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DUTTA CYCLE STORES & ORS.

v.

SMT. GITA DEVI SULTANIA & ORS.

JANUARY 25, 1990

B

[K. JAGANNATHA SHETTY & T. KOCHU THOMMEN, JJ.]

Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947: S. 11(1)(d)—Tenant—Eviction of on grounds of wilful default—Held on facts that no reason seen to suspect rent remained in arrears.

C

The appellant-defendants fell in arrears of rent for the months of February and May to August 1974 for the demised premises. The respondent-plaintiffs sought their eviction under s. 11(1)(d) of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 on the grounds of default. Decreeing the suit, the trial court found that rent for the said D five months had not been paid. The decree was affirmed by the appellate court in part, that is, in respect of May and June, 1974. That finding was affirmed by the High Court.

Allowing the appeal by special leave, the Court,

E **HELD: The Supreme Court does not ordinarily interfere in proceedings under Article 136 of the Constitution particularly when all the courts below had reached the same conclusion. But where the finding of fact is based on no evidence or opposed to the totality of evidence and contrary to the rational conclusion to which the state of evidence must reasonably lead, then the Court will in the exercise of its discretion F intervene to prevent miscarriage of justice.** [154C-D]

In the instant case, there was no reliable oral evidence on the side of the plaintiffs to support the allegation that rents were in arrears. Nor was there any documentary evidence in support of their case. Neither the first plaintiff, the widow nor the other two plaintiffs, her children, G testified in support of the allegation PW-4, who verified the plaint on behalf of the plaintiffs admittedly had no personal knowledge that the defendants were in arrears of rent or whether the first plaintiff or anybody else had demanded rent from the defendants. [156F-G]

On the other hand, DW-8, one of the defendants, stated that for H the months of May and June 1974 he had paid the rent in June 1974 by

handing over the amount to the first plaintiff's daughter when she went to his shop to collect the rent. Since she was a minor he accompanied her to her house to make sure that the amount was received by her mother, the first plaintiff. This evidence has been supported by DW-7. He was the Accountant of the first defendant firm. DW-6 also spoke of the fact that in June 1974 the defendants had given Rs.200 as rent to the younger daughter of the plaintiff. These statements of defence witnesses were categoric and clear. There was no contradiction in term for there was no evidence on the side of the plaintiffs to the contrary. The conclusion arrived at by the courts below that rents remained in arrears was, therefore, perverse and totally unjustified. [155A-B, E; 156D, F, G]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 652 of 1982.

From the Judgment and Order dated 22.8.1980 of the Patna High Court in Second Appeal No. 125 of 1977 (R).

Ashok K. Sen and D.P. Mukherjee for the Appellants.

N.H. Hingorani, Ms. Kapila Hingorani and R.P. Wadhwani for the Respondents.

The Judgment of the Court was delivered by

THOMMEN, J. This civil appeal by special leave is brought by the defendants against the judgment of the Patna High Court, Ranchi Bench, in Second Appeal No. 125 of 1977 dismissing *in limine* their appeal against the judgment of the learned District Judge in Title Appeal No. 2/5 of 1977 whereby the decree for eviction granted by the learned Munsiff in Title Suit No. 3 of 1975 was in part affirmed.

The plaintiffs (respondents) instituted the suit against the defendants (appellants) for eviction under Section 11(1)(d) of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 on the ground that the defendants were in arrears of rent for the months of February 1974 and May 1974 to August 1974. The defendants contested the suit on various grounds. Their main defence was that they were not in arrears of rent as alleged by the plaintiffs. Decreeing the suit, the learned Munsiff found that rent for the months of February 1974 and May 1974 to August 1974 had not been paid by the defendants. This decree was affirmed by the learned District Judge in part, that is, in respect of the alleged arrears for the months of May

A and June 1974, and not for any other period. The finding of the First Appellate Court was affirmed by the High Court by dismissing the defendants' appeal *in limine.*

The question which arises for consideration is whether the courts below were justified in coming to the conclusion, which they did, and B whether the impugned judgment of the High Court is liable to be interfered with in the present appeal brought by special leave under Article 136 of the Constitution.

Whether or not rent for the two months in question had been duly paid by the defendants is a question of fact, and with a finding of C such fact, this Court does not ordinarily interfere in proceedings under Article 136 of the Constitution, particularly when all the courts below reached the same conclusion. But where the finding of fact is based on no evidence or opposed to the totality of evidence and contrary to the rational conclusion to which the state of evience must reasonably lead, then this Court will in the exercise of its discretion intervene to prevent D miscarriage of justice.

The suit was instituted by the widow of Rameswarlal Sultania. The plaint was verified by Rameswarlal Sultania's nephew on behalf of the plaintiffs, and he deposed as PW-4. Neither the first plaintiff, the widow nor the other two plaintiffs, her children testified in support of E the plaint allegations. The newhew, PW-4 frankly admitted in the box that he had no personal knowledge of the facts alleged in the plaint. He did not know if the defendants were in arrears of rent or whether his aunt, the first plaintiffs or anybody else had demanded rent from the defendants. None of the witnesses on the side of the plaintiffs had any personal knowledge of the facts alleged by the plaintiffs in regard F to the arrears of rent. PW-4 is, amongst the plaintiff's witnesses, the only person who speaks to this fact, but admittedly speaks without any claim of personal knowledge. In the circumstances, there is no reliable oral evidence on the side of the plaintiffs to support the plaint allegation regarding the arrears of rent. Nor is there any documentary evidence in support of their case.

G

On the other hand, the defendants categorically stated that they had paid the rent for the two months in question to the first plaintiff. At that time her husband was alive, but he was in no condition, on account of poor health, to give a receipt for the rents paid. The defendants, in view of their personal relationship with him, did not H insist upon a receipt.

A

DW-8 is one of the defendants. He categorically stated that for the months of May and June 1974 he paid the rent in June 1974 by handing over the amount to the first plaintiff's daughter when she went to his shop to collect the rent. Since she was a minor he accompanied her to her house to make sure that the amount was received by her mother, the first plaintiff. His evidence on the point is in the following words:

B

> "It is incorrect to say that I have not paid the rent for May-June 1974. In June, the daughter of Rameshwar Babu had come to demand Rs.200 towards the rent for May-June 1974 and I had given the (Illegible) at that time. I had demanded the receipt, but he was unwell and as such did not give it".

C

> "Rameshwar Babu was not living in his senses in June, 74. His brain was not in proper condition. In June, 74 I gave Rs.200 to his wife (plaintiff), after taking the same to his house. Even subsequently my brother had gone to pay the rent to the plaintiff, Gita Devi for two-three times."

D

This evidence is supported by DW-7. He is the Accountant of the first defendant-firm of which defendants Nos. 2 and 3 who are brothers are partners. Referring to these partners, and a neighbour by name Nandi (DW-6), this is what he says:

E

> "In June 74, the defendants, Bibhuti and Prahalad Chandra Dutta had given Rs.200 two hundred rupees to the daughter of Rameshwar Babu. Nandi Babu, Bibhuti Babu and I were (present) in the shop, at that time. This money was paid towards the rent of the house".

F

Nandi (DW-6) also speaks on this point:

> "The defendants always used to pay the rent in my presence .... In June, 1974, they had given Rs.200 as rent to the younger daughter of Ramesh Babu in my presence. I told (them) that as she was a small girl, they should also accompany her. Then Bibhuti Bhusan Dutta reached the girl."

G

The evidence of these three defence witnesses is that the rent for the months of May and June. 1974 had been duly paid in June 1974 in

H

A the sum of Rs.200 by the second defendant (DW-8) to the landlord, Rameswarlal Sultania by handing over the amount to his minor daughter who went to the defendants' shop to collect the same and by accompanying her to her house to see to the safe delivery of the same to the first plaintiff, her mother who obviously received it on behalf of her husband, the landlord. The evidence seems to be clear on the point B and we see no contradiction in this.

The courts below did not appreciate that this much evidence was staring in the face, and there was total absence of evidence on the point on the side of the plantiffs to contradict the defence evidence. The plaint allegation regarding arrears was not spoken to on the plaintiffs' side by any person having personal knowledge. The C plaintiffs made no attempt to let in any reliable evidence on the point. The evidence of PW-4 who admittedly had no personal knowledge on the point is no evidence at all. On the other hand, the evidence of DW-8, supported by the evidence of his Accountant (DW-7) and his neighbour (DW-6) is categoric and clear.

D The learned District Judge disbelieved this evidence on the assumption that DW-6 contradicted himself when he stated that the amount was paid to the daughter and also to her monther. In his written statement he stated that the amount had been paid to the landlord, Rameswarlal Sultania.

E In the light of what we have stated above, we see no contradiction in these statements. The amount was, in our view, rightly stated to have been paid to Rameswarlal Sultania when it was handed over to the daughter to be paid over to her monther, viz., the first plaintiff who was reasonably understood to have received it for and on behalf of her husband. If the statement is true, there is no contradiction in it F and it is categoric and clear. We see no reason to suspect that it is not true for there is no evidence on the side of the plantiffs to the contrary. As stated earlier, there is no evidence at all on the side of the plaintiffs that rents were in arrears. In the absence of any reason to disbelieve the clear and categoric testimony of the defence witnesses on the point, we see no reason to suspect that the rents remained in arrears. G In the circumstances, we are of the view that the courts came to the conclusion, as they did, without any evidence whatsoever to support it and contrary to the available evidence let in by the defence. Their conclusion was, therefore, perverse, irrational and totally unjustified. For this reason, we set aside the impugned decree and judgment of the courts below. The appeal is allowed with costs.

H P.S.S. Appeal allowed.

INDIAN PISTON LIMITED

v.

COLLECTOR OF CENTRAL EXCISE, MADRAS

JANUARY 30, 1990

[M.H. KANIA AND KULDIP SINGH, JJ.]

A

B

Central Excises and Salt Act, 1944/Central Excise Rules, 1944: Sections 4 and 11B/Rule 233B—Excise duty—Sales by assessee to distributors—Distributors treated as 'related persons' by Department—Price list filed with protest—An appeal distributors held 'independent buyers'—Refund on excess duty—Whether arises.

C

The appellant was a manufacturer of motor vehicle parts falling under Item 34-A, and components for I.C. Engines falling under Item 68, of the Central Excise Tariff.

D

The marketing pattern of the appellant was that they sold goods in the wholesale to O.E. manufacturers, Transport Undertakings and Government Bodies, and the requirements of the replacement market were met by sale in the wholesale to other persons who were met by sale in the wholesale to other persons who were designated by them as distributors/ primary wholesale buyers on the basis of agreements with such distributors.

E

The Department took the view that sales by the appellant to its distributors would be considered as sales to 'related persons' on account of the amendment to sec. 4 of the Central Excises and Salt Act, 1944, which came into force from October 1 1975, and directed the filing of revised price lists showing a discount of 12 1/2% from the price at which the goods supplied by the appellant were sold by its distributors to independent buyers.

F

The appellant complied with this direction under protest taking up the contention that the distributors were also a class of independent buyers, which was however rejected by the Assistant Collector.

On appeal the Collector (Appeals) took the view that distributors were not related persons relying on this Court's decision in ***Union of India*** **v.** ***Bombay Tyres International Ltd.*****, [1983] 14 ELT 1896.**

G

The appellant then claimed refund of the excess amount of excise duty paid. This was rejected by the Assistant Collector on the ground that except in respect of sales to wholesale distributors/primary wholesellers and O.E. manufacturers, the excise duty had been paid by the appellant voluntarily.

H

The Customs, Excise and Gold (Control) Appellate Tribunal dismissed the Appellant's appeal.

A In the appeal to this Court it was conteded on behalf of the appellant that the language of section 4(1) of the Central Excises Act, indicates that there could be only one normal price for sales to independent distributors, and that as the letter of protest sent by the appellant covered the entire payment of exicse duty in those cases where the normal price was fixed on the footing that the distributors of the appellant were B related persons, no question of limitation would arise in considering the application of the appellant for refund.

On behalf of the respondent, it was contended that the protest made by the appellant must be read as limited to the cases of sales by the appellant to the wholesale distributors/primary wholesellers and to O.E. manufacturers and that the other categories of sales must be held not to C be covered by the protest.

Allowing the appeal, this Court,

HELD: (1) In view of the fact that the distributors of the appellant were finally held not to be related persons, the excise duty collected in respect of the difference between the price at which the goods were sold D by the appellant to the distributors and the price to which the said goods were sold by the distributors to independent buyers calculated as aforesaid, must be held to be excess duty. [162D-E]

Indian Oxygen Ltd. v. *Collector of Central Excise,* [1988] 36 E.L.T. 723, *Collector of Central Excise, Madras* v. *Ashok Layland Ltd., Madras,* [1987] 29 E.L.T. 530 referred to. E

(2) The protests filed by the appellant clearly took up the contention that its distributors could not be regarded as related persons and hence the protests lodged by the appellant must be held to cover all cases where the price at which the appellant sold its goods to its distributors was not regarded as the normal price on the ground that the distributors F were related persons. [162E-F]

Indian Cements Ltd. v. *Collector of Central Excise,* [1989] 2 S.C.C. 676 referred to.

(3) Rule 233B of the Excise Rules does not prescribe any particular form of protest and hence it is not possible to say on the basis of this rule G that the appellant-assessee in this case must be deemed to have paid the duty without protest. [163E-F]

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 1430-36(NM) of 1987.

H From the Judgment and Order dated 23.4.1987 of the Custom Excise and Gold (Control) Appellate Tribunal, South Regional Tri-

bunal, Madras in Appeal Nos. 174, to 176 and 240 to 243 of 1986 MAS in Order No. 247 of 1987. A

Anil B. Divan, H.K. Dutt, S. Ramasubramanium, Krishna Srinivasan and Ms. Midula Ray for the Appellant.

A.K. Ganguli, A. Subba Rao and P. Parmeshwaran for the Respondent.

B

The Judgment of the Court was delivered by

KANIA, J. These appeals arise from a judgment of the Customs, Excise and Gold (Control) Appellate Tribunal (South Regional Bench) at Madras.

The facts necessary for the disposal of these appeals are as follows. C

The appellant is a manufacturer of motor vehical parts falling under Item 34-A of the Central Excise Tariff and components for I.C. Engines falling under Item 68 of the said Tariff. The period with which we are concerned in these appeals is the period from October 1, 1975 D to July 21, 1984. The marketing pattern of the appellant was that they sold goods in the wholesale to O.E. manufacturers, Transport Undertakings and Government Bodies. The requirements of the replacement market were met by the appellant by sale in the wholesale to other persons who were designated by the appellant as distributors/primary wholesale buyers on the basis of agreements with such distributors. E The amendment to section 4 of the Central Excises and Salt Act, 1944 (hereinafter referred to as "the Central Excises Act") came into force from October 1, 1975 and, as from that date, the Department took the view that sales by the appellant to its distributors would be considered as sales to related persons. The Department, therefore, directed the appellant to file price lists in Part IV in the form prescribed for sales to F related persons. The appellant filed the price lists in Part II, Part IV and Part VI. The price lists filed in Part II related to sales to industrial buyers, Government Bodies and so on who were admittedly not related persons regarding the appellant. These price lists were duly approved. It was regarding the price lists filed under Part IV that the Assistant Collector on the basis of the aforesaid view directed the G appellant to file revised price lists showing a discount of 12-1/2% from the price at which the goods supplied by the appellant were sold by their distributors to independent buyers. The appellant complied with this direction under protest taking up the contention that the distributors were also a class of independent buyers. This claim was rejected by the Assistant Collector, who took the view that the distributors H

A were related persons and hence the prices charged by these distributors to their purchasers should be taken as the assessable value. This was contested by the appellant before the Collector (Appeals) who by his order dated July 27, 1984 took the view that the distributors were not related persons, on the basis of the decision of this Court in the case of *Union of India & Ors.* v. *Bombay Tyres International Ltd.*, B [1983] 14 E.L.T. 1896. The appellant applied for a refund on the ground that the excise duty had been collected from the appellant on the footing that the distributors were related persons and that, in view of the finding that the distributors were not related persons, the excess amount should be refunded to it. This contention was rejected by the Assistant Collector and on the ground that except in respect of sales to C wholesale distributors/primary wholesellers and O.E. manufacturers, the excise duty had been paid by the appellant voluntarily. Against this decision, the appellant preferred an appeal to the Tribunal. The Tribunal, however, confirmed the view of the Assistant Collector on the ground that the other modes of sale like depot transfers, retail sales, direct dealer sales, sales to transport undertakings and sales to D Government bodies like transport undertakings had not figured as issues for determination before the excise authorities and the protest made by the appellant was only in respect of the assessable value regarding the said two categories of sales to wholesale distributors/ primary wholesellers and to O.E. manufacturers. On the basis of these conclusions, the Tribunal dismissed the appeal of the appellant. The E present appeals are directed against this decision of the Tribunal.

It was submitted by Mr. Divan, learned counsel for the appellant, that the decision of the Tribunal was erroneous and liable to be set aside as, for purposes of levy of excise duty on the sales in question only one price can be treated as the normal price and, as the dis- F tributors were held not to be related persons, it was the wholesale price at which the goods were sold by the appellant to the distributors which must be held to be the normal price. It was pointed out by him that all the circumstances show that the payment of excise duty was made under protest and that the returns were originally filed only on the basis of the single normal price, namely, the price at which the G goods were sold by the appellant to its distributors. Learned counsel drew our attention to the provisions of section 4 of the Central Excises Act. The relevant part of section 4 runs as follows:

> "4. Valuation of excisable goods for purposes of charging of duty of excise—(1) Where under this Act, the duty of H excise is chargeable on any excisable goods with reference

to value, such value shall, subject to the other provisions of this section, be deemed to be— A

> "(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale." B

We are not concerned with the proviso to this section for the purposes of this appeal. Learned counsel submitted that the language of section 4(1) suggests that there can be only one normal price for sales to indpendent distributors.

C

Learned counsel for the appellant also drew our attention to the decision of this Court in *Indian Oxygen Ltd.* v. *Collector of Central Excise,* [1988] 36 E.L.T. 723. It has been observed by this Court in that judgment as follows (para 6 of the said report):

D

> "It is necessary to reiterate that value for assessable goods must be determined in term of section 4 of the Act. The said section 4(1) provides that where the duty of excise is chargeable on any excisable goods with reference to value, such value shall, subject to the other provisions of this section be deemed to be the normal price thereof, that is to E say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale."

F

It may be noted that in the present case there was no contention that there was any consideration for the sale other than the price.

In *India Cements Ltd.* v. *Collector of Central Excise,* [1989] 2 S.C.C. 676 a Division Bench of this Court has taken the view that no particular form is prescribed for making up of protest. In that case, the G Court took the view that an ordinary reading of the letter sent by the appellant showed that the appellant was not accepting the liability without protest and in view of this, the letter must be held to be in the nature of a protest. The Division Bench further held that in view of this, the question of limitation does not arise for refund of the duty (para 10 of the said report). H

A It was submitted by learned counsel for the appellant that in the present case the letter of protest sent by the appellant, on a commonsense reading thereof, covered the entire payment of excise duty in those cases where the normal price was fixed on the footing that the distributors of the appellant were related persons and submitted that in view of this no question of limitation would arise in considering the B application of the appellant for refund. The learned counsel drew our attention to the decision of the Special Bench of the Tribunal in *Collector of Central Excise, Madras* v. *Ashok Leyland Ltd., Madras,* [1987] 29 E.L.T. 530 where on similar facts a Special Bench of the Tribunal had taken the view that even removals for captive use and retail sales had to be assessed at the normal price available at the time and place of removal from their main dealers. The contention of the C Department in that case that the removals were not the subject matter of the original adjudication by the Assistant Collector and hence the assessments had become final, was rejected.

In our opinion, the submission on behalf of the appellant is D well-founded. In view of the fact that the distributors of the appellant were finally held not to be related persons regarding the appellant in cases where excise duty has been levied on the footing that the distributors of the appellant were related persons and hence, the price at which the goods were sold to them could not be regarded as the normal price and the excise duty collected in respect of the difference between E the price at which the goods were sold by the appellant to its distributors and the price at which the said goods were sold by the distributors to independent buyers, calculated as aforestated, must be held to be excess levy. The protests filed by the appellant clearly took up the contention that its distributors could not be regarded as related persons and hence the protests lodged by the appellant must be held to F cover all cases where the price at which the appellant sold its goods to its distributors was not regarded as the normal price on the ground that the distributors were related persons.

It was submitted by Mr. Ganguly, learned counsel for the respondent, that the protest made by the appellant must be read as G limited to the cases of sales by the appellant to its wholesale distributors/primary wholesellers and to O.E. manufacturers and that the other categories of sales like stock transfers, clearances to retail sellers and other wholesale sales to purchasers other than distributors must be held not to be covered by the protests. He placed strong reliance on the observation of this Court in *Assistant Collector of Central Excise & Ors.* v. *Madras Rubber Factory Ltd. & Ors.*, [1987] 27 E.L.T. 553 H

(S.C.) where it has been held (page 20 of the report) that the different prices can be normal prices for the purposes of the determination of the assessable value of an article. In that case, however, it must be appreciated that the separate price lists in respect of supplies made to the Government and other departments were filed by the assessee, the Madras Rubber Factory, distinct and different from the price lists in relation to dealers and it was held that since different price lists for different classes of buyers are specifically recognised under proviso (i) of section 4(1) of the Central Excises Act, therefore, merely because the product is sold at a lower price to the Government and its department that does not enable the MRF to contend that the difference in price with reference to an ordinary dealer and the Government is a discount to the Government. The difference in price is not a discount but constitutes a normal price for the Government as a class of buyers and no deduction on this Head is admissible. It was, in these facts and circumstances, that the aforesaid conclusion was arrived at and it has no application to the case before us because it has not been shown to us that a distinct or different price list was filed regarding any particular category of buyers in respect of the sales in question.

Mr. Ganguly next drew our attention to Rule 233B of the Central Excises Rules, 1944 which lays down the procedure to be followed when duty is paid under protest. The provisions of this rule, however, are of no relevance here because it has not been pointed out to us as to how the appellant has failed to observe this rule in any particular regard so that the provisions of clause 8 of the rule can come into effect. This rule does not prescribe any particular form of protest and hence it is not possible to say on the basis of this rule that the appellant-assessee in this case must be deemed to have paid the duty without protest.

In the result, the appeal is allowed. The order of the Tribunal is set aside and it is held that the assessee is entitled to refund where excise duty has been assessed and collected from the assessee at a higher rate on the footing that the wholesale distributors of the assessee were persons related to it, that is, in respect of the other categories of sales, namely, retail sales, sales to dealers, sales to State Transport Undertakings and export clearances. Looking, however, to the facts and circumstances of the case, there will be no order as to costs of the appeals. The orders for costs already made shall, however, stand.

N.V.K. Appeal allowed.