

(1995) 08 DEL CK 0074

In the Delhi High Court

Case No : Civil Writ Petition No. 5064 of 1993 and Civil Miscellaneous Appeal No. 600 of 1995

DCM Shriram Industries Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 22-08-1995

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1995) 3 AD 709 : (1995) 34 DRJ 601

Hon'ble Judges : Dr. M.K. Sharma, J; D.P. Wadhwa, J

Bench : Division Bench

Advocate : Shanti Bhushan, Jayant Bhushan, Sangeeta Chandra, Madan Lokur and Nandini Ramachandran, for the Appellant;

Judgement

M.K. Sharma, J.

(1) This writ petition is directed against the order dated 10.9.1993 passed by the Customs, Excise and Gold (Control) Appellate Tribunal, New, Delhi, (hereinafter referred to as the Tribunal) in appeal No.E/4262/91-C and also against the order dated 14.8.1991 passed by the Collector of Central Excise, Meerut. By the order dated 10.9.1993 the Tribunal directed the petitioners to deposit the duty demand of Rs.60 lacs as a condition precedent for hearing of the appeal filed by the petitioners against the order dated 14.8.1991 passed by the Collector of Central Excise imposing on the petitioners a demand of Rs-96,94,400.95 as basic excise duty and Rs-2,73,313.42 as special excise duty totaling to Rs-99,67,808.92 and also a personal penalty of Rs.20 lacs only.

(2) The petitioners are a public limited company engaged in the manufacture of various .Chemicals in their factory "Daurala Sugar Works", (Chemicals Division) Daurala, District Meerut. The petitioners are regular Central Excise licensees for many years. A scheme known as Modvat scheme was introduced by the Central Government w.e.f.1.4.1986 providing for benefit of credit of the excise duty paid on the "inputs" used in the manufacture of final products. The aforesaid scheme

stipulated that Modvat credit would not be available if the final product is exempt from duty in terms of Rule 57 of the Central Excise Rules, 1944. The petitioners applied to the respondents under their letter dated 17.3.1986 for availing the benefit of the Modvat scheme.

(3) By a notification No.217/86-CE dated 2.4.1986 the Central Government granted certain exemptions. The said notification was issued in the exercise of powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, 1944 (hereinafter referred to as the Rules) framed under Central Excises & Salt Act, 1944 (hereinafter referred to as the Act) whereunder the Central Government exempted certain goods specified in column (2) of the table appended thereto, manufactured in factory and used within the factory of production, in or in relation to the manufacture of final products specified in column (3) of the said Table, from the whole of the duty of excise livable thereon, which is specified in the Schedule to the Central Excise Tariff Act, 1985. A proviso had also been added to the aforesaid provision contained in the circular "that nothing contained in this notification shall apply to inputs used in or in relation to the manufacture of final products which are exempt from the whole of duty of excise livable thereon or is chargeable to nil rate of duty". It is stated by the petitioners that Benzyl Cyanide which is manufactured by the petitioners in their factory by the Chemical reaction of Benzyl Chloride and Sodium Cyanide in the presence of suitable catalyst is duly covered by the description of inputs to the table annexed to the said notification as it falls under Chapter 29. The petitioners further stated that it is-not disputed that Phenyl Acetic Acid falling under Chapter 29 and Aqueous Layer falling under Chapter 38 are covered by the description of final product in the table annexed to the said notification. The petitioners have further stated that water is removed under vacuum" from the reaction mass in the distillation kettle so as to obtain crude Benzyl Cyanide used captively in the manufacture of Phenyl Acetic Acid and Aqueous Layer of Phenyl Acetic Acid (hereinafter referred to as Aqueous Layer). According to the petitioners the Phenyl Acetic Acid stands exempted under notification No. 147/1984 while the Aqueous Layer has always been cleared from the factory on payment of basic excise duty of 11% ad valorem apart from special excise duty as applicable. It is the case of the petitioners that the Benzyl Cyanide manufactured by the petitioners is different from marketable Benzyl Cyanide and is Therefore, not subject to levy of excise duty. According to them the former contains lower Organic impurities and higher impurities which is not the case as regards the latter.

(4) However, the respondent No.3 issued a show cause notice dated 19.2.1991 to the petitioners directing the petitioners to show cause as to why basic excise duty and special excise duty should not be levied on them for manufacture of Benzyl Cyanide cleared at nil rate of duty and also for manufacture of Phenyl Acetic Acid which was also cleared at nil rate of duty. The petitioners were also directed to show cause as to why penalty for contravention of Rules 9, 49, 52, 173 (b) of the Central Excise Rules, 1944 should not be imposed under Rule 173-

U of the Central Excise Rules. In reply to the aforesaid notice the petitioners submitted their show cause. Subsequently, personal hearing was also afforded to the petitioners. The Collector of Central Excise, Meerut, thereafter on perusal of the records of the case passed his order dated 10.8.1991 demanding Rs. 96,94,495.50 as basic excise duty and Rs. 2,73,313.42 as special excise duty totaling to Rs. 99,67,808.92 on Benzyl Cyanide cleared for Captive Consumption without payment of duty under Rule 9(2) of the Central Excise Rules 11-A of the Central Excise and Salt Act. The Collector further imposed a personal penalty of Rs.20 lacs on the petitioners "under Rule 173-U of the Central Excise Rules. The Collector however, dropped the demand of Rs. 55,57,295.76 on Benzyl Chloride used for manufacture of Benzyl Cyanide.

(5) The petitioners being aggrieved by the aforesaid order passed by the Collector of Central Excise imposing the excise duty and personal penalty on the petitioners, preferred an appeal before the Tribunal which was registered and numbered as Appeal No. E/4262/91-C. Along with the aforesaid appeal the petitioners also preferred a stay application for staying the operation of the order dated 12.8.1991 passed by the Collector of Central Excise. The aforesaid stay application, it appears, was initially listed before the North Regional Bench but subsequently appears to have been transferred to "C" Bench of the Tribunal. After hearing the parties and taking into consideration the facts and circumstances of the case and also the factor of financial . hardship pleaded by the petitioners, the Tribunal passed an order granting waiver of pre-deposit of the amount in question subject to the petitioners depositing Rs.60 lacs within 8 weeks of the date of receipt of the said order, failing which their appeal would be liable to be dismissed without further notice.

THE petitioners by this writ petition moved this court against the aforesaid order passed by the Tribunal directing deposit of Rs.60 lacs as a condition precedent for hearing of the appeal. By order dated 5.11.1993 this court issued notice to the respondents and directed that the appeal filed by the petitioners be not dismissed by the Tribunal for non-compliance of their order. Subsequently however, by order dated 24.10.1994, this court modified the earlier order passed by this court to the extent that the petitioners would pay a sum of Rs.30 lacs within one month from that date and subject to the aforesaid payment launching of the proposed prosecution of the petitioners was stayed. In the said order it was clarified that if the amount was not paid within the time stipulated therein the interim order would automatically stand vacated. Subsequently, by order dated 8.12.1994 this writ petition was admitted and Rule D.B. was issued. The respondents have appeared in the present petition and have contested the petition by filing a counter affidavit.

(6) Mr. Madan Lokur, appearing for the respondents raised a preliminary objection regarding the maintainability of the writ petition. According to the learned counsel for the respondents the Act being of a special nature the remedies provided for in the Act itself for any breach or violation thereof were

the remedies which were to be pursued by the aggrieved party if his or her right is infringed and that no writ for such violation is maintainable. The learned counsel further submitted that the petitioners herein have filed the present writ petition not only against the order of stay but also challenging the order passed by the Collector, Central Excise, whereas they have. also filed a Statutory appeal against the order passed by the Collector before the Tribunal, which is a statutory alternative remedy provided for under the Act. Accordingly, he submitted that the petitioners cannot be allowed to continue two parallel proceedings and under such circumstances this writ petition should be dismissed.

(7) Mr. Shanti Bhushan, the learned Senior Counsel appearing for the petitioners submitted that existence of an alternative statutory remedy could not affect the writ jurisdiction as such inasmuch as, according to him, existence of an alternative statutory remedy is not an absolute bar for issue of a writ and that the court is not obligated, as a rigid norm, to always relegate the petitioner to an alternative remedy. According to the learned counsel there could be circumstances and reasons for which a writ court may be justified in issuing a writ without the petitioners exhausting the alternative remedy. Mr. Shanti Bhushan further submitted that where the alternative statutory remedies provided for under the Statute are onerous and burdensome the &same cannot be regarded as efficacious alternative remedies, particularly when such statutory right of appeal is subjected to such condition precedent as to render the right of appeal as almost nugatory and illusory. In support of his contention the learned counsel relied upon decisions of the Supreme Court in the case of Himmatlal Harilal Mehta Vs. The State of Madhya Pradesh and Others, and also in the case of M.G. Abrol Vs. Shantilal Chhotalal and Co., .

(8) Mr. Shanti Bhushan further submitted that the reaction of Benzyl Chloride with Sulphuric Acid for manufacture within the factory results in emergence of Phenyl Acetic Acid and Aqueous Layer, a bi-product and while Phenyl Acetic Acid is wholly exempt from duty, Aqueous Layer is chargeable to duty @ 15% which covers duty under heading 38.23. He thus submitted that Benzyl Cyanide is used within the factory for the production of Phenyl Acetic Acid which is wholly exempt under Notification No.217/1986 and that the proviso to the aforesaid notification is wholly inapplicable in the circumstances of the case. In support of the aforesaid submissions the learned counsel also relied upon the case of Commissioner of Sales Tax Vs. Bharat Petroleum Limited; 1992 (2) Sc 579. The learned counsel further submitted that the Tribunal should have granted unconditional waiver of duty and penalty and in failing to do so the Tribunal committed manifest error of law which vitiated the impugned order.

(9) We have considered the submissions of the learned counsel for the parties. It is true. that ordinarily the High Court should not issue a writ in the nature of certiorari when an adequate and alternative efficacious remedy is available for getting the redressal of the grievances of the party concerned. The aforesaid principle has been evolved by the courts as a kind of self-imposed restriction on

their writ jurisdiction. This rule is justified on the ground that persons should not be encouraged to circumvent the usual procedure provided for by a Statute laying down mechanism and procedure to challenge a decision. However, the same is not a rigid or absolute rule. Deviations and flexibility has been permitted by authoritative decisions of the Supreme Court laying down that existence of an alternative remedy is by itself no bar to an application in the writ jurisdiction provided certain factors such as initial lack of jurisdiction, violation of the rules of natural justice etc. exist. In cases where there is initial lack of jurisdiction or violation of the principles of natural justice etc. the courts shall exercise jurisdiction to entertain a petition in spite of existence of an alternative remedy, because in a suitable case relief might still be given. In the case of *Himmat Lal Hari Lal Mehta* (supra) it has been laid down that where the remedy provided for under the Act is of an onerous and burdensome character in view of the fact that the concerned party in order to avail of the same has to deposit the whole amount of tax, then in such cases the said remedy cannot be described as an adequate alternative remedy. In the other case of *M.G.Abrol* (Supra) it has been held by the Supreme Court that a remedy by way of appeal against the order of confiscation and imposition of large penalty under the Sea Customs Act is not an effective remedy, when no appeal can be filed unless the penalty imposed upon the petitioner has first been deposited.

(10) In the present petition the total demand which has been raised against the petitioners are to the tune of Rs.99 lacs towards basic excise duty and Rs.20 lacs towards personal penalty, as against which the Tribunal has directed payment of Rs.60 lacs as a condition for hearing of the appeal. While passing the aforesaid order the Tribunal has considered the factor of hardship pleaded by the petitioners and on consideration of the entire facts and circumstances of the case it ordered accordingly for the aforesaid deposit of the amount as a condition precedent for hearing of the appeal. In the case of *Himmat Lal Hari Lal Mehta* (Supra) the Supreme Court held that the appeal is not an adequate alternative remedy in view of the fact that in that case the entire amount of tax was to be deposited. In the case of *M.G.Abrol* (Supra) a large penalty imposed upon the petitioner was directed to be deposited. In the light of the aforesaid context, in our opinion, the aforesaid observations were passed by the Supreme Court. At this stage we may appropriately refer to another decision of the Supreme Court in the case of *Sales Tax Officer, Jodhpur and Another Vs. Shiv Ratan G. Mohatta*, . In the said case the Supreme Court has held that it is not the object of Article 226 to convert the High Courts into original or appellate assessing authorities whenever an assessee chooses to attack an assessment order on the ground that a sale was made in the course of import and, Therefore, exempt from tax. The Supreme Court has further held in the said case that the fact that the assessee has to deposit sales tax while filing an appeal does not always mean that he can bypass the remedies provided by the Sales Tax Act and that to warrant entertainment of a petition under Article 226 there must be something more in a case, something going to the root of the jurisdiction of the Sales Tax

Officer, something which would show that it would be a case of palpable injustice to the assessed to force him to adopt the remedies provided by the Act. In the said case the Supreme Court concluded that it is not the function of the High Court in exercising jurisdiction under Article 226, in taxing matters to constitute itself into an original authority or an appellate authority and determine questions relating to the taxability of a particular turnover. In our opinion, in view of the facts and circumstances of the present petition, the ration of the decision in the case of Sales Tax Officer (Supra) is applicable.

(11) The Scheme of the Central Excise and Salt Act provides for statutory remedies to an aggrieved party. As and when a person is aggrieved by any decision or order passed by an authority lower than the Collector of Central Excise, an appeal lies to the Collector and when the original order is passed by the Collector himself an appeal lies to the Appellate Tribunal. A further remedy is also provided for by way of revision. There is also provision in the scheme of the Act for reference being made to the High Court by the Appellate Tribunal. The Act also envisages waiver of deposit, of duty demanded or penalty levied pending disposal of the appeal. Under the aforesaid circumstances, it is apparent that the Act envisages an efficacious alternative remedy to an aggrieved party whereunder the party could approach the Collector up to the stage of the High Court and also can claim an interim order pending decision in the appeal.

(12) It is pertinent to point out at this stage that in the present case the petitioners have already approached the Tribunal as against the original order passed by the Collector imposing basic and special excise duty and personal penalty on the petitioners, invoking the statutory alternative remedy and their appeal as of today is pending before the Tribunal, for decision. Accordingly, the petitioners have themselves taken advantage of the alternative legal remedy, and are actively pursuing it. In view of the aforesaid position, the question that arises for our consideration is as to whether the petitioners could be permitted to carry on two parallel proceedings at the same time and in that view of the matter whether the present writ petition should be entertained. Similar issue like the issue involved in the present case came to be decided by the Supreme Court in the case of K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc., . In that case the Supreme Court has observed thus:-

"WE think that it is not necessary for us to express any final opinion in this case as to whether Section 8(5) of the Act is to be regarded as providing the only remedy available to the aggrieved party and that it excludes altogether the remedy provided for under Article 226 of the Constitution. For purposes of this case it is enough to state that the remedy provided for under Article 226 of the Constitution is a discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party has an adequate or suitable remedy elsewhere. So far the present case is concerned, it has been brought to our notice that the appellants before us have already availed themselves of the remedy provided for in Section 8(5) of the

Investigation Commission Act and that a reference has been made to the High Court of Allahabad in terms of that provision which is awaiting decision. In these circumstances, we think that it would not be proper to allow the appellants to invoke the discretionary jurisdiction under Article 226 of the Constitution at the present stage, and on this-ground alone, we would refuse to interfere with the orders made by the High Court."

(13) In the similar context in a very recent decision in the case of Bombay Metropolitan Region Development Authority, Bombay Vs. Gokak Patel Volkart Ltd. and Others, , the Supreme Court has held thus:

"WE are of the view that the point taken by the appellant is of substance. This is a case, where there is not only the existence of an alternative remedy but the writ petitioner actually had availed of that remedy. The writ petitioner's appeal before the Statutory Authority was pending.. In that view of the matter this writ petition should not have been entertained."

(14) The present petition is also a case where it is not merely the position that an alternative remedy exists but it is also a case where the petitioners have themselves taken resort to such alternative efficacious remedy which as of today is also pending disposal before the Appellate Authority. inspire of the pendency of the aforesaid appeal the petitioners have moved this court under the extraordinary jurisdiction of this court under Article 226 as against the final order passed by the Collector of Excise, which is also the subject matter of the appeal. Accordingly, for the same cause of action two parallel proceedings - one by way of an appeal under the statutory law and the other by way of present writ petition under extraordinary jurisdiction of this court under Article 226 of the Constitution of India are pending. It may also be mentioned that as against the appeal. preferred by the petitioners before the Appellate Authority, they have statutory remedies provided for up to a reference to this court on questions of law. In the aforesaid view of the matter, .in our opinion a clear distinction is to be made between cases where one is considering the mere existence of an alternative remedy and cases where there exists an alternative remedy in law and that remedy is being actively pursued by the aggrieved party giving rise to parallel proceedings. In the present case the petitioners come particularly under the second category having taken recourse simultaneously to two parallel proceedings - one having filed an appeal statutorily provided for and the other, the present writ petition. In our opinion the ratio laid down by the Supreme Court in the case of K-S.Rashid & Son case (supra) and Bombay Metropolitan Region case (supra) are fully applicable to the facts and circumstances of this case. Accordingly, in our opinion the present writ petition is not liable to be entertained.

(15) As we have upheld the preliminary objection raised by the learned counsel for the respondents that the present writ petition is not maintainable in view of the pendency of a parallel proceeding before the Tribunal we are not inclined to deal with the issues raised by the Counsel for the petitioners with regard to the

merit of the case as in our opinion the same could also be raised before the Tribunal while hearing the appeal itself. Doubtlessly, the aforesaid issues raised in this petition and argued before us by the learned counsel for the petitioners would be gone into when the appeal is finally heard and determined by the Tribunal, and in view of the same it would not be in the interest of the parties to deal with the submissions made by the parties with regard to the merit of the case before us in this petition, as that would prejudicially and adversely affect the case of the parties before the Tribunal.

(16) We have also carefully perused the order passed by the Tribunal directing for deposit of Rs.60 lacs as a condition precedent for hearing .of the appeal filed before it. We find that the Tribunal has taken into consideration the factor of hardship as also the prima facie case of the petitioners and thereafter has come to the aforesaid conclusion, directing the petitioners to deposit Rs.60 lacs as a condition precedent for hearing of the appeal. We find no infirmity in the said order. The Tribunal has given substantial relief to the petitioners by the aforesaid impugned order and the discretion exercised by the Tribunal cannot be said to be illegal and arbitrary. Accordingly, we uphold the same.

(17) In the result, this writ petition has no merit and is dismissed accordingly. We direct that the petitioners shall deposit the balance Rs.30 lacs as directed by the Tribunal within 6 weeks from today failing which their appeal shall be dismissed without further notice. Counsel fee Rs.5,000.00 .