

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CENTRAL EXCISE APPEAL NO.90 OF 2006

The Commissioner of Central Excise,
Mumbai-I, having its office at
Commissionerate of Central Excise,
Mumbai-I, Opp: Churchgate Railway
Station, Mumbai – 400 020.

.... Appellant

- Versus -

1. M/s. Sapna Engineering,
313, Rgakkhar Industrial Estate,
20, Chapsi Bhimji Road, Mazgaon,
Mumbai – 400 010.

2. Shitala Prasad Sharma,
Manager of M/s. Sapna Engineering
and Proprietor of Neha Refrigeration,
313, Thakkar Industrial Estate,
20, Chapsi Bhimji Road, Mazgaon,
Mumbai – 400 010.

.... Respondents

Ms P.S. Cardozo with Mr. Joel A. Carlos for the
Appellant.

Mr. V.M. Doiphode i/by M/s. V.M. Doiphode & Co.
for the Respondents.

**CORAM: S.C. DHARMADHIKARI &
B.P. COLABAWALLA, JJ.**

DATE : MARCH 14, 2017

ORAL JUDGMENT (Per Shri S.C. DHARMADHIKARI, J.):

1. By this appeal, which was admitted on a substantial question of law, the Tribunal's Order is challenged.

2. The appeal is admitted on the following substantial question of law:-

“Whether M/s Neha Refrigeration was a necessary and/or proper party in the adjudication of the show cause notice which was issued to Respondent No.1 and therefore whether the Tribunal was right in interfering with the original order dated 29th January 2004 passed by the Commissioner (Adjudication) and in allowing the appeals preferred therefrom?”

3. Upon hearing both sides, we do not think that the question, as framed, requires any answer for it did not arise in the facts and circumstances peculiar to this case.

4. The Revenue brought this appeal thinking that the Tribunal will proceed hereafter and in all matters that a show

cause notice addressed by it to a sole proprietor does not meet the requirement of law. A notice and independently be addressed to the sole proprietary concern. Addressing a notice to the sole proprietor does not serve the purpose of law.

5. We do not see how the Revenue can entertain this apprehension and in every given case.

6. The respondents before us, and particularly the second respondent, an individual, were proceeded against on the allegation that they are engaged in the manufacture of parts of air-conditioning and refrigerating appliances. These goods fall under Chapter Heading Nos.84.15 and 84.18 of the Central Excise Tariff Act, 1985. During the period under consideration – from 3-9-1993 to 21-7-1997 – they manufactured and cleared the said goods without payment of duty in the guise of repaired goods and using documents of a fictitious firm, M/s. Neha Refrigeration. Acting on this intelligence which was received, the premises of the respondents and other group concerned were searched on 22-7-1997 and which revealed that the four entities

are manufacturing concerns. The individual, Shitala Prasad Sharma, is the Manager of M/s. Sapna Engineering. M/s. Sapna Engineering is one of the four units holding a central excise registration. It was a manufacturing concern. They were all controlled by one Subhash Chandra Sharma. Mr. Shitala Prasad Sharma was proceeded against as Manager of M/s. Sapna Engineering. Upon all these allegations and namely that the goods manufactured were supplied to companies like M/s. Voltas Limited, who made payments through cheques, and the materials required for the production of these goods were purchased in cash, the goods were manufactured by M/s. Sapna Engineering and were cleared without payment of duty under documents of M/s. Neha Refrigeration and two other fictitious companies.

7. The show cause notice, copy of which is at page 50 of the paper-book, is addressed to M/s. Sapna Engineering, Mr. Subhash Chandra Sharma, one Mr. Manoj Sharma and respondent No.2 Mr. Shitala Prasad Sharma, Manager of M/s. Sapna Engineering.

8. The allegations are that, the central excise duty in respect of goods manufactured and then cleared under the invoices of M/s. Neha Refrigeration, without payment of duty, ought to be recovered with interest and penalty. The penalty that was imposed on respondent No.2, natural person Shitala Prasad Sharma, was for violating Rule 209A of the Central Excise Rules, 1944.

9. An Order-in-Original was passed on these allegations and holding them to be proved. The penalty was imposed on Shitala Prasad Sharma for the acts and held to be proved in terms of para 45 of the Order-in-Original. That Order-in-Original was passed on 29-1-2004.

10. Aggrieved and dissatisfied with this, appeals were brought before the Tribunal. The appeals were filed by M/s. Sapna Engineering. One of the grounds and raised in the memo of appeals was that the Commissioner ought to have gone through the entire record, and particularly the materials which denote that M/s. Neha Refrigeration is an entity potentially

capable of engaging into any business, but not engaged in manufacture of repairing of condensers. When the Commissioner found that M/s. Neha Refrigeration did exist as an entity potentially capable of engaging into any business, he should have held further that the present proceedings alleging that M/s. Neha Refrigeration is a fictitious non-existing entity, cannot be sustained. That cannot be sustained without issuing a notice to M/s. Neha Refrigeration and further calling upon it to explain the charges against it. The confirmation of the charges by holding that M/s. Neha Refrigeration did not engage in repairs and reconditioning coils and that the goods cleared under the documents of M/s. Neha Refrigeration in the guise of repaired coils and condensers were manufactured by M/s. Sapna Engineering is, therefore, not tenable in law because M/s. Neha Refrigeration was not a party to the proceedings.

11. The Tribunal, after hearing both sides, came to the following two conclusions:-

“(i) The Show Cause Notice issued to the Appellants *M/S. SAPNA ENGINEERING*, demanding

duty in respect of the goods cleared under the invoices of M/S. NEHA REFRI- alleging that it was floated by the appellants and it existed only on paper as it did not have any factory or manufacturing facility for manufacture of condensers or evaporator coils or other parts of Air-Conditioning and refrigerating appliances. That the goods on which duty had been demanded were cleared in the documents of M/S. NEHA REFRIGERATION. However, No Show Cause Notice has been issued to M/S. NEHA REFRIGERATION asking them to show cause as to why M/S. NEHA REFRIGERATION should not be considered a dummy unit of the appellants. The Ld. Advocate for the appellants have referred to the Judgments cited above in the case of Ogesh Industries, K.R. BALACHANDRAN and Poly Resins in support of his contention that the Show Cause Notice is vitiated and bad in law as no Show Cause Notice was issued to M/S. NEHA REFRIGERATION and therefore M/S. NEHA REFRIGERATION did not have opportunity to establish genuineness of the contents recorded in the documents. Therefore, the proceedings should fail on this account.

(ii) The Ld. Commissioner in his findings, has considered M/S. NEHA REFRIGERATION as an existing entity potentially capable of engaging in any business but did not exist as a unit engaged in the manufacture of condensers, evaporators etc. Thus, when the Ld Commissioner has himself agrees and finds nothing amiss about the existence of M/S. NEHA REFRIGERATION as an existing entity, potentially capable of engaging in business The Show Cause Notice ought to have been issued to M/S. NEHA REFRIGERATION should not be considered as a dummy unit of the Appellants. That not having been complied, we would hold that the entire proceedings initiated by the Show Cause Notice are vitiated and

bad in law and accordingly the impugned order is not sustainable in law and accordingly the impugned order is required to be set aside the same on this ground alone.”

12. It is upon these findings of the Tribunal that the Revenue feels that the premise on which the Tribunal proceeded is erroneous in law.

13. After hearing Ms Cardozo at great length, we are unable to agree with her. The Tribunal did not proceed on the line suggested by the Revenue to this Court at the stage of admission of this appeal. The Tribunal did not proceed on the footing that a sole proprietary concern does require a notice to be addressed not only to the concern but also to the proprietor and the notice being addressed to the proprietor alone will not suffice. The Tribunal did not proceed on the footing that the sole proprietary concern has an existence independent of the sole proprietor. This is a complete mis-reading of the Tribunal's factual findings.

14. The Tribunal held that the central excise duty being what it is, namely, a duty on manufacture, and once the

Commissioner concluded that the goods were manufactured and cleared through a fictitious unit which was very much capable of carrying on business and indeed carried on business, then, it should have been independently proceeded against by issuing a notice and calling for its explanation. Then that would proceed on the footing that it manufactured excisable goods. It manufactured excisable goods and yet it allowed the goods to be cleared as belonging to some other unit by permitting the usage of its own premises and that violates the law. That is how the Commissioner should have proceeded once he found that M/s. Neha Refrigeration is not a fictitious unit. Once M/s. Neha Refrigeration did not have the opportunity to establish the genuineness of the contents of the documents, then, all other findings of the Commissioner are vitiated. That is how it has been held to be prejudiced. In any event, the appeals have been allowed also by holding that this is not a case where M/s. Sapna Engineering have carried out activities of manufacturing coils on which the duty has been demanded. Such an evidence does not exist. The finding of fact is that the appellants did not have the

capacity to manufacture all the parts of air-conditioner and refrigerator appliances on which duty has been demanded. The finding of fact about absence of co-relation appearing in paras 4(iv) and 4(v) would denote that the allegations in the show cause notice could not be substantiated against M/s. Sapna Engineering as well. The finding further goes that there is independent evidence supporting the contention of M/s. Sapna Engineering that defective coils were repaired by M/s. Neha Refrigeration and duly confirmed by all employees of M/s. Voltas Limited. M/s. Voltas Limited have been completely exonerated. It is in these circumstances that the Commissioner's Order was set aside. Both the appeals were allowed. Thus, these are findings not just on any legal issues but on merits. The appreciation and appraisal of the documentary and oral evidence by the Commissioner was faulted by the Tribunal. Its detail finding would indicate that show cause notice should have been issued to M/s. Neha Refrigeration asking them as to why they should not be termed as a dummy unit. That show cause notice was not issued. However, apart from this, even on merits

there was no material to hold that M/s. Neha Refrigeration was a dummy unit. That is how the Tribunal proceeded and once it proceeds on this line, we do not see any basis for the apprehension that the Tribunal's understanding of the legal provision is flawed. The Tribunal will not and necessarily in every matter of this nature proceed to hold that a notice to the sole proprietor would not suffice in law and in addition an independent notice should be addressed and to the sole proprietary concern. That is not how the Tribunal has proceeded. We do not see how the substantial question, as framed, would arise from any factual findings in the Tribunal's Order. By clarifying that this question does not arise from the impugned Order of the Tribunal, and if at all it arises in any future case, it shall not be taken to have been decided by this Court by mere confirmation of the Tribunal's Order impugned in this case, We, therefore, dispose of this appeal.

15. We clarify that the substantial question of law on which this appeal was admitted and arising in any other case would be decided by this Court independent of the disposal of

this appeal and any findings in the present Judgment. Once the question does not arise at all from the impugned Order, then, it does not require any answer. That question, as framed, is kept open for decision in an appropriate case.

16. The appeal stands disposed of accordingly.

(B.P. COLABAWALLA, J.)

(S.C. DHARMADHIKARI, J.)