IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.06.2017

CORAM

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER
and
THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

C.M.A.No.120 of 2016

M/s.Chengalrayan Cooperative Sugar Mills Ltd.,
Periyasevalai-607 209
Villupuram District,
Tamil Nadu. ... Appellant

Vs.

1. Customs, Excise and Service Tax
Appellate Tribunal, Shastri Bhavan,
Annexe Building, I Floor,
26, Haddows Road,
Chennai-600 006.

2. The Commissioner of Central Excise,
Pondicherry Commissionerate,
Pondicherry. ... Respondents

Prayer : Appeal filed under Section 35G of the Central Excise Act, 1944, against the Final Order No.40698 of 2014, dated 04.08.2014, on the file of the first respondent.

For Appellant : Mr.Shankaraman

For Respondent : Mr.A.P.Srinivas,
Senior Panel Counsel

J U D G E M E N T

(Judgement of the Court was delivered by RAJIV SHAKDHER,J.)

1. This is an appeal filed by the Assessee against the judgement and order dated 04.08.2014, passed by the Customs, Excise and Service Tax Appellate Tribunal (in short, “the Tribunal”).

2. The Tribunal, by virtue of the impugned judgement, dismissed the appeal preferred by the Assessee, based on the

judgement of the Division Bench of the Patna High Court in the matter of : Harinagar Sugar Mills Ltd. V. Union of India, 2001 (138) ELT 3 (Pat.).

2.1. To be noted, the judgement of the Patna High Court in Harinagar Sugar Mills Limited, was carried in appeal to the Supreme Court, whereupon, the Special Leave Petition (SLP) was dismissed in limine.

3. The only issue, which arises for consideration in this appeal, is : whether the Assessee would be liable to pay duty on molasses, which is stored in earthen pits, i.e., Katcha pits, located within the factory premises ?

3.1. According to the Assessee, the time for payment of duty would arise only upon removal of molasses from the factory premises and since, the earthen pits, i.e., katcha pits, wherein, the molasses was stored, was located within the factory premises, no duty was payable.

3.2. It is the Assessee's case that demand of duty, in these circumstances, would be contrary to Rule 9 and 49 of the Central Excise Rules, 1944 (in short, "the Rules").

4. The captioned appeal was admitted on 29.01.2016, when, the following questions of law, were framed, for consideration by this Court :

> "1) Whether the first respondent is correct in holding that the appellant is liable to pay duty on molasses stored in katcha pits within the factory premises contrary to Rule 9 and 49 of the Central Excise Rules?
>
> 2) Whether instruction 1/88 dated 1.9.88 is beyond the provisions of the Rules 9 and 49 of the Central Excise Rules, 1944?"

4.1. Learned counsel for the Assessee does not press Question No.2.

5. In order to adjudicate upon the present appeal, the following broad facts are required to be noticed :

5.1. The Assessee is in the business of manufacture of sugar and molasses, which fall under Chapter17 of the Central Excise Tariff Act, 1985 (in short, "CETA").

5.2. It appears that the Assessee had stored 4993.930 MTs of molasses in earthen pits, i.e., katcha pits, and masonry tanks. What is not in dispute is that, the authorities had given permission for storage of molasses only in steel tanks. As a matter of fact, the permission sought for by the Assessee to store molasses in earthen pits, i.e., katcha pits, was declined by the excise authorities.

5.3. Consequent thereto, a Show Cause Notice dated 06.09.1999, was issued, whereupon, the Assessee was called upon to pay duty in the sum of Rs.24,96,965/-.

5.4. To be noted, the duty was demanded for the period pertaining to August 1999.

5.5. The Assessee responded to the Show Cause Notice vide reply dated 28.09.1999. The Adjudicating Authority, after taking into account the stand taken by the Assessee, in its reply, proceeded to drop the demand raised in the aforementioned Show Cause Notice.

5.6. One of the reasons for dropping the demand was that a similar proceeding had been initiated against the Assessee vide another Show Cause Notice dated 12.08.1998. The proceedings initiated vis-a-vis the said Show Cause Notice were dropped by the Adjudicating Authority vide order dated 23.02.1999. The reason for dropping the proceedings was that, a finding of fact was returned that the earthen pits, i.e., katcha pits, were within the factory premises.

5.7. Therefore, based on the judgement of the Tribunal in the matter of : Commissioner of Central Excise, Patna V. Bihar State Sugar Corporation, 1998 (26) RLT 586 (CEGAT), no further steps were taken to precipitate the Show Cause Notice 12.08.1998.

5.8. The Show Cause Notice dated 06.09.1999, which is relevant for the present proceedings, was adjudicated upon. The Order-in-Original was passed on 07.03.2001, whereby, the proceedings initiated via the Show Cause Notice dated 06.09.1999, were dropped. The Revenue, being aggrieved, preferred an appeal to the Commissioner of Central Excise (Appeals) [in short, "Commissioner (Appeals)].

5.9. The Commissioner (Appeals), relying upon the judgement of the Patna High Court in Harinagar Sugar Mills Limited, to which we have made a reference to above, allowed the appeal of the Revenue.

6. The Assessee, as indicated above, moved the Tribunal. The Tribunal, vide the impugned judgement sustained the order dated 28.11.2003, passed by the Commissioner (Appeals).

6.1. It is, in these circumstances, that the Assessee has preferred the instant appeal.

7. Mr.Shankaraman, who appears for the Assessee, has submitted that the impugned judgement is erroneous in law, as it fails to recognize the legal position, which is that, the excise duty would be payable on molasses in the given circumstances, only upon its removal from the factory premises. Learned counsel submits that since the earthen pits, i.e., katcha pits, were within the factory premises, no duty could have been demanded qua the Assessee. For this purpose, learned counsel also relied upon the proceedings, which were initiated via the earlier Show Cause Notice dated 12.08.1998, which, as noticed above, were dropped.

7.1. In support of his submissions, learned counsel relied upon the following judgements of the Tribunal :

(i).U.P. State Sugar Corporation Limited V. CCE, Allahabad, 1989 (29) RLT 164 (CEGAT) ;
(ii).CCE, Patna V. Bihar State Sugar Corporation, 1989 (26) RLT 586 (CEGAT); and
(iii).U.P. State Sugar Corporation Limited V. CCE, Allahabad, 1989 (29) RLT 890 (CEGAT).

7.2. Furthermore, learned counsel submitted that the judgement relied upon by the Tribunal was distinguishable on facts, as from the facts detailed out in the judgement, one is unable to gather as to whether or not, the earthen pits, i.e., katcha pits, where, molasses was stored, were within the factory premises.

7.3. It is also the submission of the learned counsel that the fact that SLP filed against the judgement of the Patna High Court in Harinagar Sugar Mills Limited was dismissed, would not result in a precedent, which would be binding on this Court, as the dismissal of the SLP was in limine. For this purpose, learned counsel relies upon the judgement of the Supreme Court in Fuljit Kaur V. State of Punjab, 2010 (262) ELT 40 (SC).

7.4. It is also the submission of the learned counsel that, since, proceedings initiated via an earlier Show Cause Notice, i.e., Show Cause Notice dated 12.08.1998, were dropped, the Revenue, ought not to have agitated the matter again, by issuing the impugned Show Cause Notice, dated 06.09.1999. For this purpose, learned counsel relied upon the following judgement of the Supreme Court : CCE, Navi Mumbai V. Amar Bitumen and Allied Products Pvt. Ltd., 2006 (202) ELT 213 (SC).

8. Mr.A.P.Srinivas, who appears on behalf of the Revenue, argues to the contrary. In support of his submissions, learned counsel, largely, relies upon the judgement of the Tribunal. Furthermore, learned counsel also seeks to place reliance on the judgement of the Patna High Court in Harinagar Sugar Mills Limited V. Union of India, 2001 (138) ELT 3 (Pat.).

8.1. Emphasis is also laid by Mr.A.P.Srinivas, on the fact that the SLP preferred against the said judgement was dismissed.

8.2. Furthermore, the submission of Mr.A.P.Srinivas, is that, since, molasses was stored in earthen pits, i.e., katcha pits, without approval of the concerned authorities, it amounted to removal within the meaning of Rule 9, and therefore, when, read with the provisions of Rule 49, duty, as demanded, would have to be paid by the Assessee.

9. We heard the parties and perused the record.

10. According to us, the relevant provisions, to which our attention has been drawn, are Rule 9 and 49. For the sake of convenience, the relevant extracts of the said rules are set forth hereafter :

"Rule 9. Time and manner of payment of duty – (1) No excisable goods shall be removed from any place where they are produced, cured or manufactured or any premises appurtenant thereto, which may be specified by the Commissioner in this behalf, whether for consumption, export or manufacture of any other commodity in or outside such place, until the excise duty leviable thereon has been paid at such place and in such manner as is prescribed in these Rules or as the Commissioner may require, and except on presentation of an application in the proper form and on obtaining the permission of the proper officer on the form :

Provided XXXXX

Provided further XXXXX

Provided further XXXXX

Provided also XXXXX

(1A) XXXXX

(2) XXXXX

Explanation – XXXXX

Rule 49. Duty chargeable only on removal of the goods from the factory premises or from an approved place of storage – (1) Payment of duty shall not be required of excisable goods made in a factory until they are about to be issued out of the place or premises specified under Rule 9 or are about to be removed from a store-room or other place of storage approved by the Commissioner under Rule 47:

Provided XXXXX

Provided further XXXXX

(2) XXXXX

(3) XXXXX

Explanation XXXXX"

10.1. A bare perusal of Rule 9(1) would show that it, inter alia, prohibits removal of excisable goods whether for consumption, or, export, or, even for manufacture of any other commodity either in or outside the place where they are produced, cured or manufactured or any other premises appurtenant thereto, which may be specified by the Commissioner, in this behalf, without payment of excise duty. In other words, excisable duty is payable, only on removal of goods for a specified purpose from a place referred to in Rule 9(1).

10.2. In so far as Rule 49(1) is concerned, the assessee is not required to pay duty on excisable goods made in a factory till such time they are about to be issued out of the place or premises specified under Rule 9 or are about to be removed from a store-room or other place of storage approved by the Commissioner under Rule 47.

11. Given the aforesaid circumstances, the moot issue, which is required to be decided by us, is : whether the storage of molasses in earthen pits, i.e., katcha pits, amounted to removal within the meaning of rule 9 read with rule 49.

11.1. The record shows that the allegation against the Assessee is that the storage of molasses was made by the Assessee in earthen pits, i.e., katcha pits, located within the premises. Quite clearly, the molasses were not removed outside the precincts of the factory.

11.2. Mr.A.P.Srinivas's argument that the earthen pits, i.e. Katcha pits, were not a storage place, which were approved by the Commissioner, and therefore, there was a removal within the meaning of Rule 9 read with Rule 49, is an argument, which cannot be accepted, as that submission, if, at all, would apply to the second limb of sub-rule (1) of Rule 9, which reads as follows :

> "or any premises appurtenant thereto, which may be specified by the Commissioner in this behalf, ..."

11.3. Clearly, the "premises appurtenant" to the place of production, curing or manufacture can only be premises, which are attached or annexed to such premises. The earthen pits, i.e., katcha pits, in this case, were not annexed to the place of production or manufacture, i.e., factory premises, as is evident from the record and, upon perusal of the impugned Show Cause Notice. The earthen pits, i.e., katcha pits were located within the factory premises.

11.4. Therefore, quite clearly, according to us, the stage and/or time for payment of duty had not arisen, as contemplated under Rule 9 read with Rule 49 of the 1944 Rules.

12. In so far as Mr.A.P.Srinivas's submission, that the issue raised in the instant case is covered by the judgement rendered by the Patna High Court in the matter of Harinagar Sugar Mills Ltd. V. Union of India, 2001 (138) ELT 3 (Pat.) is concerned, according to us, is loses sight of the correct ratio of the judgement.

12.1. A close perusal of the facts obtaining in the said judgement would show that the molasses in that case, were stored in an approved earthen pits, i.e., katcha pits; that approval was withdrawn, which led to the demand of excise duty by the concerned authorities. There is nothing to suggest that the earthen pits, i.e., katcha pits, were located within the factory premises, as is the situation obtaining in the present case.

12.2. This singular fact, according to us, would distinguish the judgment in Harinagar Sugar Mills Ltd., from the facts, which arise for consideration in the instant appeal.

13. Therefore, having regard to what has been observed by us

hereinabove, we are of the view that the Assesseee could not have been called upon to pay duty, merely, on account of the fact that the molasses had been stored in earthen pits, i.e., katcha pits, which are otherwise located within the factory premises.

14. We make it clear that the observations made hereinabove would not impact the Assessee's exigibility to imposition of duty, if any, on account of say damage or removal of molasses. Events such as these would have their own consequences in law.

15. In view of what is stated above, it is our opinion that the question of law, which remains to be answered, i.e., Question No.1 has to be answered in favour of the Assessee and against the Revenue.

16. Accordingly, the appeal is allowed. The impugned judgement passed by the Tribunal is set aside.

17. There shall, however, be no order as to costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

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To

1. The Presiding Officer,
   Customs, Excise and Service Tax
   Appellate Tribunal, Shastri Bhavan,
   Annexe Building, I Floor,
   26, Haddows Road,
   Chennai-600 006.

2. The Commissioner of Central Excise,
   Pondicherry Commissionerate,
   Pondicherry.

+1cc to Mr.A.P.Srinivas, Advocate SR.No.45672
+1cc to Mr.J.Shankararaman, Advocate SR.No.45055

C.M.A.No.120 of 2016

MSM(CO)
GN(10/08/2017)