

(2010) 12 SHI CK 0157

High Court of Himachal Pradesh

Case No: Civil Review No. 38 of 2009

Satinder Kapoor

APPELLANT

Vs

Commissioner of Central Excise
and Another

RESPONDENT

Date of Decision: Dec. 23, 2010

Acts Referred:

- Central Excises and Salt Act, 1944 - Section 35(C)(H)(K)

Citation: (2011) 270 ELT 164

Hon'ble Judges: V.K. Ahuja, J; Deepak Gupta, J

Bench: Division Bench

Judgement

Deepak Gupta, J.

By means of the review petition the Petitioner seeks recall of the judgment dated 10.4.2009 passed in Excise Reference No. 9 of 2001 on the following grounds:

1) that the petition was decided in the absence of the review Petitioner who did not have the knowledge of the listing of the matter before the Court.

2) that this Court had no jurisdiction to decide the case itself and after deciding the question referred for the opinion of this Court, this Court was required to send the matter back to the learned Tribunal for deciding the case on merits.

2 . Briefly stated the facts of the case are that the revenue filed a Central Excise Reference u/s 35H(1) in which it was prayed that the Appellant Tribunal be directed to refer to the High Court the questions of law referred to in para 8 of the petition. The petition was admitted on 12.4.2008 and the questions of law were framed while admitting the petition itself. Thereafter, notices were issued to the Respondents, who were represented by counsel. The Respondents were proceeded against ex-parte on 3.3.2009 after actual date notices were issued to them. The matter was heard on 2nd April, 2009 and thereafter vide judgment dated 10th April, 2009 this Court not only proceeded to decide the questions of law but also proceeded to

decide main case itself.

3. Section 35H of the Central Excise Act, 1944 reads as follows:

35-H. Application to High Court.-

(1) The Commissioner of Central Excise or the other party may, within one hundred and eighty days of the date upon which he is served with notice of an order u/s 35C passed [before the 1st day of July, 2003] (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), by application in the 3 prescribed form, accompanied, where the application is made by the other party, by a fee of two hundred rupees, apply to the High Court to direct the Appellate Tribunal to refer to the High Court any question of law arising from such order of the Tribunal.

(2) The Commissioner of Central Excise or the other party applying to the High Court under Sub-section (1) shall clearly state the question of law which he seeks to be referred to the High Court and shall also specify the paragraph in the order of the Appellate Tribunal relevant to the question sought to be referred.

(3) On receipt of notice that an application has been made under Sub-section (1), the person against whom such application has been made, may, notwithstanding that he may not have filed such application, file, within forty-five days of the receipt of the notice, a memorandum of crossobjections verified in the prescribed manner against any part of the order in relation to which an application for reference has been made and such memorandum shall be disposed of by the High Court as if it were an application presented within the time specified in Sub-section (1).

(4) If, on an application made under Sub-section (1), the High Court directs the Appellate Tribunal to refer the question of law raised in the application, the Appellate Tribunal shall, within one hundred and twenty days of the receipt of such direction, draw up a statement of the case and refer it to the High Court.]

4. A bare reading of Section 35H shows that the revenue or the Assessee within 180 days of the service of the notice of order passed u/s 35C by the Appellate Tribunal can apply to the High Court that it should direct the Appellate Tribunal to refer to the High Court any question of law arising from the order of the Tribunal.

5. Under Sub-Section 2 the party applying to the High Court is required to clearly state the question of law which he seeks to refer to the High Court. Sub-Section 4 provides that the High Court can direct the Appellate Tribunal to refer the question of law raised in the application and thereafter the Appellate Tribunal on receipt of such direction must within 180 days draw up a submission of case and refer it to the High Court. Thereafter, Section 35K will come into operation and the said section reads as follows:

35-K. Decision of High Court or Supreme Court on the case stated.

(1) The High Court or the Supreme Court hearing any such case shall decide the questions of law raised therein and shall deliver its judgment thereon containing the grounds on which such decision is founded and a copy of the judgment shall be sent under the seal of the Court and the signature of the Registrar to the Appellate Tribunal which shall pass such orders as are necessary to dispose of the case in conformity with such judgment.

[(1-A) Where the High Court delivers a judgment in an appeal filed before it u/s 35G, effect shall be given to the order passed on the appeal by the concerned Central Excise Officer on the basis of a certified copy of the judgment.]

(2) The costs of any [reference to the to the High Court or an appeal to the High Court to the Supreme Court as the case may be) which shall not include the fee for making the reference shall be in the discretion of the Court.

6. It is apparent that in terms of Section 35K when the High Court decide the question of law raised therein it shall deliver its judgment thereon and send a copy of the judgment to the Appellate Tribunal which shall then pass such orders as are necessary to dispose of the case in conformity with such Judgment. It is, therefore, apparent that u/s 35H this Court cannot decide any question and can only ask the appellate Tribunal to refer the question of law. Even after reference is made the High Court can only decide the question referred to it and thereafter has to send its judgment to the Tribunal who shall then decide the case in accordance with the Judgment.

7. Therefore, it is apparent that there is error apparent on the record of the case in as much as that this Court only has the jurisdiction to direct the Tribunal to refer the questions of law and could not have decided the same without such reference being made.

8. Shri Sandeep Sharma, learned Assistant Solicitor General of India, has raised a preliminary objection that since there is no provision of review in the Excise Act, this review petition is not maintainable. The High Court is a Court of record and being a judicial authority has the inherent right to correct orders which on the face of it are erroneous.

9. In [M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa](#), the Apex Court held as follows:

The High Courts in India are superior courts of record. They have original and appellate jurisdiction. They have inherent and plenary powers. Unless expressly or impliedly barred, and subject to the appellate or discretionary jurisdiction of this Court, the High Courts have unlimited jurisdiction, including the jurisdiction to determine their own powers. (See [Naresh Shridhar Mirajkar and Others Vs. State of](#)

Maharashtra and Another,

Prima facie, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings 7 that the particular matter is within the cognizance of the particular court.

10. Thereafter in [M.M. Thomas Vs. State of Kerala and Another](#), the Apex Court clearly held as follows:

14. High Court as a Court of Record, as envisaged in Article 215 of the Constitution must have inherent powers to correct the records. A Court of Record envelopes all such powers whose acts and proceedings are to be enrolled in a perpetual, memorial and testimony. A Court of Record is undoubtedly a superior Court which is itself competent to determine the scope of its jurisdiction. The High Court, as a Court of Record, has a duty to itself to keep all its records correctly and in accordance with law. Hence, if any apparent error is noticed by the High Court in respect of any orders passed by it the High Court has not only power but a duty to correct it. The High Court's power in that regards is plenary. In [Naresh Shridhar Mirajkar and Others Vs. State of Maharashtra and Another](#), a nine Judge Bench of this Court has recognized the aforesaid superior status of the High Court as a Court of plenary jurisdiction being a Court of Record.

11. Therefore, the High Court has jurisdiction to review its order and the objection is over ruled.

12. In view of the above discussion, we are clearly of the view that an error has occurred in deciding the case on 8 merits. We, therefore, allow the review petition and recall our judgment dated 10th April, 2009. The Excise Reference be restored to its original number and be listed for hearing on 10-03-2011 at 2.00 p.m. The review petition is disposed of accordingly.