2023 INSC 268

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 9569-70 OF 2019

COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX, KANPUR … APPELLANT(S)

VERSUS

M/S. A.R. POLYMERS PVT. LTD. ETC. … RESPONDENT(S)

JUDGMENT

KRISHNA MURARI, J.

The present appeals are directed against the final judgment and order dated 09.01.2019 passed by CESTAT, Allahabad in Order Nos.A/70266-20267/2019 -EX (DB) in Appeal Nos.E/70445/2017 and E/70618/2017, whereby the Respondent's plea was allowed.

FACTS

2. Briefly, the facts relevant for the purpose of these Appeals are as follows:

I. The Respondent No.1, M/s AR Polymers Pvt. Ltd. is a manufacturer engaged in the manufacture of footwear and the sale of the same to defense/paramilitary forces in bulk for their use.

II. An intelligence was received by the DGCEI that the respondent was availing benefits under notification No. 12/2012-CE dated 17/03/12 and Section 4(A) of the Central Excise Act, 1944, which is limited to footwear sold in retail. The said notification wholly exempts the payment of Central Excise Duty for retail sale of footwear under Rs. 500/- and limits Central Excise Duty to 6% where the rate of the footwear is between Rs. 501/- to Rs. 1000/-

III. Acting on the abovementioned intelligence, a team of DGCEI officers visited the factory premises of the Respondent, where it was found that the respondent was manufacturing the footwear as per a contract entered into between the parties, and a rate for the sale and purchase of the footwear was fixed under the contract. It was also found that the respondent was printing and attaching MRP stickers on the insole of the said shoes, only to avail the benefits of the abovementioned notification and Section 4(A) of the Act.

IV. A demand-show cause notice was issued to the respondent on 05.02.2016 requiring them to show cause to the commissioner of central Excise, Customs & Service tax.

V. Subsequently, the Ld. Adjudicating authority vide order dated 13.02.2017 passed an order against the respondent holding that the benefit of the aforesaid notification does not extend to the footwear sold by the

respondent, and hence the respondent was directed to pay the difference amount between the tax already paid and the tax which was liable to be paid. A penalty was also imposed on the director of the respondent company.

VI. The respondent, aggrieved by the abovementioned order filed an appeal in the CESTAT, and vide impugned order dated 09.01.2019, the CESTAT overturned the judgment of the adjudicating authority and held that the benefit of the abovementioned notification extends to the Respondent herein. As against this the Appellant herein has filed the present Appeal.

ANALYSIS

3. We have heard the counsels appearing on behalf of the Appellant in great detail. We must, however, mention that despite several opportunities being afforded to the Respondent and the counsel for the respondent being served the notice, and the matter being called multiple times, none appeared before this Court.

4. The Respondent, due to the tax assessment being less under Section 4(A) of the Act, is seeking benefit under the same, however, due to the assessment under Section (4) of the Act being more, the Appellant is claiming for the assessment to be done thereunder. This appeal, therefore, fundamentally depends on the interpretation of Section 4(A) of the Act.

5. The primary question posed in front of us today is only one, whether the goods sold by the respondent are eligible to claim tax benefits within the purview of the abovementioned notification under Section 4(A) of the Central Excise Act?

6. In the case of ***Jayanti Food Processing Pvt. Ltd. v. Commissioner of Central Excise, Rajasthan***[1], this Court, while deciding on a similar issue, held that for goods to be included under the assessment of Section 4(A) of the Central excise Act, it must comply with five factors. The relevant paragraph of the judgment is being reproduced herein:

> ***"….****Even at the cost of repetition the following would be the fActors to include the goods in Sections 4-A(1) and (2) of the Act:*
> *(i) The goods should be excisable goods;*
> *(ii) They should be such as are sold in the package;*
> ***(iii) There should be requirement in the SWM Act or the Rules made thereunder or any other law to declare the price of such goods relating to their retail price on the package;***
> *(iv) The Central Government must have specified such goods by notification in the Official Gazette;*
> *(v) The valuation of such goods would be as per the declared retail sale price on the packages less the amount of abatement.*
> *If all these factors are applicable to any goods, then alone the valuation of the goods and the assessment of duty would be under Section 4-A of the Act.*

7. A bare perusal of Section 4(A) of the Act and the abovementioned judgment would show that to attract a MRP based valuation of goods

1 (2007) 8 SCC 34

under the Central Excise Act, the goods should be notified under Section 4(A) of the Act and that such goods must come within the purview of the Standards of Weights and Measures (Packaged Commodities) Rules, 1977, which has now been repealed and replaced by the legal Metrology (Packaged Commodities) Rules,2011.

8. In the present case at hand, the respondent entered into a sale with the paramilitary and military as per the terms of agreement signed. While the goods in the impugned sale were notified under Section 4(A) of the Act by way of an official notification in the gazette, what is most relevant to us is Rule 3(b) of the Legal Metrology (Packaged Commodities) Rules, 2011 which exempts the sale to institutional consumers from its purview.

9. The purchasers in this case are military and paramilitary institutions, both of whom purchase the goods in bulk from the respondent, and then further distribute it to their employees. In this entire process from the sale of the goods to the goods Actually being used by the end consumer, the purchaser military and paramilitary institutions become industrial consumers, as they serve as an intermediary between the end consumer and the original purchaser.

10. Due to the purchasers, on account of them being institutional consumers, are exempt from the Legal Metrology (Packaged

Commodities) Rules, 2011, and since Section 4(A) of the Act mandates the applicability of the abovesaid rules, the transaction automatically becomes ineligible to claim refuge under Section 4(A) of the Act.

11. Further, even if we were to assume that Section 3(b) of the Legal Metrology (Packaged Commodities) Rules, 2011 is inapplicable to the present purchaser, the impugned sale still fails the test of point (iii) of the Jayanti Foods judgment.

12. For the sale of goods to take refuge under Section 4(A) of the Act and pass the test of point (iii) in the Jayanti Judgment, there must be a requirement in the the Legal Metrology Act, 2009 or the rules made thereunder to declare the price of such goods relating to their retail price on the package. In simpler terms, it would mean that for a sale of goods to take assessment benefits under Section 4(A) of the Act, it must be a retail sale, and there must be a mandate of law that directs the seller to affix a retail price on the goods for a sale to be considered a retail sale.

13. It would also mean that a mere affixation of the MRP on a good does not qualify it to claim benefits under Section 4(A) of the Act, and that there must be a "requirement" for the affixation of such MRP. Therefore, even if there is affixation of MRP in the goods, what must be looked at it is whether such affixation was mandated by law.

14. Apart from the exemption granted by way of Section 3(b) that automatically removes the mandate of law to affix an MRP on the sold goods, the said sale still cannot be considered a retail sale because the sale of the goods must be done to a consumer.

15. A consumer, as clarified by the Jayanti Foods Judgment, is the final consumer of the product, and not the intermediary. In the present case at hand however, the purchaser institutions, as discussed above are intermediaries, who after the purchase of the said goods, distribute it further to the final consumer.

16. In such a circumstance, where the purchaser institution is deemed to not be a consumer, the sale also cannot be held to be a retail sale as per the Act. Further, since the impugned sale is not a retail sale as per the Act, there exists no mandate of law on the Respondent herein to affix an MRP on the goods sold, and hence the said impugned transaction cannot claim benefit under Section 4(A) of the Act.

17. Again, at the sake of repetition, we find it important to clarify that the mere affixation of MRP does not make goods eligible to find refuge under Section 4(A) of the Act, and what is required along with such affixation is a mandate of law that directs the seller to affix such MRP.

18. Further, It is important to note that the tribunal in its reasoning for passing the impugned judgment only considered whether the goods in question were notified by way of a gazette, and did not consider the other four relevant conditions laid down by the Jayanti foods judgment. By not considering other relevant considerations, it is our opinion that the tribunal has committed a grave error in law, and hence the impugned judgment is liable to be set aside.

19. In view of the above-mentioned facts and discussions, the CESTAT committed an error in law by passing the impugned order dated 09.01.2019 and the Respondent being under an obligation is directed to pay the differential amount to the relevant tax authority.

20. These appeals, accordingly, stand allowed. However, in the facts and circumstances, we do not make any order as to costs.

…..…..…...….....…,J.
(KRISHNA MURARI)

……...……...….....…,J.
(SUDHANSHU DHULIA)

NEW DELHI;
21st MARCH, 2023