

IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH

Criminal Misc. No.M-31420 of 2009
Date of Decision: 25th February, 2015

Jai Pal Khanna and another

...Petitioners

Versus

**Deputy Commissioner, Central Excise, Department of Revenue,
Ministry of Finance, Government of India, Amritsar.**

...Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr Vaneet Sharma, Advocate,
for the petitioners.

Ms. Ranjna Shahi, Sr. Standing Counsel,
for the respondent.

1. To be referred to the Reporters or not? Yes
2. Whether the judgment should be reported in the Digest? Yes

Amol Rattan Singh, J.

The petitioners have invoked the jurisdiction of this Court under Section 482 Cr. P.C. and seek quashing of complaint bearing case No.151 dated 20.04.2000, titled as Deputy Commissioner, Central Excise vs. M/s H. L. Textile Mills and others, filed under Section 99-AA of the Central Excise (& Salt) Act, 1944, read with Rules 52-A, 52, 173-B, 173-C, 173-F, 173-G, 174 and 226 of the Central Excise Rules, 1944.

The petition also seeks quashing of the orders dated 17.08.2006 and 27.10.2009 (Annexures P-3 and P-6), passed by the learned Chief Judicial Magistrate, Amritsar alongwith all consequential proceedings arising therefrom.

2. A perusal of the complaint and this petition, shows that the petitioners are partners in the aforesaid M/s H. L. Textile Mills, which is engaged in the manufacturing of liner fabric/nylon duck of polypropylene/nylon/polyster fabrics, which products, as per the complaint filed by the Deputy Commissioner, Central Excise, fall under the Sub-Heading 5911.90 of the Schedule to the Central Excise Rules, 1985.

It is alleged in the complaint that the petitioners and their firm, without filing registration under Rule 174 of the Central Excise Rules, 1944 and without obtaining Central Excise Registration Certificate, were engaging in the manufacturing of the aforesaid products and in the clandestine removal thereof, without observing any of the central excise formalities and without payment of Central Excise Duty leviable thereon and all the accused, being the firm and its partners, actively participated in the day to day business of the firm and as such, are all liable to be prosecuted.

It needs to be noted that though the complaint was filed against both the present petitioners and a son of petitioner no.2, as also the firm in which the petitioners are partners, the present petition has been filed only by Jai Pal Khanna and Mohinder Pal Khanna, sons of Hira Lal Khanna, after Vaneet Khanna, son of the second petitioner, is stated to have died.

3. Further, as per the complaint, it is stated that the first petitioner had stated that the Liner produced by the firm is meant for non-apparel purposes, having industrial/technical use only and as such, would not fall under Sub-Heading No.5911.90 of the Schedule to the Central Excise Tariff Act, 1985 and would not, therefore, attract Central Excise Duty @ 15%, ad-valorem.

4. However, as per the respondent herein, i.e. the Deputy Commissioner, Central Excise, Department of Revenue, Government of India, in view of the fact that the first petitioner, having admitted that the Liner is purchased directly by tyre makers, transmission belting and V-Belt manufacturing industrial units, where it is used in the production / processing of tyres, V-Belts and transmission belting, and the product (Liner) is being cleared by the firm as a finished textile product, suitable for industrial use, as such the product is “approximately classifiable” under the Sub-Heading 5909.00 up till 25.05.1995 and thereafter, under Sub-Heading 5911.90, thereby attracting Central Excise Duty @ 15%, ad-valorem.

5. Mr. Vaneet Sharma, learned counsel appearing for the petitioners submitted that other than the filing of the criminal complaint by the respondent, on 20.04.2000, a show cause notice for imposition of penalty was also issued to the petitioners, by the Central Excise Commissioner, Chandigarh-II, vide his order dated 03.10.1997, by which penalty was imposed upon the petitioners under the Central Excise Act & Rules.

6. The said order was challenged before the Customs Excise and Gold (Control) Appellate Tribunal (CEGAT), which, vide its order dated 08.01.2001 (Annexure P-2 annexed with the present petition), set aside the order of the Commissioner, holding that the use of the product (Liner) could not be called industrial use/technical use, as it was merely used for protecting the two layers of rubber, to prevent them from sticking together.

The reliance of the Revenue, upon the decision in the case of **Simplex Mills Co. vs. CCE, Nagpur, 1993 (49) ECR 147 (T)**, was rejected by the Tribunal, on the ground that the product is a fabric and not a made up

article and the decision in the *Simplex Mills' case*, would not be applicable as the products in question in that case were belting ducks, gray canvas cloth and gray nylon belting fabrics, all of which were used for industrial purposes and as such satisfied the requirement of note 7 of Chapter 59.

[Note:-Though there does seem to be some error, with regard to the terms, “industrial purpose” and “industrial use” in the order of the CEGAT, however, that would not be something to be gone into by this Court, as would be seen further.]

7. Mr. Sharma, learned counsel for the petitioners, further submitted that the aforesaid decision of the CEGAT was challenged by the respondent before the Hon'ble Supreme Court and the Civil Appeal (CA No.6949 of 2001) was dismissed by their Lordships on 25.10.2007, in the light of an earlier judgment of the Apex Court in *Commissioner of Central Excise, Nagpur vs. Simplex Mills Co. Ltd.* (2005), which was decided against the Revenue.

It is to be noted here that though in the judgment of the Tribunal, it has been stated that the judgment in the *Simplex Mills' case*, reported as 1993 (49) ECR (47) (T) had been challenged by the Company but the appeal had been dismissed by the Hon'ble Supreme Court, vide a judgment reported as **1996(88) ELT A 185**, the judgment referred to by their Lordships while dismissing the appeal filed by the Revenue, in the petitioners' case, vide order dated 25.10.2007, is a subsequent judgment in the *Simplex Mills' case*, which refers to the earlier *Simplex Mills' case* (before the Tribunal), as “Simplex-I”.

A perusal of the aforesaid judgment of the Supreme Court, in **CEE vs. Simplex Mills, i.e. Simplex-II**, shows that the judgment of the

CEGAT in Simplex-I was over-ruled by a larger Bench of the Tribunal in **Jyoti Overseas Ltd. vs. CCE (2001) 130 ELT 446 (CEGAT)**.

While considering both the judgments of the Tribunal, in Jyoti Overseas and Simplex-I, their Lordships held in Simplex-II, that the difference between “made up and non-made up” goods would be that the latter would “cover running lengths of textiles, unprocessed in the manner specified in the section note”.

After elaborating further on the issue, it was held that the reasoning given by the Tribunal in the *Jyoti Overseas'* case was unexceptionable and the decision in Simplex-I was correctly over-ruled (by the Tribunal).

In view of the above, the appeal filed by the Revenue, in Simplex Mills-II, was dismissed.

8. In the reply filed to the present petition, referred to by Ms. Ranjna Shahi, learned counsel appearing for the respondent, the stand that is still being taken, is that the product in question is classifiable under Sub-Heading 5911.90 of the Schedule to the Central Excise Tariff Act, 1985, thereby attracting excise duty @ 15% and the stock lying in the factory premises having been verified and found to be of a value of Rs.15,39,342/-, a duty of Rs.2,30,901/- was leviable and as such the goods were seized.

In reply to the contention of the petitioners that despite the CEGAT and the Apex Court holding that excise duty is not leviable on the product in question, it has been stated that in view of Section 34-A of the Central Excise Act, 1944, no confiscation made, or penalty imposed, under the provisions of the Act or any rule made thereunder, shall prevent the infliction of any other punishment to which the person affected is liable

under the provisions of the said Act or any other law.

Hence, it is contended by the learned counsel for the respondent that the two actions, i.e. penalty levied and criminal proceedings initiated, are independent of each other and can be proceeded with as such, simultaneously.

The reply also places reliance upon a judgment of the Hon'ble Supreme Court in **Assistant Collector of Customs, Bombay and another vs. L. R. Melwani and another (AIR) 1970 SC 962**, to plead that criminal proceedings before the Court are not barred because of any adjudication by the Collector.

9. The reply of the respondent further states that since the charge has already been framed against the petitioners and in fact, the statements under Section 313 Cr. P.C. have also been recorded and defence evidence had also been led, in other words, the trial has virtually concluded, the complaint should not be quashed at this stage, nor should the subsequent orders of the learned CJM, Amritsar, dismissing the applications of the petitioners to be discharged, dated 17.08.2006 and 27.10.2009, be set aside.

10. Having heard learned counsel for the parties and having gone through the pleadings, in my opinion, this petition deserves to be allowed and the complaint filed by the respondent, deserves to be quashed, thereby setting aside all subsequent orders passed, arising from the said complaint.

11. No doubt, Section 34-A of the Central Excise Act, 1944, stipulates, in effect, that criminal prosecution as well as departmental action (with regard to penalty etc.) are two distinct actions which shall proceed simultaneously, and it was also held, in relation to the Customs Act, by their Lordships in *Melwanis' case* (supra), that such simultaneous action is not

barred, however, the situation in the present case, is wholly different.

The basis of both, penalty proceedings initiated leading to adjudication in favour of the petitioners and their firm, right up to the Supreme Court, and the criminal proceedings initiated against them, vide the complaint under challenge, both arise from the same cause of action, i.e. the goods manufactured by them, according to the Revenue, fall under Sub-Heading No.5909.00 up till 25.05.1995 and thereafter, under Sub-Heading No.5911.90 of Schedule-II to the Central Excise Tariff Act, 1985.

This contention of the Revenue, having been specifically negated and held against it by the Supreme Court in the *Simplex' case (supra)*, in the light of which the appeal of the Revenue against the petitioners themselves was also dismissed, I do not see any basis left for the Revenue to proceed in criminal proceedings against the petitioners. Once the goods manufactured are held not exigible to Central Excise, the question of any proceedings, for non-payment of such excise duty, obviously does not arise. Consequently, equally obviously, when no duty and penalty is leviable on the petitioners on the goods manufactured, criminal proceedings on the same cause of action would also be void, ab-initio.

12. It has not been either pleaded in the reply of the respondent, nor has any such argument been made in Court, that despite non exigibility to the excise duty claimed by the Revenue, against the petitioners and their firm, the goods are still required to be registered, under Rule 174 of the Central Excise Rules, 1944.

A perusal of the complaint also does not show that any such plea has been taken by the respondent; the inference obviously being that registration of a product being manufactured by the firm of the petitioners,

is only required if the product falls under either Sub-Heading No.5901 or 5911.90 of the 2nd Schedule to the Central Excise Tariff Act, 1985, and the Rules framed thereunder.

The provision with regard to registration is contained in Section 6 of the Act of 1944 and Rule 174 of the Rules framed thereunder.

Section 6 of the Act reads as under:-

“6. Registration of certain persons.- Any prescribed person who is engaged in-

- a) the production or manufacture or any process of production or manufacture of any specified goods included in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), or
- b) the wholesale purchase or sale (whether on his own account or as a broker or commission agent) or the storage of any specified goods included in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986),

shall get himself registered with the proper officer in such manner as may be prescribed.”

Rule 174 further lays down the procedure for registration in case of those persons who are engaged in the production/manufacture etc. of excisable goods.

It is also necessary to state here the provisions of Sections 9, 9A and 9AA of the Central Excise Act, 1944, in which the offences and penalties leviable for contravention of the provisions given therein are laid down. As such, the above provisions are reproduced here in under:-

“9. Offences and penalties:- 1) Whoever commits any of the following offences, namely:-

- a) contravenes any of the provisions of section 8 or of a rule made

under clause (iii) or clause (xxvii) of sub-section (2) of section 37;

- b) evades the payment of any duty payable under this Act;
- bb) removes any excisable goods in contravention of any of the provisions of this Act or any rule made thereunder or in any way concerns himself with such removal;
- bbb) acquires possession of, or in any way concerns himself in transporting, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under this Act or any rule made thereunder;
- bbbb) contravenes any of the provisions of this Act or the rules made thereunder in relation to credit of any duty allowed to be utilised towards payment of excise duty on final products;
- c) fails to supply any information which he is required by rules made under this Act to supply, or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information;
- d) attempts to commit, or abets the commission of, any of the offences mentioned in clauses (a) and (b) of this section;

[shall be punishable,-

- i) in the case of an offence relating to any excisable goods, the duty leviable thereon under this Act exceeds one lakh or rupees, with imprisonment for a term which may extend to seven years and with fine:

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court such imprisonment shall not be for a term of less than six months;

- ii) in any other case, with imprisonment for a term which may extend to three years or with fine or with both.

2) If any person convicted of any offence under this section is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to seven years and with fine:

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court such imprisonment shall not be for a term of less than six months.

3) For the purposes of sub-sections (1) and (2), the following shall not be considered as special and adequate reasons for awarding a sentence of imprisonment for a term of less than six months, namely:-

- i) the fact that the accused has been convicted for the first time for an offence under this Act;
- ii) the fact that in any proceeding under this Act, other than a prosecution, the accused has been ordered to pay a penalty or the goods in relation to such proceedings have been ordered to be confiscated or any other action has been taken against him for the same act which constitutes the offence;
- iii) the fact that the accused was not principal offender and was acting merely as a carrier of goods or otherwise was a secondary party in the commission of the offence;
- iv) the age of the accused.

9A. Certain offences to be non-cognisable.- 1) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), offences under section 9 shall be deemed to be non-cognisable within the meaning of that Code.

2) Any offence under this Chapter may, either before or after the institution of prosecution, be compounded by the Chief Commissioner of Central Excise on payment, by the person accused of the offence to the Central Government, of such compounding amount as may be prescribed.

9AA. Offences by companies.- 1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that

the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.-For the purposes of this section,-

a) “company” means any body corporate and includes a firm or other association of individuals; and

b) “director” in relation to a firm means a partner in the firm.”

13. Thus, unless there is an actual evasion of excise duty, there is no offence attracting the aforesaid provisions made out against any person and as such, obviously not by the petitioners also, as per the law laid down, discussed above, in the Simplex-II case, followed in the petitioners' own case.

Of course, if registration is compulsory under any Rule, not brought to the notice of this Court even where the goods manufactured/produced/dealt in by a person are not subject to excise duty, then, at best, non-registration can be termed an irregularity, which fact has also not been pointed out by the learned counsel for the respondent, who was assisted by the 2nd respondent herself, as she had been summoned to Court, vide order dated 02.05.2014.

Obviously, if at all there is such an irregularity, and there is any fine imposable for the same, the respondents would be at liberty to impose the same, after following due procedure.

14. A perusal of the last order impugned, i.e. the order of the

learned CJM, Amritsar, dated 27.10.2009, dismissing the application for discharging the petitioners, after the issue had been adjudicated in their favour by the Hon'ble Supreme Court, also shows that no pleading to the above effect (that the proceedings would still be required to be continued because of non-registration) was raised by the Revenue and the only reason given for dismissing the application, by the learned trial Court, was that it had no power to recall its order framing a charge, once an earlier application seeking discharge had been passed by its predecessor, even though that order was passed before the judgment of the Supreme Court was delivered.

15. In fact, even before this Court, learned counsel for the Revenue could not refute that with the basis for the criminal complaint having been actually removed, with the Apex Court having held that the goods manufactured by the firm of the petitioners are not exigible to Central Excise, the criminal complaint would no longer be maintainable. She only urged that since the two proceedings, i.e. criminal and penalty proceedings before the Officers of the Revenue and the CEGAT and the hon'ble Apex Court, are two independent sets of proceedings, there would be no reason not to take the complaint to its logical conclusion, before the trial Court.

16. Of course, there is no faulting in the absolute logic of the contention made by the learned counsel for the respondent, to the extent that the proceedings should independently proceed to their logical conclusion; however, it would actually be a misuse of the process of law, to continue the proceedings even in the light of the fact that the basis of the proceedings has been removed by the Apex Court, holding that no excise duty is leviable on the goods, in terms of the notice issued to the petitioners and their firm.

Thus, with no cause for proceedings against them for evasion of any duty,

the criminal proceedings would now only indeed be a misuse of the process.

One option with this Court, in view of the arguments of counsel for the Revenue, could be that since now only arguments have to be addressed by counsel before the trial Court and the judgment pronounced thereafter, the matter may still be allowed to continue before that Court, with a direction to ensure that the law laid down by the Supreme Court, in favour of the petitioners, and their firm, is duly followed. Obviously, the effect of such a direction would only be virtually asking the trial Court to pass a formal order of dismissal, after the matter has been adjudicated in favour of the petitioners by this Court.

The purposelessness of that action is only too obvious to elaborate any further on.

17. Consequently, the petition is allowed and the complaint dated 20.04.2000, filed by the respondent before the learned Chief Judicial Magistrate, Amritsar, is quashed, along with all proceedings arising therefrom, including the orders of the learned trial Court, impugned in the present petition, dated 17.08.2006 (Annexure P-3) and 27.10.2009 (Annexure P-6).

(AMOL RATTAN SINGH)
JUDGE

25th February, 2015
dinesh