

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.4453-4454 OF 2003

COMMNR. OF CENTRAL EXCISE, MUMBAI

Appellant(s)

VERSUS

SUNIL SILK MILLS

Respondent(s)

O R D E R

These appeals are directed against the judgment and order passed by the CEGAT on 11th November, 2002, exercising the discretion so far the quantification of penalty is concerned. The Commissioner of Central Excise, Mumbai (for short, 'the Commissioner') as also the Tribunal held that in the present case Rule 96-ZQ is applicable but the only difference is that while the Commissioner imposed penalty of an amount equivalent to duty, which is 100 per cent, the Tribunal although held that it was a case of Rule 96-ZQ of the Central Excise Rules, 1944, and was a case of penalty and exercised its discretion in scaling down the quantum of penalty to Rs.1 lac only. The aforesaid order of the Tribunal is under challenge in these appeals on which we have heard the learned counsel appearing for the parties.

Learned counsel appearing for the appellant has drawn our attention to the provisions of Rule 96-ZQ and relying on

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the same, he has submitted that the aforesaid provision is mandatory in nature and, therefore, no discretion could have been exercised by the Tribunal, as it was done in the present case.

We may refer to the relevant provision of Rule 96-ZQ, which are sub-Rules (3) and (5), which read as follows:

"(3) The amount of duty payable under sub-rule (1) shall be paid, in advance, by the 5th of each calendar month.

Provided that the amount of duty payable for the period from 16th December, 1998 to 31st December, 1998, shall be deposited on or before the 31st Day of December, 1998.

(5) If an independent processor fails to pay the amount of duty or any part thereof by the date specified in sub-rule (3), he shall be liable to,-

(i) pay the outstanding amount of duty along with interest at the rate of twenty-four per cent per annum calculated for the outstanding period on the outstanding amount; and

(ii) a penalty equal to an amount of duty outstanding from him at the end of such month or rupees five thousand, whichever is greater.

When we read sub-rule (5) of the said Rule, it gives a clear indication that if there is any failure to pay the amount of duty by the date specified in sub-rule (3), the assessee is liable to pay penalty equal to an amount of duty outstanding from him at the end of such month or Rs.5,000/-, whichever is greater. The expression 'shall' used in the said provision, also indicates that such a provision is mandatory. The same view is also taken in the decision of

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this Court in Union of India and others v. Dharamendra Textile Processors and others (2008) 13 SCC 369.

After

referring to the provisions of Rule 96-ZQ in paragraph 15 of the said judgment, this Court considered the submissions of the counsel for the assessee in the following manner:

"The stand of the learned counsel for the assessee is that the absence of specific reference to mens rea is a case of casus omissus. If the contention of learned counsel for the assessee is accepted that the use of the expression 'assessee shall be liable' proves the existence of discretion, it would lead to a very absurd result. In fact in the same provision there is an expression used i.e. 'liability to pay duty'. It can by no stretch of imagination be said that the adjudicating authority has even a discretion to levy duty less than what is legally and statutorily leviable.

While concluding, in paragraph 19 of the same judgment, reference was made to the Union Budget of 1996-

1997, whereby Section 11-AC of the Central Excise Act, 1944

(for short, 'the Act') was introduced.

The said provision

has made the position clear that there is no scope for any

discretion. In paragraph 136 of the Union Budget, reference

has been made to the provision stating that the levy of

penalty is a mandatory penalty and that in the Notes on

Clauses also the similar indication has been given.

That

being the position, this Court finally held that the plea

that Rules 96-ZQ and 96-ZO have a concept of discretion

inbuilt cannot be sustained.

In the present case also, we are directly concerned

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with the provisions of Rule 96-ZQ. So far Section 11-AC of

the Act is concerned, the scope of the said Section was

considered by this Court in Union of India v. Rajasthan

Spinning and Weaving Mills (2009) 13 SCC 448. That decision

was rendered in the context of the said provision of Section

11-AC. Although, in the said decision reference was made to

the decision in Union of India and others v. Dharamendra

Textile Processors and others (supra) but the facts remain

that in the said decision, particularly in paragraph 34,

this Court held that the decision in Dharamendra Textile

Processors's case must, therefore, be understood to mean

that though the application of Section 11-AC would depend

upon the existence or otherwise of the conditions expressly

stated in the section, but once the section is applicable in

a case, the Authority concerned would have no discretion in

quantifying the amount and penalty must be imposed equal to

the duty determined under sub-Section (2) of Section 11-A.

Here is a case where Rule 96-ZQ is directly applicable and,

therefore, the three-Judges Bench squarely covers this case.

In that view of the matter, we set aside the order

passed by the Tribunal and restore the order passed by the

Commissioner, leaving the parties to bear their own costs.

The appeals are allowed to the aforesaid extent.

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.....J.

(DR. MUKUNDAKAM SHARMA)

.....J.
(ANIL R. DAVE)

New Delhi;
April 20, 2011.

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ITEM NO.107

COURT NO.11

SECTION III

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS
CIVIL APPEAL NOS.4453-4454 OF 2003

COMMNR. OF CENTRAL EXCISE, MUMBAI

Appellant (s)

VERSUS

SUNIL SILK MILLS

Respondent(s)

(With appln(s) for stay and office report)

Date: 20/04/2011 These Appeals were called on for hearing today.

CORAM :

HON'BLE DR. JUSTICE MUKUNDAKAM SHARMA
HON'BLE MR. JUSTICE ANIL R. DAVE

For Appellant(s)

Mr. V. Shekhar, Sr. Adv.
Mr. B. Sumita Rao, Adv.
Mr. T.M. Singh, Adv.
Mr. B.K. Prasad, Adv.
Mrs. Anil Katiyar, Adv.
Mr. Vinamra, Adv.
Ms. Anindita Popli, Adv.
Ms. Priya Bhatnagar, Adv.

For Respondent(s)

Mr. Sanjay R. Hegde, Adv.
Mr. Krutin R. Joshi, Adv.

Mr. M.P. Vinod, Adv.

UPON hearing counsel the Court made the following
O R D E R

The appeals are allowed in terms of the signed order.

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(Chetan Kumar)

(Renu Diwan)

Court Master
(Signed order is placed on the file)

Court Master