

CASE NO.:
Appeal (civil) 5247-5250 of 1997

PETITIONER:
Shalimar Rubber Industries & Ors.

RESPONDENT:
Collector of Central Excise, Cochin.

DATE OF JUDGMENT: 22/11/2002

BENCH:
N.Santosh Hegde & B.P.Singh.

JUDGMENT:
J U D G M E N T

SANTOSH HEGDE, J.

The appellants in the above appeal were issued with a show cause notice by the Collector of Central excise, Cochin for having manufactured rubber products falling under sub-heading 4006.10 of Central Excise Tariff Act (the 'act'), for having not maintained proper accounts of such manufacture, for evading payment of duty on such manufacture and certain other consequential violation of the Act and the Rules. They were called upon to show cause why proceedings should not be initiated against them for the contravention of the provisions of Section 6 of the Act as also Rules 173B, 173C, 173F, 173G(i) of the Act and Rule 174 read with Rule 9(i), Rule 173G(2) read with Rule 52A, Rule 173G(4) read with Rule 53 and 226 of the Central Excise Rules, (the Rules). The said Collector after holding the necessary adjudication proceedings came to the conclusion that the appellants have manufactured and cleared 1,61,122 kgs of tread rubber and removed the same without payment of central excise duty. He also came to the conclusion that the appellants had not maintained required stock registers thereby they contravened Section 6 of the Act as also the Rules mentioned herein above. As a consequence he imposed a penalty of Rs.11,33,467.72 on the appellant firm and also directed the confiscation of the seized tread rubber but gave a option to the firm to redeem the same on payment of redemption fine. He further imposed on the firm a penalty of Rs. 3 lakhs and a penalty of Rs. 20,000/- on each of the partners of the firm and directed the confiscation of the land, building, plants and machinery used in the manufacture of the said tread rubber, with an option to redeem the same on payment of redemption fine.

On appeal, the Customs Excise and Gold Control Appellate Tribunal (the Tribunal) has confirmed the said order of the Collector. Consequently, the appellants are before us in these appeals.

On behalf of the appellants, it is urged that the basis of the case of the Department is the inquiry made by the Department with M/s. Universal Agencies, the partner of which firm allegedly told the Inspector (Preventive) Unit of the Department that the firm M/s. Universal Agencies had supplied carbon black to M/s. Shalimar Rubber Industries as per 82 invoices out of which 62 invoices were in fictitious names. It is based on this statement of the partner of M/s. Universal Agencies, namely, Shri Sunny P. Kunnath, the Department came to the conclusion that if that much quantity of carbon

black was used by the appellant firm the production must have been far in excess of what was shown in the books of the firm. Therefore, it is on this assumption the Department initiated the proceedings.

A perusal of the adjudicatory order of the Collector clearly shows that he has placed strong reliance on the statement of this Sunny P. Kunnath, partner of M/s. Universal Agencies to come to the conclusion that the quantity of carbon rubber sold under 82 invoices by his firm was in fact sold to M/s Shalimar Rubber Industries. The appellant herein have contended 62 of the said invoices were not in the name of Shalimar Rubber Industries but were in different names with which the appellant firm had no connection. But the Collector accepted the case of the Department that the supplies made under 62 invoices must have been made only to Shalimar Rubber Industries and it is on this basis a finding was arrived at in the adjudicatory proceedings against the appellants. The Tribunal also in the impugned order placed heavy reliance on the statement allegedly made by said Shri Sunny P. Kunnath while affirming the finding of the Collector that the quantity of carbon black sold by M/s Universal Agencies in fictitious names in 62 invoices were infact sold to the first appellant Shalimar Rubber Industries. It is on that basis the impugned orders came to be made.

It is relevant to note at this stage that the Department had in addition invoked the provisions of Section 9(1)(a)(b), (bb), (bbb) and 9(1)(c) of the Act and initiated criminal proceedings against the appellants in the Court of Additional Chief Judicial Magistrate, Economic Offences, Ernakulam in Calendar Case No. 71/1990.

Mr. Joseph Vellapally, learned senior advocate appearing for the appellants very strenuously contended that since the foundation of the Department's case rested on the evidence of Shri Sunny P. Kunnath, partner of Universal Agencies which allegedly supplied the unaccounted carbon black to the first appellant firm, it was obligatory on the part of the Department to have submitted this person for cross-examination. More so, in the background of the fact that Inspector (Preventive) Unit who examined Shri Kunnath had admittedly not recorded the statement of that witness. The learned counsel further contended that inspite of the request of the appellants to produce the said Shri Kunnath for cross-examination, the Department did not do so, hence, no reliance could be placed on that part of the case of the Department as to the purchase of un-accounted carbon black, and if that part of the case is excluded, then there could have been no finding against the appellants. The learned counsel also pointed out that the criminal proceedings initiated against the Department has since culminated in an order of discharge and in support of which he has produced a copy of the judgment by way of additional evidence in I.A. Nos. 9 to 12 of 2002 in these appeals which clearly shows that the Department's case as to the purchase of this un-accounted carbon black has been rejected by the Court. He also pointed out from records that the very same Shri Sunny P. Kunnath by a letter dated 22.6.1987 addressed to the appellants had denied the statement allegedly made to the Department and the said letter was produced before the Collector who according to the learned counsel has erroneously rejected the same. It is on the above basis the learned counsel pleaded that the Department has failed to establish its case against the appellants.

Shri T.L.V. Iyer, learned senior advocate appearing for the Department contended that there is sufficient material on record apart from the evidence of Shri Sunny P. Kunnath which implicates the appellants in regard to the charges levelled

against them, that apart he contended merely because said Shri Sunny P. Kunnath has not been subjected to cross-examination. There is no reason why his evidence should be rejected if it is otherwise acceptable and supported by other evidence.

Having heard the learned counsel for the parties and perused the record we notice that the Collector in the adjudication proceedings has relied very strongly on the evidence produced by the Department to show that the appellant firm had in fact purchased carbon black from M/s Universal Agencies as per the 82 invoices recovered by the Investigating Agency. He also relied upon the so called statement made by Shri Sunny P. Kunnath to the Investigating Officer that out of the 82 invoices 62 invoices which even though did not show the name of Shalimar Rubber Industries, the appellants herein under the said fictitious invoices did purchase huge quantity of carbon black from M/s. Universal Agencies. As noticed above, this witness was not examined by the Collector in the proceedings. Consequently, he could not be subjected to a cross-examination. Question thus arises, can the evidence of this witness be accepted as gospel truth to condemn the appellants herein? It is to be seen from the records that the appellants herein had produced a letter dated 22nd June, 1987 written by M/s. Universal Agencies of which above mentioned Shri Sunny P. Kunnath was a partner wherein it was specifically stated that the appellant Shalimar Rubber Industries had not purchased carbon black recovered by the 62 of the 82 invoices. The Collector in the course of his order rejected this letter preferring to rely on the alleged oral statement made by said Shri Kunnath to the Inspector. While discussing this point the Collector observed "moreover, this letter was dated 22nd June, 1987 and addressed to M/s. Shalimar Rubber Industries, Perumbavoor, almost two months after the recovery of the invoices on 13.4.1984. This confirmation, I have no hesitation to state, is tailor made to the request of M/s Shalimar Rubber Industries." We find it extremely difficult to accept this explanation of the Collector to reject the letter written by M/s. Universal Agencies. If the Collector can accept a statement allegedly made by a partner of the Universal Agencies which is not confirmed by his oral evidence in the inquiry and not subjected to cross-examination, we fail to understand how he could reject the letter signed by the very same person wherein he has given a diametrically opposed statement. In our opinion the Collector on this point has used a different yardstick in assessing the evidence of Shri Sunny P. Kunnath. In this background though the Collector did not have the benefit of the finding of the order of the Magistrate made in the criminal proceedings, we notice it from the copy of the order produced before us that this Shri Sunny P. Kunnath was examined as PW 4 and has stated in his statement under oath that Shalimar Rubber Industries, the appellants herein never purchased carbon black from him in fictitious name. He also has denied that he ever made any statement to the Inspector (Preventive) Unit in regard to the 62 invoices seized from his firm as to the sale of carbon black. He has also stated that these invoices alongwith other invoices were taken up by the said Inspector most of which were in the name of other parties and not Shalimar Rubber. He has admitted before the Magistrate that he has issued the letter dated 22nd June, 1987. In that background it becomes extremely difficult to place reliance on the so called statement made by Shri Sunny P. Kunnath to the Inspector which according to the evidence of the Inspector himself made before the Magistrate was not recorded. On the basis of such evidence, in our opinion, it is not possible to come to the conclusion that there was such a clandestine purchase of carbon black from M/s Universal Agencies.

Thus if we exclude this vital material as to the clandestine purchase of carbon black from M/s.Universal Agencies by the appellant, in our opinion, the foundation of the department's case fails. In the said view of the matter, these appeals should succeed.

For the reasons stated above, these appeals succeed. The same are allowed quashing the impugned orders.

JUDIS