Collector Of Central Excise, Ahmedabad vs Orient Fabrics Pvt. Ltd on 25 November, 2003

Equivalent citations: AIR 2004 SUPREME COURT 956, 2004 (1) SCC 597, 2003 AIR SCW 6529, 2003 (10) SCALE 374, 2003 (7) SLT 416, (2004) 14 ALLINDCAS 154 (SC), (2004) 2 KHCACJ 495 (SC), (2003) 111 ECR 769, (2003) 10 SCALE 374, (2003) 8 SUPREME 515, (2004) 1 RECCIVR 290, (2004) 13 INDLD 583

Bench: S.B. Sinha, Ar. Lakshmanan

CASE NO.:
Appeal (civil) 4914 of 1997

PETITIONER:
COLLECTOR OF CENTRAL EXCISE, AHMEDABAD

RESPONDENT:
ORIENT FABRICS PVT. LTD.

DATE OF JUDGMENT: 25/11/2003

BENCH:
V.N. KHARE CJ & S.B. SINHA & DR. AR. LAKSHMANAN

JUDGMENT:

JUDGMENT 2003 Supp(6) SCR 243 The following Order of the Court was delivered.

The short question that arises for our consideration in these appeals, which arises from the judgments and orders dated 10.2.1997 and 26.3.1996, as regards jurisdiction of the authorities under the Central Excise Act, whether it is permissible to resort to penalty proceedings or forfeiture of goods for non-payment of additional duty in terms of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (for short 'the Act') by taking recourse to the provisions of the Central Excise Act and Rules framed thereunder.

The respondents herein carry on business of manufacture of man made fabrics. They have alleged to have misdisclosed the composition of certain sorts of fabrics. They were further alleged to have under valued goods by not paying duty on the amount realised through debit notes. The Collector, by his order dated 17th November, 1987, confirmed the levy of duty, amounting to Rs. 1,19,453,59. The Collector held that 35 bales of Fabric of Sort Nos. 1200 and 1300 are liable to be confiscated, but since the goods had already been released, he appropriated a sum of Rs. 10,000 towards the value of goods. He also imposed the penalty of Rs. 50,000. Aggrieved, the respondents preferred appeals before the Central Excise and Gold (Control) Appellate Tribunal.

The Tribunal relying upon the decision in the case of Pioneer Silk Mills Pvt. Ltd. v. Union of India, reported in (1995) 80 E.L.T. 507 (Del.), allowed the appeals, holding that the provisions of Central Excise Act and the Rules made thereunder, so far as they relate to confiscation cannot be made applicable for the breach of provisions of the Act. It is against the said judgment and order of the Tribunal, the appellant is in appeal before us.

Mr. S.R. Bhat, learned counsel appearing for the appellant, urged that the view taken by the Tribunal in allowing the appeals was erroneous inasmuch as it is contrary to the decisions in the case of M/s. Khemka & Co. (Agencies) Pvt. Ltd. v. State of Maharashtra, reported in [1975] 2 SCC 22 and Commissioner of Central Excuse v. Ashok Fashion Ltd., reported in (2002) 141 E.L.T. 606 (Gujarat).

In order to appreciate the issue, it is relevant to set out the sub-section (3) of Section 3 of the Act, as applicable in this matter and which runs as under :

> "SECTION 3 : Levy and collection of additional duties :
>
> (1).....
>
> (2).....
>
> (3) The provisions of the Central Excises and Salt Act, 1944 and the rules made thereunder including those relating to refunds and exemptions from duty shall, so far as may be, apply in relation to the levy and collection of the additional duties as they apply in relation to the levy and collection of the duties of excise on the goods specified in sub-section (1)."

A perusal of the said provision shows that the breach of provision of the Act has not been made penal or an offence and no power has been given to confiscate the goods. It only provides for application of the procedural provisions of the Central Excises and Salt Act, 1944 and the Rules made thereunder. It is no ionger res integra that when the breach of the provision of the Act is penal in nature or a penalty is imposed by way of additional tax, the constitutional mandate requires a clear authority of law for imposition for the same. Article 265 of the Constitution provides that no tax shall be levied or collected except by authority of law. The authority has to be specific and explicit and expressly provided. The Act created liability for additional duty for excise, but created no liability for any penalty. That being so, the confiscation proceedings against the respondents were unwarranted and without authority of law.

The Parliament by reason of Section 63(a) of the Finance Act, 1994 (Act No. 32 of 1994) substituted sub-section (3) of Section 3 of the said Act, which now reads as under :

> "3. Levy and collection of Additional Duties :
>
> (1) .....

(2) .....

(3) The provisions of the Central Excise Act, 1944 (l of 1944), and the rules made thereunder, including those relating to refunds, exemptions from duty, offences and penalties, shall, so far as may be, apply in relation to the levy and collection of the additional duties as they apply in relation to the levy and collection of the duties of excise on the goods specified in sub-section (1)."

A comparison of the amended provisions with the unamended ones would clearly demonstrate that the words 'offences and penalties' have consciously been inserted therein. The cause of action for imposing the penalty and directions of confiscation arose in the present case in they year 1987. The amended Act, therefore, has no application to the facts of this case.

The Gujarat High Court in Ashok Feshion Ltd. (supra) although took notice of the fact that the cause of action therein arose in the year 1993, but inadvertently or otherwise noticed the amended provisions of sub-section (3) of Section 3 of the Act. It furthermore although noticed the decision of M/s. Khemka & Co. (Agencies) Pvt. Ltd. (supra), as would appear from the discussion made hereinafter, but chose to follow the minority decision and not the majority one.

In M/s.. Khemka & Co. (Agencies) Pvt. Ltd. (supra), this Court categorically laid down paras 25 and 26, which runs as under :

"25. Penalty is not merely sanction. It is not merely adjunct to assessment. It is not merely consequential to assessment. It is not merely machinery. Penalty is in addition to tax and is a liability under the Act. Reference may be made to Section 28 of the Indian Income-tax Act, 1922 where penalty is provided for concealment of income. Penalty is in addition to the amount of income-tax. This Court in Jain Brothers v. Union of India, (1970) 77 ITR 107 = [1969] 3 SCC 311, said that penalty is not a continuation of assessment proceedings and that penalty partakes of the character of additional tax.

26. The Federal Court in Chatturam v. C.I.T., Bihar, (1947) 15 ITR 302,.

Said that liability does not depend on assessment. There must be a charging section to create liability. There must be first a liability created by the Act. Second, the Act must provide for assessment. Third, the Act must provide for enforcement of the taxing provisions. The mere fact that there is machinery for assessment, collection and enforcement of tax and penalty in the State Act does not mean that the provision for penalty in the State Act is treated as penalty under the Central Act. The meaning of penalty under the Central Act cannot be enlarged by the provisions of machinery of the State Act incorporated for working out the Central Act."

Beg. J. in his concurring opinion held paras 37 ard 38,which runs as under

:

"37. I also find from the Mysore Act of 1957, that Section 13 of the Act was entirely re-cast in 1958. It would, I think be carrying the theory of referential legislation too far to assume that Section 9(2) of the Central Act, 1956, purported to authorise the State Legislatures to impose liabilities in the nature of additional tax or penalties leaving their rates and conditions for their imposition also to be determined by the State Legislatures as and when the State Legislatures decided to impose or amend them. It is evident that these differ from State to State, and, in the same State, at different times. A conferment of such an uncontrolled power upon the State Legislatures could, if it was really intended, be said to travel beyond the province of permissible delegated Legislation no the principles laid down long ago by this Court in Re Delhi Laws 's case (supra) as no guidelines are given in Section 9(2) about the nature, conditions, or extent of penalties leviable. If such a power was really conferred would it not amount to an abdication of an essential legislative function with respect to a matter found as Item 92A of the Union List I of the Seventh Schedule so that, according to Article 246(1) of our Constitution, Parliament has exclusive power to legislate on a topic covered by it? As this question was not argued before us I would only say that the correct canon of construction to apply in such a case is that we should so interpret Section 9(2) of the Central Act, if possible, that no part of it may conceivably be invalid for excessive delegation. The well known maxim applicable in such cases is : ut res magis valeat quam pereat.

38. It is evident from Section 16(4) of the Bombay Act of 1953 that there is a particular percentage of the amount of tax levied which is prescribed as penalty to be paid as an "addition to the amount of tax for every month after the expiry of the prescribed period of default". In other words it is a liability in the nature of an additional or penal tax. Section 13(3)(b) of the Mysore Act also makes it clear that, on an application made to the Magistrate, such as the one made in the case which has come up before us from Mysore, the penalty may be equated with a fine. Section 63 of the Bombay Act of 1959 speaks of certain "offences and penalties". Indeed, Chapter 8 of that Act is itself headed as "Offences and Penalties"/' Mathew, J., however, in his dissenting opinion, inter alia, held that penalty can be levied as incidental to the levy and recovery of tax stating as under :

"As the power to impose penalty is specifically provided for in Section 16 of the Bombay Sales Tax Act for enforcing payment of tax payable under it, it is unnecessary to speculate whether, but for the express provision in that Act, a power to impose penalty for enforcement of tax payable under that Act would have been implied. The object of the provision for the imposition of penalty in Section 16 of the Bombay Sales Tax Act is to provide a stimulant to the dealer to observe the mandate of the section directing the payment of the tax within the prescribed time. In other words, the provision for imposition of penalty in Section 16 of the Bombay Sales Tax Act facilitates the collection of tax as it is a sanction for non-observance of the duty to pay the tax within the prescribed time. It operates as a deterrent against the commission of breach of that duty, and is a means to enforce the payment of tax within the time

prescribed."

The Gujarat High Court, in Ashok Fashion (supra), adopted the minority view holding:

> "9.3. It will thus be seen that penalty provisions are an integral part of assessment and collection of duties of assessment and collection of duties of which the necessary adjuncts are confiscation and penalty without which the imposition of taxes will lack teeth and become ineffective. If power to impose penalty for violation of the obligation to pay additional duty of excise is excluded in respect of the goods enumerated in the First Schedule of the Additional Duties Act, then these taxation provisions would be reduced to a donation drive in respect of these very items for which duty of excise is also imposed under the Central Excise Act, 1944 and the Rules made thereunder and violation of which would entail both confiscation and penalty."

It further referred to the amended provisions of the said Act, as would appear from the following :

> "7. It will be noticed from Sub-section (3) of Section 3 of the Additional Duties Act that all the provisions of the Central Excise Act, 1944 and the Rules made thereunder including those relating to refunds and exemptions are made applicable, so far as may be, in relation to the levy and collection of additional duty of excise. The provisions of the Central Excise Act, 1944 and the Rules made thereunder are made applicable to the additional duty of exercise in the same manner and extent to which they apply in relation to the levy and collection of the duties of excise on the goods specified in column 3 of the First Schedule referred to in Section 3(1) of the Additional Duties Act. This is so stated, because, all the goods specified in the said First Schedule were also subjected to duties of excise at the rates set forth in the Schedule to the Central Excise Tariff of 1985, under Section 3 of Central Excise Act 1944, which provision also lays down that such duties of excise shall be 'levied and collected' in such manner as may be prescribed."

The decision in Ashok Fashion (supra) was, therefore, rendered on total misapplication of the law laid down by the Constitution Bench decision by M/s. Khemka & Co. (Agencies) Pvt. Ltd. (supra).

We are bound by the Constitution Bench decision in M/s. Khemka & Co. (Agencies) Pvt. Ltd. (supra) The Delhi High Court also in Pioneer Silk Mills Pvt. Ltd. (supra), upon noticing M/s. Khemka & Co. (Agencies) Pvt. Ltd. (supra) and various other decisions clearly held :

> "37. When penalty is additional tax, constitutional mandate requires a clear authority of law for imposition thereof. If long-drawn arguments are needed to explain if the Act by referential legislation or legislation by incorporation levies penalty or not, it is better for the court to lean in favour of the tax payer. There is no room for presumption in such a case. The mere fact that all these years the Additional Duty Act has not been challenged on this ground is of no consequence if authority of law as mandated by the Constitution is lacking. We may also note in the passing that it was

> submitted before us that penalty so realised earlier has never been distributed among the States as part of net proceeds of the coliection of the additional duties of excise under the Additional Duties Act. This statement made at the Bar was not challenged. Since, however, this point was not raised in the writ petition and the revenue had no opportunity to reply in its counter-affidavit, we leave the matter at that. Levy of penalty which is an additional tax has to be under the authority of law which should be clear, specific and explicit."

Furthermore this Court recently in Balram Kumawat v. Union of India and Ors., reported in [2003] 7 SCC 628, held as follows :

> "37. We are, however, not oblivious of the fact that potential public mischief cannot be a ground to invoke the court's interpretative role to make a new offence. Making of legislation is not the job of the judiciary. Making of a penal legislation by the judiciary is strictly out of its bound. However. when the law working in the field is clear then what is necessary for it is to find out as to whether any offence has been created or not. Once it is held that the subject-matter comes within the purview of the law, the court may not do further and say by interpretive re soning that the same is not so created."

It is now a well settled principles of law that expropriatory legislation must be strictly construed (see M/s. D.L.F. Qutab Enclave Complex Educa_ional Charitable Trust v. State of Haryana and Ors., reported in AIR [2003] SC 1648.) It is further trite that a penal statute must receive strict construction.

The matter may be considered from another angle. The Parliament by reason of the Amending Act 32 of 1994 consciously brought in the expression 'offences and penalties' in sub-section (3) of Section 3 of the Act. The mischief rule, if applied, would clearly show that such amendment was brought with a view to remedy the defect contained in the unamended provisions of sub-section (3) of Section 3 of the Act. Offences having regard to the provisions contained in Article 20 of the Constitution of India cannot be given a retrospective effect. In that view of the matter too sub-section (3) of Section 3 of the Act as amended cannot be said to have any application at all.

In view of the aforesaid decisions, it must be held that the confiscation proceedings taken against the respondents and the penalty imposed upon them were totally without the authority of law and were rightly set aside by the Tribunal.

For the aforesaid reason, we do not find any merit in the appeals. They fail and are, accordingly dismissed. No costs.