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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
S. RAVINDRA BHAT; J., DIPANKAR DATTA; J.
CIVIL APPEAL NOS. 8581-8585 OF 2010; 9 February, 2023

G.T.C. INDUSTRIES LTD (NOW KNOWN AS GOLDEN TOBACCO LIMITED) THR. MANAGER LEGAL AND ANR.
versus
COLLECTOR OF CENTRAL EXCISE AND ORS.

Central Excise and Salt Act 1944 - Supreme Court endorses Delhi High Court judgment upholding Section 9D - Pulls up cigarette company for protracting proceedings - Asks it to pay Rs 5 lakh cost to any charitable organisation involved in providing help, assistance and relief to children suffering from cancer.

For Appellant(s) Mr. Sanjay Bagaria, Sr. Adv. Mrs. Nisha Bagchi, Adv. Mrs. B. Sunita Rao, AOR Mrs. Sujata S., Adv. Mr. Gunmaya Mann, Adv.

For Respondent(s) Mr. Arijit Prasad, Adv. Mr. C. Bhatia, Adv. Mr. I. Prasad, Adv. Mr. Mukesh Kumar Maroria, AOR

J U D G M E N T

DIPANKAR DATTA, J.

These appeals, by special leave, challenge the judgment and order dated 28th August, 2009 rendered by the Delhi High Court (hereafter 'the High Court', for short) while disposing of 5 (five) writ petitions, viz. WP(C) Nos. 1854 and 1895 to 1898 of 1992.

2. The High Court, for the reasons assigned in the impugned judgment, declared section 9-D of the Central Excise and Salt Act, 1944 (hereafter 'Excise Act', for short) as intra vires while dismissing the writ petitions.

3. In course of hearing before us, Mr. S.K. Bagaria, learned senior counsel appearing for the appellants, did not even attempt to assail the reasons assigned by the High Court for up-holding the constitutional validity of section 9-D of the Excise Act. However, Mr. Bagaria argued that by a judgment and order dated 25th April, 2008, this Court had remitted the matters back to the High Court for consideration thereof afresh. In view of the judicial mandate, while deciding the writ petitions afresh on remand, the High Court could not have limited its decision only to the issue relating to vires of section 9- D. The writ petitions, as amended, also raised the issue as to how the essential pre-requisites of section 9-D were breached by the department in the adjudication orders. The effect of the principles and pre-requisites laid down by the High Court for invocation of section 9-D vis-à-vis the appellants' case could not have been left undecided.

4. According to Mr. Bagaria, the principles laid down by the High Court in the impugned judgment ought to have been applied to test the legality and correctness of the impugned action of the department and there being apparent breach of such principles at the end of the department, the High Court committed an error of law in not deciding the other issues raised in the writ petitions. In other words, according to Mr. Bagaria, the High Court could not have stopped at deciding the issue of vires of section 9-D by reading it down and summarizing the conditions precedent in-built into

it and it was obligatory for the High Court to decide the writ petitions in its totality; and while so deciding, to declare whether on the parameters of the conditions precedent in section 9-D, as laid down in the impugned judgment, the petitioners were entitled to any relief or not.

5. Mr. Bagaria continued by submitting that the details of the earlier proceedings as well as all earlier orders including the orders passed by the Customs, Excise and Gold Control Appellate Tribunal (hereafter 'Tribunal', for short) and this Court were placed on record before this Court by way of a 'status chart'. Such status chart was reproduced in the judgment and order dated 25th April, 2008; and after noting all these facts, the matters were remitted to the High Court for deciding the writ petitions afresh. It is not as if the remand was only for deciding the issue of section 9-D alone without deciding the remaining issues raised in the writ petitions.

6. The argument of Mr. Bagaria was that if the effect of the principles and pre-requisites laid down by the High Court visà-vis the appellants' case were to be left undecided, the entire proceedings continuing since the last several years would simply be rendered academic. He has, therefore, endeavoured to persuade us hold that the High Court committed an error of law requiring correction by us.

7. Mr. Bagaria referred to the decisions of this Court in **State of UP vs. Mohammad Nooh**[1], **Calcutta Discount Company vs. ITO**[2], **Institute of Chartered Accountants of India vs. L.K. Ratna**[3] and **Andaman Timber Industries vs. CCE**[4] in support of his arguments.

8. To appreciate the contentions of Mr. Bagaria, we need to take a quick look at the events preceding the impugned judgment and order.

9. The facts giving rise to the writ petitions reveal that huge demands of about Rs. 94,00,00,000/- were raised by the department on the ground that the appellants and its job workers had manufactured deceptively similar versions of certain regular brands of cigarettes showing sale price whereas the same were sold through marketing chain at the higher price of normal brands and that the difference between the two prices was received by the appellants as flow-back through various super wholesale buyers. On 23rd March, 1988 and 29th March, 1988, two show-cause notices were issued by the department to the petitioners raising demands for alleged short payment of excise duty. Such notices primarily relied on the statements of 75 (seventy-five) witnesses to establish the recovery of prices higher than the declared prices and flow back of additional amounts to the appellants. Pursuant to directions of the Bombay High Court, facility of cross-examination was extended in respect of only 29 (twenty-nine) witnesses and most of them, during crossexamination, denied any flow back to the appellants. The remaining statements remained untested but were relied upon by invoking section 9-D of the Excise Act. Grievance of the appellants in the writ petitions was that the parameters of section 9-D had been completely ignored by the authorities.

10. Since the show-cause notices were spread over a thousand pages and 600 (six hundred) of which were related to 63 (sixty-three) statements on which the department

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[1] AIR 1958 SC 86
[2] AIR 1961 SC 372
[3] (1986) 4 SCC 537
[4] (2016) 15 SCC 785

had placed reliance, the appellants on 6th March, 1991 made a request for cross-examination of 31 (thirty-one) witnesses. However, without attempting to follow the principles of natural justice, adjudication orders in respect of the showcause notices had been passed by the adjudicating authority confirming the demands.

11. Despite persistent requests, the facility of crossexamination was denied. Even before the Collector of Central Excise had passed any order confirming the demand of duty against them, the appellants had rushed to the High Court to complain about the fairness of the procedure followed by the Collector, more particularly, the denial of the opportunity to cross-examine. During the pendency of the proceedings, the Collector had passed the final orders. By applying for amendment in each one of the writ petitions, permission was sought to assail the validity of the orders passed by the Collector. Such applications were disposed of by an order dated 28th October, 1992 with the observation that the order of the Collector being appealable, the petitioners could pursue their remedy in appeal before the prescribed appellate authority. However, since there was also a challenge to the constitutional validity of section 9-D of the Excise Act, the High Court did not dispose of the writ petitions finally but intended to examine that limited question later. The petitioners had preferred appeals before the Tribunal for the period relevant to WP(C) 1854/1992 and 1895/1992. The Tribunal had disposed of the appeals in favour of the department, whereafter appeals were carried to this Court. The appeals arising out of orders passed by the Tribunal relevant to WP(C) Nos. 1896/1992 and 1898/1992 were dismissed by an order dated 12th September, 1997 of this Court for failure to make the requisite pre-deposit.

12. The Tribunal on 21st March, 2001 had allowed appeals filed by M/s J&K Cigarettes and M/s. Kanpur Cigarettes Pvt. Ltd. These orders were carried in appeal by the department by filing appeals before this Court under section 35L of the Excise Act, being Civil Appeal Nos. 6398-6403 of 2002.

13. During the pendency of these 2 (two) appeals, the 5 (five) writ petitions came up for hearing before the High Court on December 6, 2006. The common grievance of the petitioners was noted by the High Court in paragraph 3, that they had invoked the writ jurisdiction feeling aggrieved by denial of adequate opportunity to cross-examine certain witnesses whose statements were recorded by the excise authorities in the course of investigation. The appellants had argued that the statements of such witnesses, obtained by the excise authorities in the course of their investigation, could only be used if they were given an opportunity to crossexamine the witnesses.

14. The High Court in its order dated 6th December, 2006 recorded that 2 (two) issues emerged for decision, viz.,

"1. Whether this Court would be justified in reading down or interpreting Section 9-D of the Act as suggested by counsel for the petitioner company when three appeals involving the validity of the orders passed by the Collector and the CEGAT placing reliance upon Section 9-D of the Act are pending before the Supreme Court?

2. If answer to question No. 1 is in the affirmative, whether Section 9-D suffers from any vice of unconstitutionality?"

15. Insofar as the first question is concerned, the High Court, inter alia, held as follows:

"Two of the orders when challenged before the Supreme Court, were upheld by Their Lordships also while the remaining three appeals are pending adjudication. It is obvious that

stand (sic) disposed of or those pending before the Apex Court, the question of fairness of the procedure and in particular, the denial of any opportunity to cross-examine the witnesses was and continues be available to the petitioner. If the discretion vested in the authority in terms of Section 9D(1)(a) has been improperly exercised, Their Lordships could have granted relief in the disposed of appeals and can even now grant relief to the petitioner in the appeals that are pending for disposal. It is also evident that while examining the question of fairness of the procedure adopted by the adjudicating authority, the interpretation of provisions of Section 9D(1)(a) would fall for consideration of Their Lordships. What is the true scope of Section 9 D(1)(a) and what is the true interpretation to be placed upon the same having regard to the possible 'constitutional infirmity suggested by the petitioner's is a matter which would legitimately arise for consideration of the Supreme Court. Even assuming that the dismissal of two appeals filed by the petitioner involving the same question is not indicative of the Court finding infirmity either (sic, in) the procedure adopted by the adjudicating authority or in the interpretation placed upon Section 9D(1)(a) by the saidauthority or the Tribunal, the contrary interpretation which petitioner wishes this Court to place upon Section 9D is a matter still open to the petitioners before the Supreme Court. That being so, there is no compelling reason why this court should take upon itself the exercise of interpreting Section 9 D and in the process reading the same down as suggested by the petitioner. If the interpretation suggested does eventually appeal to the Supreme Court during the course the hearing pending before Their Lordships, the opinion of this court on that aspect would be wholly inconsequential and academic. Such an academic exercise need not be undertaken by this court nor is any duplication of the process of interpretation (sic) Question number 1 is, therefore, answered in the negative."

In the light of the answer to question no. 1, the Court felt that the answer to the second question becomes unnecessary. Consequently, the writ petitions were dismissed with costs.

16. The judgment and order dated 6th December, 2006 was carried in appeal before this Court in Civil Appeal Nos.3187-3189/2008. By an order dated 25th April, 2008, this Court disposed of the appeals by the following order:-

"7. The High Court, as noticed hereinbefore, did not decide the question of constitutionality of the said provision, nor did it determine the objection of the respondents that no cause of action had arisen therefor.

8. We are, therefore, of the opinion that interest of justice would be subserved if the impugned judgments are set aside and the matters are remitted back to the High Court for consideration thereof afresh. We direct accordingly.

9. The appeals are disposed of with the aforementioned observations and directions.

10. However, as these matters are pending for a long time, we would request the High Court to consider the desirability of disposing of thewrit petitions, filed by the appellants, as expeditiously as possible, preferably without a period of three months from the date of communication of this order. All contentions of the parties shall remain open."

17. It was in terms of the order dated 25th April, 2008 that the High Court once again considered the challenge of the appellants to the vires of section 9-D of the Excise Act. Upon hearing learned counsel appearing for the parties, the High Court in the impugned judgment and order dated 28th August, 2009 recorded the following conclusions:-

"32. Thus, we summarize our conclusions as under:-

(i) We are of the opinion that the provisions of Section 9- D(2) of the Act are not unconstitutional or ultra vires;

(ii) While invoking Section 9-D of the Act, the concernedauthority is to form an opinion on the basis of material on record that a particular ground, as stipulated in the said Section, exists and is established;

(iii) Such an opinion has to be supported with reasons;

(iv) Before arriving at this opinion, the authority would give opportunity to the affected party to make submissions on the available material on the basis of which the authority intends to arrive at the said opinion; and

(v) it is always open to the affected party to challenge the invocation of provisions of Section 9-D of the Act in a particular case by filing statutory appeal, which provides for judicial review".

and dismissed the writ petitions holding that the same had no merit.

18. Bearing in mind these preceding facts and circumstances, we need to consider the contentions raised by Mr. Bagaria. For the reasons that follow, the contentions do not commend acceptance.

19. This Court while remitting the writ petitions to the High Court for hearing the same afresh had taken note of the fact that, inter alia, the appellants' appeals bearing Civil Appeal Nos. 5134-34/1997 questioning the order of the Tribunal confirming the demands against the appellants stood dismissed by an order of this Court dated 12th September, 1997.

20. As noted above, the orders of the Tribunal dated 21st March, 2001 deciding the appeals in favour of the appellants, were the subject matter of challenge in this Court at the instance of the department in Civil Appeal Nos.63986403/2002 . Such appeals were ultimately allowed by order dated 31st July, 2008; while directing a remand, it was observed by this Court that the Tribunal had not recorded any findings regarding the flow back.

21. At this juncture, from paragraph 1(xxiv) of the Statement of Case filed on 10th December, 2012, we also note that pursuant to the remand ordered by this Court as above, the Tribunal disposed of the statutory appeals confirming the demands against Kanpur Cigarettes Pvt. Ltd. and J&K Cigarettes. Civil Appeal Nos. 1533-1534 of 2011, carried before this Court from the orders of the Tribunal, were thereafter dismissed in view of inability to comply with the conditional order passed by this Court directing issue of notice subject to deposit of the entire demand amount as confirmed.

22. There was one other appeal filed before this Court but the same too had not been not pursued by the appellants and the job workers.

23. Therefore, as on date of hearing of these civil appeals, there is no lis pending in respect of the concerned demands between the parties.

24. It would be appropriate to note the issues involved in the writ petitions. First, the vires of section 9-D of the Excise Act was under challenge. Secondly, even if section 9-D were intra vires, whether the parameters thereof were completely ignored by the excise authorities.

25. The writ petitions were instituted before the High Court way back in 1992 before any adjudication order was passed praying, inter-alia, for cross-examination of the remaining witnesses whose cross-examination had already been permitted but who were not produced. Pursuant to the liberty given by the High Court, the appellants filed an application for amendment mentioning in detail as to how and for what reasons

invocation of section 9-D by the Commissioner was illegal and also challenging the vires of section 9-D of the Excise Act.

26. Though vehemently argued by Mr. Bagaria, there is no pending proceeding where the principles and prerequisites laid down by the High Court for invocation of section 9-D of the Excise Act vis-à-vis the appellants' case could be attracted for a decision. When this Court by its order dated 25th April, 2008 remitted the matter to the High Court for deciding the question of vires of section 9-D, only the civil appeals carried from the orders of the Tribunal by the department were pending. These appeals were ultimately allowed by this Court vide its order dated 31st July, 2008 and the matters remitted to the Tribunal. These two appeals, on remand to the Tribunal, have since been decided in favour of the department and against the appellants. As noticed above, the appeals carried to this Court by the appellants from the orders of the Tribunal confirming the demands against the appellants also stand dismissed. We are, therefore, left to wonder in which proceedings would the principles and prerequisites and/or the parameters of the conditions precedent in section 9-D, laid down by the High Court, could at all be applied.

27. The contentions raised by Mr. Bagaria that the parameters of section 9-D were completely ignored while the adjudication orders were made could have been regarded to be of some worth and engaged our attention if only any remedy by way of an appeal before the departmental authority or by a petition before any court were open to be pursued by the appellants as on date these civil appeals came up for consideration before us. What we find from the factual narrative is that although two proceedings were pending before the Tribunal in view of the order of remand dated 31st July, 2008 when the judgment and order dated 28th August, 2009 under challenge came to be made, even those proceedings stand closed today after the appellants had approached this Court and their civil appeals stood dismissed for non-deposit of the amount demanded. With the final decision on all the appeals arising from the orders of the Tribunal being rendered against the appellants, there is no pending lis where the principles and conditions precedent could be applied. The endeavour of the appellants to have these appeals argued before us is, therefore, of purely academic interest and would not serve any real purpose.

28. While dismissing the civil appeals, we endorse the views of the High Court insofar as it spurned the challenge of the appellants to the constitutional validity of section 9-D of the Excise Act.

29. For unnecessarily protracting the proceedings before this Court, although no lis survived for resolution, we impose costs of Rs.5,00,000/- on the appellants. This amount is to be paid to any charitable organization involved in providing help, assistance and relief to children suffering from cancer. Such costs shall be paid within a month from date. Within two weeks thereof, proof of payment shall be produced before the Registrar who shall satisfy himself that the recipient organization is, in fact, providing care to children suffering from cancer. In default thereof, the amount of costs shall be recovered as arrears of land revenue.