2024:CHC-OS:140-DB

IN THE HIGH COURT OF JUDICATURE AT CALCUTTA

SPECIAL JURISDICTION (CENTRAL EXCISE)

ORIGINAL SIDE

RESERVED ON: 10.05.2024
DELIVERED ON: 24.05.2024

CORAM:

THE HON'BLE MR. CHIEF JUSTICE T.S. SIVAGNANAM

AND

THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

CEXA NO. 14 OF 2023

I.A NO: GA 1 OF 2023

M/S. ANURAG STEEL ENTERPRISE

VERSUS

COMMISSIONER OF CGST & CENTRAL EXCISE, HOWRAH CGST & CX COMMISSIONERATE

Appearance:-
Mr. Arijit Chakraborty, Adv.
Mr. Akash Dutta, Adv.
Mr. Aditya Dutta, Adv.
Mr. Deepak Sharma, Adv.

.....For the Appellant.

Mr. K.K. Maiti, Adv.
Mr. Tapan Bhanja, Adv.

.....For the Respondent.

JUDGMENT

(Judgment of the Court was delivered by T.S. Sivagnanam, CJ.)

1. This appeal filed by the assessee under Section 35G of the Central Excise Act, 1944 (the Act) is directed against the final order dated 4th May, 2023 passed by the Customs, Excise and Service Tax Appellate Tribunal, Regional Bench, Kolkata. The appellant assessee has raised the following substantial questions of law for consideration:

> *A. Whether penalty under Rule 26 of the Central Excise Rules, 2002 is imposable without holding any exercisable goods as confiscable under the Central Excise Act, 1944 or Rules made thereunder?*
>
> *B. Whether penalty under Rule 26 of the Central Excise Rules, 2002 is imposable upon any person without arriving at specific finding about the prior knowledge and/or reasons to believe about confiscable nature of any exercisable goods under the Central Excise Act, 1944 and/or Rules made thereunder?*
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> *F. Whether the Ld. Tribunal below has miserably failed to follow their own Final Order No. 75583-75585/2020 dated 12.11.2020 passed in Excise Appeal No. 76211 of 2018 [M/s. Jai Balaji Industries Limited (Unit- III) v. Commissioner of CGST and CX, Bolpur Commissionerate], amongst others, whereat the Ld. Tribunal has held that the recoveries from the premises of M/s. Shree Parasnath Re-Rolling Mills Limited on 27.12.2012 cannot be relied upon to arrive at any adverse conclusion?*
>
> *G. Whether the rule of judicial discipline demands the Ld. Tribunal to follow their earlier order with respect to the similarly situated appellants more particularly when the earlier Final Order No. 75583-75585/2020 dated 12.11.2020 passed by*

the Ld. Tribunal in Excise Appeal No. 76211 of 2018 [M/s. Jai Balaji Industries Limited (Unit- III) v. Commissioner of CGST and CX, Bolpur Commissionerate], amongst others, has not been appealed against any of the parties in the said proceeding?

2. We have heard Mr. Arijit Chakraborty, learned Advocate assisted by Mr. Akash Dutta, Mr. Aditya Dutta and Mr. Deepak Sharma, learned Advocates for the appellant and Mr. K.K. Maiti and Mr. Tapan Bhanja, learned Advocates for the respondent.

3. On 19th April, 2024 when this appeal was heard, it was represented by Mr. Arijit Chakraborty, learned Advocate appearing for the appellant that the decision of the Tribunal in the case of ***M/s. Jai Balaji Industries Limited (Unit- III) Versus Commissioner of CGST and CX, Bolpur Commissionerate*** in Excise Appeal No. 76211 of 2018 etc. is identical on facts to the assessee's case as in the said case also the assessee was a purchaser from Shree Parasnath Re-Rolling Mill Limited and the learned Tribunal has allowed the appeals and such orders have become final, however the learned Tribunal did not do so in the assessee's case and therefore, the assessee is on appeal and prayed for similar benefit be extended to the appellant as well. Subsequently, the matter was listed and heard and the case was reserved for judgment.

4. Search was conducted by the officers of the intelligence wing of the Central Excise Department on Shree Parashnath Re-Rolling Mills Limited hereinafter referred to as SPRML, on the specific intelligence that they were evading Central Excise Duty by clandestinely procuring raw material namely M.S. billets, M.S. ingots, sponge iron and M.S. scrap, suppressing production and clandestinely procuring the finished goods i.e. M.S. structural items, M.S.

wire rods of various sizes. This search led to issuance of a show-cause notice on the appellant dated 16.03.2017 containing various allegations and the appellant assessee was called upon to show cause why penalty should not be imposed on them under Rule 26 (1) of the Central Excise Rules, 2002 (the Rules).

5. The sum and substance of the allegations is that the appellant assessee was involved in clandestine removal of several metric tons of wire rods manufactured by SPRML during the period from 01.02.2012 to 25.12.2012 without cover of Central Excise invoices and the appellant assessee appears to have knowingly concerned themselves in transporting, removing, concealing, purchasing or selling the said goods which they knew or had reason to believe were liable to confiscation under the provisions of the Act and the Rules framed thereunder. Further, the allegation was that the action of the appellant assessee was deliberate and the abetted SPRML in evasion of Central Excise Duty by contravening the provisions of the Act and the Rules. The appellant assessee did not submit their reply to the show-cause notice but had belatedly submitted a reply and after the Order-in-Original was passed by the adjudicating authority dated 27.11.2017. The adjudicating authority after noting the facts of the case as well as the other records held that it is evident that SPRML was involved in clandestine removal of wire rods without payment of duty which came to light from the data recorded in the search operations conducted on SPRML and also from the statement recorded from one Debasis Sasmal who was the Chief Financial Officer of SPRML who had admitted the clandestine removal.

6. Furthermore, the adjudicating authority referred to the statement recorded from the Managing Director of SPRML Anil Jain who admitted the practice of clandestine removal of MS wire rods and evasion of duty and SPRML voluntarily deposited an amount of Rs. 14.60 crores towards their Central Excise Duty liabilities. Furthermore, the brokers as well as the transporters involved in the business transaction of SPRML admitted clandestine removal of excisable goods without payment of Central Excise Duty and without Central Excise invoices. Further, the names of the noticees featured in the party wise / buyer wise details of sales of MS wire rods manufactured by SPRML as retrieved from the hard drives recovered from the secret office of SPRML and the appellant assessee procured 543.15 MT of MS wire rods from SPRML during the period of 01.02.2012 to 25.12.2012. A statement was recorded under Section 14 of the Act from the proprietor of the appellant assessee, Sanjay Agarwal who admitted procurement of MS wire rods from SPRML without any Central Excise invoices and that the payments were made in cash. After noting all these details and also taking note of the fact that the appellant assessee did not deny or dispute the charges leveled against them in the show-cause notice nor placed any evidence to dislodge the allegations, confirmed the proposal in the show-cause notice and imposed penalty of Rs. 26,94,687/-. Challenging the said order, the appellant assessee preferred appeal before the Commissioner of Central Excise (Appeals) Kolkata II (Commissioner Appeals).

7. The appellate authority discussed the facts and also considered the statement which was recorded from the proprietor of the assessee which was found to be admissible, took note of the other materials and held that the appellant assessee had knowingly indulged themselves in clandestine purchase of wire rods from SPRML during the relevant period without receiving any Central Excise invoice and subsequently sold the same in the open market without accounting for it in their records and therefore held that the appellant assessee was directly involved in the clandestine purchase of wire rods from SPRML. Accordingly, the Appeal filed by the assessee was dismissed. Challenging the said order, the assessee preferred appeal before the Tribunal, contending that the allegation of clandestine removal of wire rods from SPRML is based on the records received / recovered from SPRML without any corroborative evidence and without conducting any enquiry at the end of the recipient i.e. the appellant assessee.

8. Further, it was contended that the onus to prove the allegation is on the person who alleges and therefore the department has to prove the allegation of clandestine receipt of the impugned goods and except for the so called statement recorded from the proprietor of the appellant, there is nothing on record to establish the case of clandestine purchase. Further, it was contended that any entry made in any record or any other person namely SPRML is not sufficient to hold the appellant guilty of clandestine purchase. Therefore, it was contended that the show-cause notice which was issued was based on conjectures and surmises. Further, it was submitted that no evidence has been adduced to prove the allegation of involvement in the alleged fraud in so far as it relates to or has connection with the appellant assessee and the entire allegation is based on conjectures and surmises without any positive evidence. The assessee also referred to the other decisions of the Tribunal wherein the appeals of those assessees are allowed. The Tribunal by the impugned order has dismissed the appeal filed by the assessee.

9. As mentioned above, the show-cause notice was issued to the appellant pursuant to investigation being carried out at the premises of SPRML, which has ultimately led to the imposition of penalty which has been confirmed by the appellate authority as well as the Tribunal. In this appeal filed under Section 35G the Court is required to consider as to whether any substantial questions of law arises for consideration. While doing so, the Court will also have to consider as to what would be the effect of the decision of the learned Tribunal in the case of ***Jai Balaji Industries Limited*** on which heavy reliance was placed by the learned Advocate for the appellant and also on the ground that the said order of the Tribunal has attained finality in favour of those assesses and there are other similar orders where the assesses who have alleged to be involved with SPRML were all successful before the Tribunal. The adjudicating authority, the appellate authority as well as the learned Tribunal have noted that the proprietor of the assessee in his voluntary statement recorded on 11th March, 2014 has admitted to the fact of receipt of goods from SPRML without cover of a purchase invoice for which payments were admittedly made in cash.

10. Further the appellant furnished the details of brokers and transporters of SPRML through whom such deals were facilitated. There are other voluntary statements recorded from the brokers Narender Agarwal and Surender Kumar Jain. The tribunal after referring to Rule 26 of the Central Excise Rules, 2002 observed that it is an admitted position that the assessee in their statement which has not been retracted, admitted that they had procured wire rods without cover of duty paid invoices from SPRML which was evident and established from the computerized ledgers which were seized by the department. The learned tribunal posed a question to itself as to whether the appellant can be held liable on the basis of the statement tendered by the co-accused. To answer the said question, the learned tribunal went into the facts of the case and noted that the computerized records which are date stamped, which cannot be tampered evidence supply of wire rods to the assessee; identification of the chain of brokers/transporters and their statements; cash dealing staff of SPRML admitted that sales were made without raising any invoice and the payment were received in cash and such cash was recovered from the secret places which were searched by the department; the assessee admitted to have sold the manufactured goods out of the impugned wire rods purchased/received from SPRML without invoice, by selling the same in open market after realization of their profit element. The tribunal also noted that the prime accused in the case namely SPRML had voluntarily paid Rs. 14.50 crores towards the duty liability. Further the tribunal noted that there was no retraction on the statement which was recorded on 11.03.2014 and the contention of the assessee raised after three years and nine months after the incident at the appellate stage casting a shadow on the veracity of the statement cannot be held to be legally sustainable and this aspect was also dealt with by the Commissioner of Appeals and rejected. Thus, on facts the tribunal held that penalty was imposed on the assessee not solely based upon any statement of the co-accused but along with the statement of the proprietor of the appellant as well as the other records much of which are computerized records where the dates and other details cannot be altered.

11. On going through the facts which have been recorded by the adjudicating authority, it is seen that the proprietor of the appellant was confronted with the computerized details of the ledger account showing sales of wire rods to Shri Durga Steel, Shri Ganesh Steel which is stated to be the names used as camouflage for SPRML maintained from 01.02.2012 to 25.12.2012 showing sales of MS Wire Rods to several parties and found that the said details were actually maintained by SPRML, Durgapur for a period 01.12.2012 to 25.12.2012 and where showing the details of sales of MS Wire rods by the SPRML to different parties/buyers. Further the proprietor of the assessee identified that during the period from 01.12.2012 to 25.12.2012 several consignments of MS Wire rods were sold/dispatched by SPRML to the appellant assessee which were reflected in the several pages in the computerized ledger accounts. Furthermore, the proprietor of the appellant assessee has put his signature with date on all the details which were shown pertaining to sales of wire rods by SPRML to the appellant during the relevant period. This information and the documents which were seen by the proprietor of the appellant and in acknowledgement thereof having put his signature has not been retracted or even assuming there was a retraction such retraction should be outrightly rejected as an afterthought and not substantiated and the statement recorded from the proprietor of the appellant is admissible in evidence.

12. The appellate authority has re-appreciated the factual position, apart from other things noted that the proprietor of the appellant was confronted with the computerized ledger account maintained for the relevant period and he was asked to produce the relevant purchase invoices as reflected in the computerized ledger however, he failed to produce any invoice for the relevant period. The proprietor had no details of the total quantity of MS wire rods purchased during the relevant period, payment for which has been made in cash in the Kolkata office of the SPRML through brokers.

13. The Commissioner Appeals also considered the plea of retraction raised by the appellant at the appellate stage and, noted that such a plea of retraction made after three years and nine months after the statement was recorded that too in the grounds of appeal filed within the year 2018 cannot in any manner dilute the veracity of the voluntary statement recorded on 11.03.2014. That apart there is no allegation that there was threat or coercion meted to the proprietor of the appellant when the statement was recorded on 11.03.2014. That apart, the alleged retraction has not been addressed to the officers who had recorded the statement or to the investigating officer. Therefore, the alleged retraction in the grounds of appeal filed before the Commissioner after a period of three years and nine months was rightly rejected by the Commissioner of Appeals.

14. In the facts and circumstances, the appellate authority was right in applying the decision of the Hon'ble Supreme Court in ***K.I. Pavunny Versus Assistant Collector (HQ) Central Excise Collectorate, Cochin*** [1] wherein it was held that the confessional statement of the accused, if found to be voluntary, can form the sole basis for conviction. Thus, in the absence of any valid retraction, the statement recorded from the proprietor of the appellant was admissible and if that be so, the admitted facts need not be proved.

15. The learned tribunal has also re-appreciated the factual position and has rendered its findings affirming the view taken by the appellate authority and the adjudicating authority. So far as the decision in the case of ***Jai Balaji Industries and Others*** the facts of the case were gone into and the learned tribunal concluded that the department has not attempted to investigate in the direction, they ought to have done to prove the alleged clandestine removal. In the case on hand, such situation does not arise in the light of the admission

[1] 1997 (90) ELT 241 (SC)

made by the proprietor of the appellant in his voluntary statement which continue to remain valid. Therefore, in our view, the decision in the case of ***Jai Balaji Industries Limited*** and the other two decisions of the learned tribunal referred to by the learned advocate for the appellant are factually distinguishable and cannot be applied to the facts and circumstances of the case on hand.

16. In the light of the above, we find that the matter is entirely factual and no question of law much less substantial questions of law arises for consideration in this appeal. Accordingly, the appeal fails and stands dismissed.

(T.S. SIVAGNANAM, CJ.)

I Agree

(HIRANMAY BHATTACHARYYA, J.)

(P.A – PRAMITA/ SACHIN)