

(2011) 08 AP CK 0082

In the Andhra Pradesh High Court

Case No : Writ Petition No. 17892 of 2011

Andhra Cylinders Pvt. Ltd.

APPELLANT

Vs

The Deputy Commissioner of Customs and Central Excise,
The Commissioner of Customs and Central Excise and The
Superintendent of Central Excise

RESPONDENT

Date of Decision : 05-08-2011

Acts Referred:

Central Excise Rules, 1922 — Rule 31, 8(1), 8(3)(A)
Central Excises and Salt Act, 1944 — Section 11, 35B, 35F, 37B
Constitution of India, 1950 — Article 226

Citation : (2011) 08 AP CK 0082

Hon'ble Judges : V.V.S. Rao, J;Ramesh Ranganathan, J

Bench : Division Bench

**Advocate : C. Kodandaram, representing Challa Gunaranjan, for the Appellant;
A. Rajasekhar Reddy, SR. SC for CCE, for the Respondent**

Judgement

Ramesh Ranganathan, J.—The order of attachment dated 23.06.2011, passed by the 1st Respondent during the pendency of the stay application before the Central Excise & Customs and Service Tax Appellate Tribunal (for short - CESTAT), is questioned in this Writ Petition as being illegal, arbitrary and in violation of the CBEC circular dated 25.05.2004.

2. Facts, to the extent relevant, are that the Petitioner, a private limited company engaged in the manufacture of LPG Cylinders, is registered with the Central Excise Department. The 2nd Respondent issued show cause notice dated 14.10.2010 alleging contravention of Rule 8(3)(A) of the Central Excise Rules, 2002. The Petitioner submitted their reply on 08.11.2010, contesting the allegations in the show cause notice. The 2nd Respondent passed the order in original dated 28.01.2011, a copy of which was received by the Petitioner on 02.02.2011. Aggrieved thereby, the Petitioner filed an appeal u/s 35-B of the Central Excise Act, along with a stay application, before the CESTAT on 20.04.2011. The 3rd Respondent issued notice dated 23.03.2011 demanding the

amount for the subsequent period, which was followed by another notice dated 15.04.2011. The Petitioner replied that they had already filed an appeal in respect of the same issue for the earlier period. They contended that No. show cause notice had been issued by the department prior to passing the order of attachment for the subsequent period, and there was No. adjudication in so far as the demand relating to the period September, 2010 to February, 2011 was concerned, corresponding to the notice issued by the 3rd Respondent dated 23.03.2011.

3. While matters stood thus the 1st Respondent issued an order of attachment dated 23.06.2011, u/s 11 of the Central Excise Act, for detaining the goods of the Petitioner for recovery of the disputed duty in respect of a part of which an appeal, along with an application for stay, is pending before the CESTAT. It is the Petitioner's case that, in the said order of attachment, the 1st Respondent had also included the amount demanded by the 3rd Respondent vide notice dated 23.03.2011, although there had been No. adjudication of the issue for the subsequent period September, 2010 to February, 2011; in terms of the CBEC circular dated 25.05.2004, the authorities were precluded from taking coercive steps for recovery of the disputed duty during the pendency of the stay petition before the appellate authorities; issuance of the notice was contrary to the said circular issued by the CBEC; and, in view of the law laid down in *Ranadey Micronutrients v. Collector of Central Excise* (1996) 87 ELT 19 (SC) and *Lanco Kondapalli Power v. Union of India* (2009) 242 ELT 340 (AP), the department was precluded from taking coercive steps for recovery of the disputed duty during the pendency of the stay petition/application before the CESTAT.

4. In the counter-affidavit, filed on behalf of Respondents 1 to 3, the Assistant Commissioner (Legal) would submit that, as the Petitioner had not complied with Rule 8(1) of the Central Excise Rules, a notice of default, in payment of excise duty, dated 23.03.2011 was issued to them covering the period September, 2010 to February, 2011; on their failure to pay the defaulted amount, a further notice dated 15.04.2011 was issued; for arrears of revenue, recoverable u/s 11 of the Act, No. show cause notice need be issued; and, since the issue of non-payment of duty by the due date is not disputed, the action initiated by the department is not contrary to the CBEC circular, as the circular merely refers to disputed duties; and the defaulted amounts have to be recovered u/s 11 considering them as arrears of revenue.

5. Under the impugned order of attachment dated 23.06.2011, passed u/s 11 of the Central Excise Act, 1944, (for short - "the Act"), the Deputy Commissioner, Central Excise ordered that the excisable goods, including capital goods belonging to the Petitioner, for a value equivalent to the amount due from them be detained for the purposes of recovering the company dues. The said order is in two parts. Under the first part, Rs. 1,36,64,126/- (One Crore thirty six lakhs sixty four thousand one hundred and twenty six only), along with penalty of Rs. 10 lakhs and interest of Rs. 1825/-, and penalty of Rs. 2 lakhs on the Managing

Director is said to be due, under the Act, from the Petitioner as arrears of revenue payable by them as confirmed in the order in original dated 28.02.2011 passed by the Commissioner of Central Excise, Hyderabad. The second part of the impugned order is for Rs. 1,33,49,586/- (One crore thirty three lakhs forty nine thousand five hundred and eighty six only) being the amount of duty defaulted during the period September, 2010 to February, 2011 by the Petitioner, and for recovery of which notice dated 23.03.2011 and 15.04.2011 had been issued by the Range Officer, Patancheruvu, Hyderabad.

6. While the order-in-original dated 28.01.2011, which forms the basis of the first part of the order of attachment, is under challenge before the CESTAT, the second part of the order of attachment is not. Sri C. Kodandaram, Learned Senior Counsel appearing on behalf of the Petitioner, would submit that he does not seek adjudication of the second part of the order, and it would suffice if the Petitioner is given liberty to challenge the second part of the order by initiating separate proceedings in accordance with law. The Petitioner is granted liberty as sought for. As the second part of the impugned order is not under challenge, we are required to confine our examination only to the first limb of the order of attachment dated 23.06.2011.

7. Section 37B of the Act empowers the Central Board of Excise and Customs, (for short - the Board), if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on such goods, to issue such orders, instructions and directions to Central Excise Officers" as it may deem fit, and such officers and all other persons employed in the execution of the Act are required to observe and follow such orders, instructions and directions of the Board. Rule 31 (1) of the Central Excise Rules, 2002, (hereinafter called the Rules), empowers the Board or the Chief Commissioner or the Commissioner, to issue written instructions providing for any incidental or supplemental matters, consistent with the provisions of the Act and the Rules.

8. The circular, relied upon by the Petitioner, dated 25.05.2004 stipulates that, in respect of the stay application pending against orders in original of the Commissioner before the CESTAT, the Field Officer should refrain from taking coercive action till expiry of the period of six months from the filing of the stay petition before the CESTAT, or till the disposal of the stay petition whichever is earlier. Rule 31, which empowers the Board to issue instructions consistent with the provisions of the Act, would have No. application if the Board circular is inconsistent with the provisions of the Act. Section 37-B of the Act empowers the Board to issue instructions or orders only for (1) the purposes of uniformity in the classification of excisable goods; or (2) with respect to levy of duties of excise on such goods. Prima facie, the circular dated 25.05.2004 does not fall within either of the aforementioned two categories.

9. In *M/s. Lanco Kondapalli Power* (2009) 242 ELT 340 (AP), a Division Bench of this Court, following the judgment of the Supreme Court in *Collector of Central*

Excise, Patna v. Usha Martin Industries Ltd. (1997) 94 ELT 460 (SC) held that the circular dated 25.05.2004, issued by the Central Board, was binding on the Revenue. The question whether the circular of the Board dated 25.05.2004 falls within the ambit of Section 37-B of the Act was not considered in the said Division Bench judgment.

10. However, in *Ranadey Micronutrients*, (1996) 87 ELT 19 (SC) the Supreme Court held that the circulars, referred to in the said case, were issued by the Board under the provisions of Section 37B; that they did not so recite did not mean that they did not bind Central Excise officers, or become advisory in character; if the circular was contrary to the terms of the statute, it must be withdrawn; but, while the circular remained in operation, the Revenue was bound by it, and could not be allowed to plead that it was not valid; and it did not lie in the mouth of the Revenue to repudiate a circular issued by the Board on the basis that it was inconsistent with a statutory provision. In the light of the observations, in *Ranadey Micronutrients*, (1996) 87 ELT 19 (SC) it would be wholly inappropriate for us to dwell further into the question whether the circular dated 25.05.2004 is ultravires Section 37-B of the Act. We shall proceed on the basis that the circular dated 25.05.2004 binds the revenue.

11. u/s 35-B(1)(a) of the Act, any person aggrieved by a decision or order passed by the Commissioner of Central Excise, as an adjudicating authority, may appeal to the Appellate Tribunal against such order. Section 35-C relates to orders of the Appellate Tribunal and, under the proviso to Sub-Section 2(A), where an order of stay is made, in any proceedings relating to an appeal filed u/s 35-B(1), the CESTAT shall dispose of the appeal within a period 180 days from the date of the order of stay. Under the second proviso, if such an appeal is not disposed of within the period specified in the first proviso, the stay order shall, on expiry of that period, stand vacated. u/s 35-F where, in any appeal under chapter VI-A, the order appealed against relates to any duty demanded in respect of goods which are not under the control of the Central Excise authorities, or any penalty levied under the Act, the person desirous of appealing against such order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied. Under the proviso to Section 35-F where, in any particular case, the CESTAT is of the opinion that deposit of the duty demanded or penalty levied would cause undue hardship to such person, the CESTAT may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the interests of the revenue.

12. Compliance with Section 35-F, subject to its proviso, is a pre-requisite for an appeal being entertained u/s 35-B of the Act. The CESTAT has the power to grant full or partial waiver of pre-deposit pending disposal of the appeal, in case the Appellants seek waiver by filing an application in this regard. In the case on hand, the Petitioner is said to have filed an application along with the appeal.

13. As the Petitioner has already elected to prefer an appeal to the CESTAT, would this Court be justified in examining the merits, of the order under appeal

before the CESTAT, in proceedings under Article 226 of the Constitution of India? The Doctrine of Election suggests that when two remedies are available for the same relief, the party to whom the said remedies are available has the option to elect either of them. *Andhra Pradesh State Financial Corporation Vs. M/s. GAR Re-Rolling Mills* and another, There are three elements to the Doctrine of election, namely, existence of two or more remedies; inconsistencies between such remedies, and a choice of one of them. *Transcore Vs. Union of India (UOI)* and Another, As the Petitioner has elected to file an appeal, which is pending before the CESTAT, the merits of the order in original passed by the Commissioner ought not to be examined by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

14. The Petitioner has sought stay of the order of attachment pending disposal of their stay application by the CESTAT, relying on the CBEC circular dated 25.05.2004. In view of the Circular dated 25.5.2004, and as a stay/waiver application is pending adjudication before the CESTAT, we were initially inclined to suspend operation of the order of attachment dated 26.03.2011 on condition that the Petitioner furnished a bank guarantee for the amount allegedly due. We are, however, constrained to refrain from passing such an order as what remains under challenge in this Writ Petition is merely the first limb of the order of attachment of Rs. 1,36,64,126/- with interest and penalty. The Petitioner has sought, and has been granted, liberty to question the second limb of the order of attachment relating to the duty default of Rs. 1,33,49,586/- in separate proceedings. Even if the first limb of the order of attachment, relating to the amount in default of Rs. 1,36,64,126/- with interest and penalty, is suspended, the order of attachment dated would continue to remain in force as long as the second part of the order of attachment for Rs. 1,33,49,586/- is not suspended or set aside. Suspension of the impugned order of attachment, only to the extent of the first part relating to Rs. 1,36,64,126/- with interest and penalty, would merely be an exercise in futility. In *Dr Pramod Kumar Joshi Vs. Medical Council of India and Others*, the Petitioner was refused admission in the diploma course in Paediatrics while others, similarly situated, were given admission. Even though it found force in the Petitioner's claim that the action was discriminatory, the Supreme Court declined to grant relief in his favour as the session was nearing completion, and belated admission of the Petitioner would have disturbed others who were already admitted, and were undergoing the course.

15. In *Munindra Kumar and others Vs. Rajiv Govil and others*, the selection process adopted by the State Electricity Board was held to be arbitrary and ultra vires the Rules. Since, however, creation of three more posts, (for the three Petitioners), would have required candidates, similarly situated, also to be considered and, as there was only a remote chance of the Petitioners being selected, the Supreme Court declined to issue a writ holding that it would be an exercise in futility, and that these were all matters of discretion and not of jurisdiction of the Court.

16. A petition, under Article 226 of the Constitution, may be dismissed on the ground that issuance of a writ will be ineffective, infructuous, unnecessary or futile. If the Court is satisfied that No. useful purpose would be served by issuing a writ, it can dismiss the application on that ground alone. As it is not the practice of Courts to issue meaningless writs, the High Court while granting relief, on its being satisfied that issuance of a writ would be ineffective, should consider whether grant of a writ would be an exercise in futility. *Suresh Vs. Vasant and Others, Balmadies Plantations Ltd. and Others Vs. State of Tamil Nadu*, It is of the greatest importance, in deciding whether or not discretion should be exercised in favour of granting relief, that the relief should serve some useful purpose. If it does not, it is difficult to see what reason there can be for granting relief. (de smith, Woolf & Jowell: *Judicial Review of Administrative Action: Fifth Edition*). Whenever a writ of mandamus would be unavailing, or if granted fruitless, it will be refused. (*Bal Krishan Aggarwal v. The Punjab State AIR 1956 P&H 2011* *Ajit Kumar Addy and Others Vs. S.M. Maitra, Collector, 24-Parganas*, . A writ of certiorari or mandamus should not be issued when they would be useless. *Debendra Bandhu Lahiri Vs. The State of West Bengal and Others*, . A mandamus is not granted unless it clearly appears that it will be effectual. (*Mrs. Lilawati Mutatkar v. State of Madhya Bharat AIR 1952 MB 105*

17. As suspension of the first part of the impugned order of attachment would merely be an exercise in futility, we refrain from doing so. We consider it appropriate, therefore, to direct the CESTAT to hear and dispose of the stay/waiver petition filed by the Petitioner in accordance with law within a period of three weeks from today. The Writ Petition stands disposed of. However, in the circumstances, without costs.