, he cannot be blamed. As a matter of fact, the Central Excise authorities at the time of the release of the tobacco obtained sufficient amount of cash security to cover all such eventualties and as a matter of fact, a redemption fine of Rs. 1099.06 p. as already stated, was realised out of the said security deposit.

36. However, in view of the facts and circumstances of the case, I do not think that the respondents could recover from the security deposit a sum of Rs. 6974.70 p. towards excise duty since ex-facie the seized tobacco represented the duty-paid stock of the petitioner.

37. Thus, on a consideration of the facts and circumstances above, the writ petition succeeds in part.

38. The relevant adjudication orders (Annexures 'E', 'F' and 'G') are hereby quashed only so far as they relate to recovery of excise duty of Rs. 6974.70 p. (Rupees six thousand nine hundred seventy-four and paise seventy) from the petitioner and the respondents are hereby directed by the issuance of a writ in the nature of Mandamus to refund the said amount to the petitioner within a period of 45 days from this date. The respondents are further directed not to proceed any further against the petitioner in the matter.

39. There will be no order for costs.