

A M/S GRAVER AND WEIL (INDIA) LTD.
v.
COLLECTOR OF CENTRAL EXCISE, BARODA

OCTOBER 26, 1994

B [R.M. SAHAI AND M.K. MUKHERJEE, JJ.]

Factories Act, 1948—Section 2 (m)—Factory—Definition—Word ‘premises,—Meaning—Words ‘any premises including the precincts thereof’—Scope of.

C *Central Excise and Salt Act, 1944—Section 11A(1), proviso and 35 L—Central Excise Rules, 1944—Rule 173 F r/w Rules 9 (1), 173 B, 173 C, 173 B(2) r/w 52A—Issue of notice for contravention of—Case of conscious disregard of statutory obligations—Deliberate suppression of material facts to avoid payment of excise duty—Order of imposition of penalty upheld.*

D *Words and Phrases: ‘Factory’ ‘Premises’ ‘any premises including the precincts thereof,—Meaning of in one context of Factories Act, 1948.*

E Appellants who were engaged in the manufacture of Sodium Bichromate under a valid license had removed their product, on payment of central excise duty and under gate passes, for captive consumption to their Chromic Acid section situated adjoining to their manufacturing premises, for the manufacture of Chromic Acid flakes. It was found that those flakes were manufactured with the aid of power and were removed under delivery challans of the appellants without payment of excise duty.

F The goods were confiscated by a team of Central Excise Officers holding that the appellants were not entitled to exemption from duty under Notification No. 46/81 dated March 1, 1981. A notice was issued to the appellants charging them with contravention of Rule 173 F read with Rule 9 (1), rule 173 B, Rule 173 C, Rule 173 G (2) r/w Rule 52 A, Rule 173 F (4) r/w Rule 53 of the Central Excise Rules, 1944 and they
G were asked to show cause why penalty should not be imposed on them, why the goods seized and subsequently released provisionally should not be confiscated and why they should not be called upon to pay duty on 1,52,950 Kgs. of Chromic Acid flakes valued at Rs. 44,95,475.00
H illicitly manufactured and cleared by them during the period from September, 1981 to January, 1983.

The Collector, on consideration of the cause shown by the appellants, passed an order of imposition of penalty of Rs. 5,00,000 under Rule 173 Q (1) of the Rules with order of confiscation of the goods namely 'Chromic Acid flakes'. On appeal, the Tribunal while upholding the order of the Collector directing payment of excise duty, set aside the order of confiscation and imposition of fine in lieu thereof. The Tribunal also upheld the order of imposition of penalty but reduced it to Rs. 1,00,000. This appeal u/s 35 L of the Central Excise and Salt Act, 1944 was directed against the order of the Appellate Tribunal.

The appellants submitted that Chromic Acid section of their premises constituted a unit different from the unit where Sodium Bichromate was manufactured and the workers employed in that section were not more than 4, so it could not be said to be a 'factory' within the meaning of Section 2 (m) of the Factories Act. Therefore, the appellants contended that they were exempted from payment of excise duty under the Notification No. 46/81 dated March 1, 1981.

The appellant further contended that even if it was accepted that the appellants' Chromic Acid Section was a factory even then, the excise authorities could raise demand of duty for only a period of six months prior to the date of issue of notice to show cause u/s 11 A (1) of the Act but could not have recourse to the proviso thereof to claim duty beyond that period as the appellants could not be said to be guilty of fraud, collusion, wilful mis-statement or suppression of facts. Therefore, in any view of the matter appellants could not be asked to pay penalty as the breach in question flowed from the bonafide belief that they were not liable to pay excise duty.

In dealing with the above contentions, the Excise authorities conceded that if the Chromic Acid section was not a 'factory' within the meaning of Section 2 (m) of the Factories Act the Chromic Acid manufactured by the appellant therein would not attract duty under the Notification but they asserted that the said section did constitute a factory and, therefore, the appellants were liable to pay duty under the Notification.

Dismissing the appeal, this Court :

HELD : 1.1. From a bare perusal of the definition of factory under Section 2 (m) of the Factories Act, it is patent that if on any premises including the precincts thereof ten or more workers are working or

A were working on any day of the preceding twelve months, and in any part thereof a manufacturing process is being carried on with the aid of power it would be a factory. Ordinary meaning of the word premises is a piece of land including its buildings or a building together with its surrounding place. The words "any premises including the precincts thereof" under Section 2 (m) of the Factories Act are therefore wide enough to include all buildings with its surroundings which form part of one unit. If, therefore, in such an area ten or more workers are working and *in any part thereof* manufacturing process is being carried on with the aid of power it would be a factory within the meaning of Section 2 (m). (176-A-C)

C 1.2. The question as to whether in a given case the requirements for invoking the proviso to Section 11 A(1) of the Central Excises and Salt Act, are fulfilled or not is one of fact. In the facts and circumstances of the instant case, a reasonable conclusion could certainly and legitimately be drawn that the appellants wilfully and deliberately made misstatements and suppressed material facts to avoid payment of excise duty. It was not a case of simple inaction or failure on the part of the appellants to furnish material information. (177-F, 178-F)

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 785 of 1986.

E From the Order dated 7.6.85 of the Customs Excise and Gold (Control) Appellate Tribunal, New Delhi in Order No. C-441 of 1985.

Dushyant Dave, U.A. Rana, Rajiv Tyagi and Anant Prasad for Gagrut and Co., for the Appellant.

Joseph Vellapally and V.K. Verma for the Respondent.

F The Judgment of the Court was delivered by.

G **M.K. MUKHERJEE, J.** This appeal under Section 35 L of the Central Excise and Salt Act, 1944 ('Act' for short) is directed against the order dated June 7, 1985 passed by the Customs, Excise and Gold (Control) Appellate Tribunal ('Tribunal' for short) in Appeal No. ED (SB)A 104/84.C. Facts leading to and relevant for disposal of the appeal are as under.

H On January 30, 1983 a team of Central Excise (Preventive Officers of Bulsar Division paid a surprise visit to the factory premises of M/s. Grovel Chromates, a division of M/s. Grauer and Weil (India) Ltd., Bombay, the

appellants herein, situated in Plot No. 407, G.I.D.C., Vapi. They found that the appellants, who are engaged in the manufacture of Sodium Bichromate (Falling under Item No. 14AA of the First Schedule to the Act) under a valid license, had removed their product, on payment of central excise duty and under gate passes, for captive consumption to their Chromic Acid Section situated adjoining to their manufacturing premises, for the manufacture of Chromic Acid flakes. The Officers further found that those flakes, (falling under T I 68) were manufactured with the aid of power and were removed under delivery challans of the appellants without payment of duty. The Officers detained 98 drums containing 4,900 kg. of Chromic Acid flakes lying in the Chromic Acid section for making further enquiry into the matter. On a subsequent visit on February 2, 1983, the Officers seized 126 drums of Chromic Acid flakes (which included the 98 drums detained earlier) in fully manufactured condition weighing 63,000 kgs. and valued at Rs. 1,89,000 on the reasonable belief that the goods were liable to confiscation as the appellants were not entitled to exemption from duty under Notification No. 46/81 dated March 1, 1981. The goods were provisionally released to the appellants on their executing requisite bonds.

In due course a notice was issued to the appellants on July 14, 1983 charging them with contravention of Rule 173F read with Rule 9 (1), Rule 173 B, Rule 173 C, Rule 173 G (2) read with Rule 52 A, Rule 173 F (4) read with Rule 53 of the Central Excise Rules, 1944 and they were asked to show cause why penalty should not be imposed on them, why the goods seized and subsequently released provisionally should not be confiscated and why they should not be called upon to pay duty on 1,52,950 kgs. of Chromic Acid flakes valued at Rs. 44,95,475.00 illicitly manufactured and cleared by them during the period from September, 1981 to January, 1983.

On consideration of the cause shown by the appellants and the oral submissions made on their behalf the Collector made and recorded the following order on November 30, 1983 :

“(i) I impose a penalty of Rs. 5,00,000 on M/s. Growel Chromates of Vapi under Rule 173 Q(1) of Central Excise Rules, 1944;

(ii) The goods namely “Chromic Acid flakes” weighing 6300 kgs. contained in 126 drums valued at Rs. 1,89,000.00 P. seized from their possession from Chromic Acid Section and subsequently released provisionally on execution of B 11 bond are liable to confiscation. Accordingly under Rule

A 173 Q(1) of the Central Excise Rules, 1944, I confiscate the same and order that the assessee shall pay a fine of Rs. 1,89,000 in lieu of confiscation within one month of receipt of this order by them.

B On redemption, the confiscation goods shall be properly accounted for by them and cleared in accordance with law, if not already done.

C (iii) I order that M/s. Growel Chromates of Vapi shall pay the duty of excise at the appropriate leviable rate on 1,52,950 kgs. of 'Chromic Acid flakes' falling under Tariff Item 68, valued at Rs. 44,95,475.00P. illicitly manufactured and removed by them without paying the duty leviable thereon, during the period from September, 1981 to January, 1983 or thereabouts, as shown in Annexure 'A' to the show cause notice, under the proviso to sub-section (i) of Section 11 A of the Central Excises and Salt Act, 1944, read with Rule 9 (2) of the Central Excise Rules, 1944."

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E Aggrieved by the above order the appellants filed an appeal before the Tribunal. The Tribunal while upholding the order of the Collector directing payment of excise duty, set aside the order of confiscation and imposition of fine in lieu thereof. The Tribunal also upheld the order of imposition of penalty but reduced it to Rs. 1,00,000. Hence this appeal.

To appreciate the contentions of the appellants, it will be profitable at this stage to refer to Notification No. 46/81 dated March 1, 1981, which reads thus :

F "In exercise of the powers conferred by sub-rule (i) of rule 8 of the Central Excise Rules, 1944, and in supersession of the notification of the Government of India, in the Ministry of Finance (Department of Revenue), No. 85/79-Central Excises, dated the 1st March, 1979, the Central Government hereby exempts all goods, falling under Item No. 68 of the first Schedule to the Central Excises and Salt Act, 1944 (1 of 1944), other than goods manufactured in a factory, from the whole of the duty of excise leviable thereon,

G *Explanation:* in this notification, the expression "factory" has the meaning assigned to it in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948).

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This notification shall come into force with effect from the 1st day of April, 1981.” A

and Section 2 (m) of the Factories Act, 1948 which, so far as it is relevant for our present purposes, reads as under :

“(m) “factory” means any premises including the precincts thereof - B

(i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or C

(ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on -

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.....

The first ground that was unsuccessfully canvassed by the appellants before the Collector and the Tribunal, and which has been re-agitated before us, is that Chromic Acid section of their premises constitute a unit different from the unit where Sodium Bichromate is manufactured and as, admittedly, the workers employed in that section are not more than 4 it cannot be said to be a ‘factory within the meaning of Section 2 (m) of the Factories Act. That necessarily means, the appellants have contended, that they were exempted from payment of excise duty under the above quoted Notification. E F

In dealing with the above contention the Excise authorities conceded that if the Chromic Acid section was not a ‘factory’ within the meaning of Section 2 (m) of the Factories Act the Chromic Acid manufactured by the appellant therein would not attract duty under the above Notification but they asserted that the said section did constitute a factory and, therefore, the appellants were liable to pay duty under the Notification. G

On perusal and appraisal of the materials placed before him, the Collector rejected the above submission of the appellants with the following findings : H

A "In this regard, reference to 24th Annual Report for the year 1981 of M/s. Grauer And Weil (India) Ltd. (the appellant) is also relevant. In the said annual report, in the director's report on the item "Additional to fixed assets" it has been stated that "the company has also acquired the complete assets and liabilities of Growel Chromates Pvt. Ltd., located at Vapi, in the district of Valsad, Gujarat. The plan so acquired is designed for annual capacity to manufacture the following products :-

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(1) Chromic Acid 730 Tons

C (2) Sodium Bichromate 2190 Tons

(3) Yellow Sodium Sulphate 1314 Tons.

D From the director's report it is quite clear that the entire plan of M/s. Growel Chromates Pvt. Ltd., including Chromic Acid Section formed the division of Grauer and Weil (India) Ltd., Bombay, in the name of M/s. Growel Chromates, or merger. On the other hand, while applying for L4 licenses for manufacture of "Sodium and Potassium Dichromate" falling under T.I. 14 AA on 2.12.81 and for "Yellow Sodium Sulphate" falling under T.I.68 on 18.1.82,

E in the ground plans produced therewith, the assessee has safely avoided to show their premises demarcated as "Chromic Acid" Section, though the same premises is situated in the same plot bearing No. 407.

F The facts discussed as above clearly bring out that the assessee has made a wrongful attempt to get considered "Chromic Acid" section as a separate premises/entity entitled for exemption under Notification No. 46 dated 1.3.81 as amended, as not governed by Section 2 (m) of the Factories Act, 1948.

G It has also not been disputed by the assessee, that their "Chromic Acid" Section is situated in the same plot No. 407, where their another section for manufacture of "Sodium Bichromate" is situated. It is also an admitted fact that there is common connection for supply of water and electricity to both the sections are borne by the assessee themselves. It is further found that the assessee is also silent

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on the allegations that the payments of salaries to the staff working in "Chromic Acid" Section is made by themselves, i.e. the assessee, accounts for chromic acid flakes manufactured and cleared are maintained on the stock-register by the store keeper alongwith accounts of other items at the assessee-firm, the main raw-material viz., "Sodium Bichormate" manufactured by the assessee in their "Sodium Bichromate" Section is also supplied/issued to Chromic Acid Section by showing removals as for "captive consumption" or as "issued to Chromic Acid Section" in the gate passes issued for "Sodium Bichromate" by the assessee-firm, finished product that is "Chromic Acid flakes" is also removed under the delivery challans of the assessee and bills/invoices are also issued for such flakes under the name of the assessee i.e. M/s. Growel Chromates, a division of M/s. Grauer and Weil (India) Ltd., Vapi.

It is further found that the material requisition book is maintained in the name of the assessee-firm, under which the raw-material (Sodium Bichromate) is shown as supplied to Chromic Acid section as one of the department of the assessee-firm. Besides, confirmation of buyers orders in respect of "Chromic Acid flakes" is also given in the name of the assessee-firm i.e. M/s. Growel Chromates (a division of M/s Grauer and Weil (India) Ltd.,

The Tribunal also in its turn, re-appraised the relevant materials and concurred with the finding of the Collector with the following observations:

"Here, the appellants were engaged in the manufacture of sodium bichromate, a vital input for manufacture of chromic acid and using it as such. How the two activities can be said to be independent of each other passes our comprehension, especially considering the other features of the case, i.e. common water and power connections, common payments for these facilities, common payments to workers, common delivery challans, etc. This is not, therefore, a case in which it can be said that the activities in the chromic acid section were not connected with but were totally independent of the activities in the rest of the premises."

- A From a bare perusal of the definition of factory under Section 2 (m) of the Factories Act, it is patent that if on any premises including the precincts thereof ten or more workers are working or were working on any day of the preceding twelve months, and in any part thereof a manufacturing process is being carried on with the aid of power it would be a factory. Ordinary, meaning of the word 'premises' is a piece of land including its buildings or
- B a building together with its grounds or appurtenances and precincts mean the areas surrounding a place. The words "any premises including the precincts thereof" under Section 2 (m) are therefore wide enough to include all buildings with its surroundings which form part of one unit. If therefore in such an area ten or more workers are working and *in any part thereof* manufacturing process is being carried on with the aid of power it would be
- C a factory' within the meaning of Section 2 (m).

- Since both the Collector and the Tribunal have recorded their respective findings as quoted above, taking into consideration all relevant facts and relevant factors in the light of the above definition of factory, no exception can be taken to the same. The first contention of the appellants
- D therefore fails.

- The next contention that was raised on their behalf - and did not find favour with the authorities below - is that even it is accepted that the appellants Chromic Acid Section is a factory still then, the excise
- E authorities could raise demand of duty for only a period of six months prior to the date of issue of notice to show cause under Section 11 A(1) of the Act but could not take recourse to the proviso thereof to claim duty beyond that period as the appellants cannot be said to be guilty of fraud, collusion, wilful mis-statement or suppression of facts. The appellants have urged, relying upon the following contents of their letter dated September 19, 1981
- F addressed to the Excise authorities :

- "Further to our Declaration dated 15.4.81 we have to inform you that the premises where Chromic Acid is manufacturing is not a factory within the meaning of Section 2 (m) of Factories Act, 1948. This premises is completely
- G segregated and the goods manufactured therein are wholly exempted from the payment of duty, by virtue of Notification No. 46/81 dated 1.3.81, as amended by Notification No. 92/81 dated 1.4.81."

- that they honestly believed that their Chromic Acid Section is not a
- H factory and on such belief did not pay excise duty on the flakes

manufactured therein till the Excise authorities held otherwise. According to the appellants, the above contents of the letter not only prove their bonafides but negate the allegations of fraud, collusion, wilful misstatement or suppression of facts also. To bring home their above contention the appellants have relied upon the following passage from the judgment of this Court in *Collector of Central Excise v. Chemphar Drugs and Liniments*, (1989) 40 ELT 276.

“In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to sub-section. 11A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. *Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before the period of six months.* Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case.”

(emphasis supplied)

As has been observed in the above quoted passage the question as to whether in a given case the requirements for invoking the proviso are fulfilled or not is one of fact. It has therefore to be ascertained whether in the set of facts and circumstances of the instant case, the Collector and Tribunal were justified in concluding that the appellant was guilty of wilful misstatement and suppression of facts. On perusal of the record we find that in arriving at the above conclusion the Collector and the Tribunal relied upon the following facts and circumstances :-

(i) the reference to the declaration dated April 15, 1981 by the appellants in their letter dated September 19, 1981 was incorrect and misleading inasmuch as the said declaration related to M/s. Growel Chromates Pvt. Ltd. and was filed for availing exemption under Notification No. 105/80 dated June 19, 1980, which pertained to factories

A wherein the total investment on plant and machinery was not over 10 lakhs, and had no reference or relevance to Notification No. 46/81 dated March 1, 1981;

B (ii) the copy of the prescribed form of the above declaration dated April 15, 1981, which was filed in the impugned proceeding indicates that, against the column "reference to the notification under which exemption from duty is claimed" is the remark "105/80 dated 19.6.80; Not as 92/81 (not falling under Factories Act having less than 10 workers)" but in the original of the declaration form the words "Not No. 92/81 (not falling under Factories Act having less than 10 workers)" are significantly missing;

C (iii) the claim of the appellants that the Factories Act authorities had on February 9, 1982 approved their lay out plan wherein the Chromic Acid Section has been described as "premises which do not come under Section 2 (m) of the "Factories Act", was unfounded for it had not been signed by a duly empowered officer administering the Factories Act;

D (iv) the statement of non-factory status of the Chromic Acid Section in the letter dated September 19, 1981 was a conclusion drawn without any factual basis for the same, for, on the own showing of the appellants, the endorsement regarding the "non-factory" status of the said section was made for the first time on or around February 9, 1982; and

E (v) though the appellants showed the Chromic Acid Section in the ground plan submitted to the Factories Act authorities and claimed 'non-factory' status for it, in the ground plan submitted to the Excise authorities for approval of license for manufacture of 'Sodium Bichromate' they did not even indicate its existence.

F In our opinion from the above facts and circumstances when taken together, a reasonable conclusion can certainly and legitimately be drawn that the appellants wilfully and deliberately made misstatements and suppressed material facts to avoid payment of excise duty. In other words it is not a case of simple inaction or failure on the part of the appellants to furnish material information.

G It has lastly been contended that in any view of the matter the appellants could not be asked to pay penalty as the breach in question flowed from the *bonafide* belief that they were not liable to pay excise duty. In support of this contention the appellants have relied upon the following passage from the Judgment of this Court in *Hindustan Steel Ltd. v. State of*

H *Orissa*, (1978) ELT J 159.

“An Order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation.” A

Since we have already found that the appellants have acted in conscious disregard of their statutory obligations and deliberately suppressed material facts the above contention can neither be accepted nor the above quoted passage pressed into service. B

In the result the appeal fails and the same is hereby dismissed. C
However, there will be no order as to costs.

A.G.

Appeal dismissed.