
(1991) 12 GUJ CK 0004
In the Gujarat High Court

Dharampur Leather Cloth Co. Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 09-12-1991

Acts Referred:

Chartered Accountants Act, 1949 — Section 22A
Constitution of India, 1950 — Article 226, 226, 227, 227

Citation : (1992) 2 GLR 937

Hon'ble Judges : J.M. Panchal, J;A.P. Ravani, J

Bench : Division Bench

Judgement

A.P. Ravani, J.—The petitioner-Company is a manufacturer of PVC coated plastic paper known as wall paper. According to the petitioner, it was entitled to claim benefit under Notification No. 165 of 1970 dated September 5, 1970 which was amended from time to time by subsequent Notifications No. 46 of 1973 dated March 1, 1973 and 27 of 1974 dated February 1, 1974. The department was of the view that the aforesaid notifications were not applicable to the case of the petitioner because the PVC coated plastic papers were printed by using printing machine.

The petitioner preferred five different refund claims and the same were rejected. The details are as follows:

Date of Period	Amount	Date of Appln.	rejection
11-5-1976	April 1974 to Feb. 1975	81,934.14	18-5-1978
11-5-1976	March 1975 to Feb. 1976	1,17,900.89	20-5-1978
20-2-1977	March 1976 to Jan. 1977	1,24,882.46	30-8-1978
01-3-1978	Feb. 1977 to Aug. 1977	22,59,522	25-7-1978
01-3-1978	Sept. 1977 to Feb. 1978	11,850.05	25-7-1978

2. The petitioner preferred appeal against the said orders before the Collector, Appeals who as per his judgment and order dated 10th August, 1979 allowed the appeal holding that the printing of colour on the plastic paper would not mean employment of a printing machinery as understood in common parlance, that is printing press normally used for printing of paper. Moreover, in his view even the

Government of India had taken a similar view. Therefore he allowed the appeal. However he did not pass any specific order regarding refund of the amount.

3. After the decision of the Collector, the petitioner preferred fresh refund claims as follows:

	Amount	Period	Date of Application	
48,928.57	April 1974 to Feb. 1975	10-09-1979	22,386.46	Feb. 1977 to Aug. 1977
74,344.33	March 1975 to Feb. 1976	10-09-1979		

All the aforesaid claims were adjudicated by the Assistant Collector of Customs. In respect of the first claim of Rs. 48,928.57 ps. he held that the entire claim was time barred and therefore rejected the same in its entirety as per order dated 7-10-1980 produced at Annexure "B" to the petition. In respect of the claim of Rs. 22,389.46 ps. the Assistant Collector granted the claim of Rs. 19,360.91 ps. and rejected the rest of the claim on the ground of limitation. As regards the claim of Rs. 74,344.33 ps. the Assistant Collector allowed the claim of Rs. 56,399.12 ps. and rejected the rest of the claim on the ground of limitation. All the three orders are produced at Annexures "B", "C & "D" respectively. By order dated 6-10-1980 produced at Annexure "E" to the petition, the Assistant Collector allowed the refund claim of Rs. 1,00,259.93 ps. for the period commencing from March 1976 to January 1977. However, the entire amount allowed is adjusted against the outstanding Government dues of Rs. 1,83,949.26 ps. Similarly for the period commencing from September 1977 to February 1978, refund claim of Rs. 11,850.05 ps. was made. That has also been allowed and the same has been adjusted against the Government dues of Rs. 1,83,949.26 ps. This order dated 6-10-1990 is produced at Annexure "F" to the petition.

3A. All the aforesaid orders have been challenged in this petition. However, at the time of hearing, the learned Counsel for the petitioner conceded that in view of the subsequent development and the fact that the revision before the Government of India is decided against the petitioner, the challenge to the orders at Annexure "E" & "F" does not survive.

4. In view of the aforesaid position, in this petition we are required to decide the question as regards the legality and validity of the orders passed by the Assistant Collector on 7-10-1980 and which are produced at Annexures "B" "C & "D". The learned Counsel for the petitioner submitted that once the appeal is allowed by the Collector, Appeals, thereafter the question was of mere calculation. After the appeal having been decided, the question of limitation should not have been raised by the Assistant Collector. In support of this contention, the learned Counsel for the petitioner has relied upon a trade notice No. 203 of 1979 dated

29th September, 1979 issued by Baroda Collectorate wherein it is mentioned that no refund claim need be preferred where the refund arises out of an order passed in appeal or revision. As per this trade notice, in such case, the proper officer is required to refund the amount without a formal claim being lodged.

5. In facts of the case, the aforesaid contention cannot be accepted. Initially when the petitioner claimed refund of amount the refund was disputed solely on the ground that the petitioner was not entitled to claim benefits of exemption notification. According to the department, the PVC coated plastic papers were printed by using printing machine and therefore the same is out of the purview of the exemption notification. However, this question has been decided against the department by the Collector, Appeals. In this decision there is no reference whatsoever as regards the amount of refund claim. Probably this was the reason why the petitioner also preferred fresh refund claims. From the following table, this discrepancy would become evident:

Original claim	Fresh claim made after Order passed in the the decision in appeal	fresh claim
Rs. 81,932.14 ps.	Rs. 48,928.57 ps.	
Rejected entirely by order dated 7-10-1980.	Rs. 22,595.22 ps.	Rs. 22,386.46 ps.
Rs. 19,360.91 ps.	allowed.	Rest of the claim rejected.
Rs. 1,17,900.80 ps.	Rs. 74,344.33 ps.	Rs. 56,399.12 ps.
allowed.	Rest of the claim rejected.	

Thus it is evident that what has been done by the Assistant Collector, Central Excise & Customs while passing the orders at Annexures "B", "C & "D" is that he has considered the fresh refund claims made by the petitioners. From the aforesaid facts it is evident that even the petitioner did not consider that on the appeal being allowed, refund claims were to be automatically allowed by making simple calculation of the amount claimed. Had it been so, the petitioner would not have lodged fresh refund claims, and that too of different amounts.

6. The learned Counsel for the petitioner submitted that the Assistant Collector, Central Excise & Customs should not have taken, too technical view of the matter and should not have raised the plea of limitation when the claim of the petitioner was required to be allowed on merits. The contention cannot be accepted for the simple reason that as laid down by the Supreme Court, the Assistant Collector, and all the authorities exercising powers under the provisions of the statute are bound by the provisions of the statute and the rules framed thereunder. This is the view taken by the Supreme Court in the case of Miles India Limited GJ-1990-0166.boq Assistant Collector of Customs, reported in 1987 (30) ELT 641 and in the case of Collector of Central Excise, Chandigarh Vs. Doaba Co-operative Sugar Mills Ltd., Jalandhar, . It is an undisputed position that the old rule provided for limitation of one year only. In the instant case, while adjudicating the claim, the date of the initial claims made on 12th May, 1976 and not the date

of revised claims made, i.e., 10th July, 1979 has been taken into consideration. Thus the maximum lenient view has been taken by the department. Even when it is considered that the application for refund was made on 12th May, 1976, then also, the refund claim for the period commencing from 1st April, 1974 to February 1975 was beyond the time limit of one year. In this view of the matter, applying the old Rule 11 of Central Excise Rules, 1944, which was then in force, the entire claim of the petitioner has been rejected. Applying the same reasoning in respect of the claim for the period commencing from February 1977 to August 1977, in relation to claim of Rs. 22,836.46 ps, the claim of Rs. 19,360.91 ps. has been allowed while the rest of the claim has been rejected as time barred (See Annexure "C"). For the period commencing from March 1975 to February, 1976 the petitioner has claimed refund of Rs. 74,344.33 ps. Out of this claim an amount of Rs. 56,399.12 ps. has been allowed as being within time. Rest of the claim is considered to be beyond the period of limitation and the same has been rejected. In view of the decisions of the Supreme Court holding that the authorities exercising power under the Central Excises & Salt Act, 1944 are bound by the provisions of the Act and the Rules, by no stretch of reasoning it can be said that the Assistant Collector has committed any error in rejecting the claim.

7. The learned Counsel for the petitioner has submitted that the Assistant Collector has not afforded an opportunity of being heard to the petitioner to show cause as to how the claim preferred by the petitioner was beyond the prescribed period of limitation. Since it is not disputed by the other side that no show cause notice was issued on the point of limitation, it was submitted that the order at Annexures "B", "C & "D" dated 7-10-1980 should be held to be against the principles of natural justice and therefore illegal and void. In view of the aforesaid position, we have permitted the petitioner to produce on record to show that the claims were not barred by the period of limitation. After the hearing was concluded, the matter was adjourned twice, in-all for a period of about three weeks. The learned Counsel for the petitioner has fairly conceded that on this point the record is not available. In view of this factual position, even if the order is set aside and the matter is remanded to the Assistant Collector, Central Excise & Customs, it would be an exercise in futility. In the case of Olga Tellis and Others Vs. Bombay Municipal Corporation and Others, . in para 51 of the judgment, the Supreme Court referred to its earlier decision reported in S.L. Kapoor Vs. Jagmohan and Others, and has inter alia observed that where on the admitted or indisputable facts only one conclusion is possible under the law only one penalty is permissible, the Court may not issue its writ to compel the observance of natural justice not because it is not necessary to observe natural justice but because Courts do not issue futile writs.

8. In view of the aforesaid principles laid down by the Supreme Court, we thought it fit to grant opportunity to the petitioner to produce evidence before this Court by which the claim made by the petitioner could be brought within the period of limitation. As indicated hereinabove, the petitioner has not been able to

produce any evidence whatsoever indicating that the claim rejected could be brought within the period of limitation. In this view of the matter, setting aside of the order passed by the Assistant Collector and remanding the same to the Assistant Collector would be an exercise in futility. While exercising power under Article 226/227 of the Constitution, the Court would and should not issue writs in futility as laid down by the Supreme Court. Therefore on this ground also we refuse to exercise our extra-ordinary jurisdiction under Article 226/227 of the Constitution of India, for remanding the matter to the Asstt. Collector of Central Excise and Customs. For, such exercise would be an exercise in futility.

9. The learned Counsel for the petitioner has relied upon a decision of the Supreme Court in the case of *Institute of Chartered Accountants of India Vs. L.K. Ratna and Others*, . It is a case arising out of disciplinary proceedings under the Chartered Accountants Act, 1949. A chartered accountant was charged with misconduct. At the initial stage, the Council of the Chartered Accounts did not afford an opportunity of being heard. Therefore it was contended that the order passed against him was in contravention of the principles of natural justice and hence illegal and void. It was contended that appeal u/s 22A of the Chartered Accountants Act was, maintainable and that it provided a complete safeguard against any insufficiency against the original proceeding. Repelling the contention, the Supreme Court inter alia observed, that if natural justice is violated at the first stage, the right of appeal is not so much a true right of appeal as a corrected initial hearing. Instead of fair trial followed by appeal, the procedure is reduced to unfair trial followed by fair trial.

10. Relying on the aforesaid decision of the Supreme Court, the learned Counsel for the petitioner submitted that this Court should set aside the orders passed by the Assistant Collector, Central Excise and remand the matter. If it is true that if the initial order suffers from the vice of violation of principles of natural justice, it would be a nullity and the same cannot be cured by affording an opportunity of being heard at the appellate stage. But the appellate forum provided under the statute cannot be equated with the writ jurisdiction exercised by the High Court under Article 226/227 of the Constitution of India. When the High Court exercises extra-ordinary jurisdiction under Article 226/ 227 of the Constitution of India, it is not bound by the record placed before the original authority. The High Court could see any material which may be produced before it by either side. This Court, in fact, granted time to the petitioner to show anything which may even remotely suggest that the claim rejected by the Assistant Collector on the ground of limitation could be brought within the period of limitation. As indicated hereinabove, nothing has been produced to show that the claim could be brought within the period of limitation.

11. In view of this position, the principles laid down and approved by the Supreme Court in the case of *Olga Tellis (supra)* comes into play in this case also. The High Court would not exercise its writ jurisdiction in futility. When the High Court exercises its writ jurisdiction, it does not act as an appellate forum.

The High Court is not bound by the procedural rules by which the appellate forum is bound. The High Court would not be constrained by the record which may be available to the original forum and the appellate forum. In fact there are no such limits and constraints. If justice demands, the High Court can certainly exercise its power under Article 226/227 of the Constitution of India and see that justice is done to the litigant. In this view of the matter, the decision relied upon by the learned Counsel for the petitioner in the case of Institute of Chartered Accountants of India (*supra*) is of no help to the petitioner inasmuch as this Court is not exercising appellate jurisdiction against the order of the Assistant Collector, and this Court is not powerless to do justice on relevant material being shown to it.

12. There is one more reason why we would not set aside the impugned orders and remand the matters to the Assistant Collector. To adopt such a course would result into multiplicity of litigation. Justice demands that multiplicity of litigation be prevented as far as possible. This was the reason why we requested the learned Counsel for the petitioner to produce some evidence before this Court by which it can be said that the claims rejected by the Assistant Collector were within the period of limitation. No such evidence, even remotely suggesting that the claim rejected was within the period of limitation, has been produced before this Court. Thus in view of the admitted factual position, when no other conclusion is possible, it would be an exercise in futility to quash and set aside the order and remand the matter to the Assistant Collector. Be it noted that claim pertains to the year 1975 to 1976 and 1977 and the applications were made in the year 1976 and 1977. Thereafter fresh applications were made in the year 1979 and the order has been passed in the year 1980. To remand the matter to the Assistant Collector after such a long period would itself be an unusual thing. Ordinarily such a course should not be adopted when things, could be proved by document. In the instant case, whether the claim is within the period of limitation or not would depend upon the production of documents only. If the petitioner could not produce any documentary evidence on this point after such a long time it is impossible to believe that it could be so before the Assistant Collector even after the remand of the matter. Therefore, to avoid multiplicity of litigation and to avoid issuing futile writs, we refrain from quashing and setting aside the impugned orders.

13. The learned Counsel for the petitioner submitted that the amount was paid under protest and therefore the provisions of Rule 11 would not be applicable. However, as Rule 11 was in force at the relevant time, there was no provision for making payment under protest. In this view of the matter, even if it is assumed that the amount is paid under protest, the period of limitation would not stand extended. It is not disputed that Rule 11 as it was in force at the relevant time did not provide for extending the period of limitation if the amount is paid under protest. Therefore this contention is also required to be rejected.

14. The learned Counsel for the petitioner submitted that this Court should

exercise its extraordinary jurisdiction under Art. 226 of the Constitution and direct the respondents to refund the amount. Be it noted that the powers under Article 226/227 of the Constitution of India are conferred upon the Court for doing justice. It does not mean that the rule as regards limitation be ignored in all matters and in all situations. The Supreme Court in the case of M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others, has observed that it is not always possible in all situations to give a logical and complete effect to a finding. Many situations of this type arise in actual practice. Referring to the provisions of limitation, the Supreme Court observed as follows:

One of the commonest issues that arose in the context of the situation we are concerned with is where a person affected by an illegal taxation files an application for refund under the provisions of the relevant statute or files a suit to recover the taxes as paid under a mistake of law. In such a case the Court can grant relief only to the extent permissible under the relevant rules of limitation. Even if he files an application for refund or a suit for recovery of the taxes paid for several years, the relief will be limited only to the period in regard to which the application or suit is not barred by limitation.

Referring to the provisions of Article 226 of the Constitution of India the Supreme Court observed:

In this situation, the question has often arisen whether a petitioner's prayer for refund of taxes collected over an indefinite period of years should be granted once the levy is found to be illegal. To answer the question in the affirmative would result in discrimination between persons based on their choice of the forum for relief, a classification which prima facie, is too fragile to be considered a relevant criterion for the resulting discrimination. This is one of the reasons why there has been an understandable hesitation on the part of Courts in answering the above question in the affirmative.

15. Thus as laid down by the Supreme Court, this Court while exercising power under Article 226 of the Constitution of India should be guided by the period of limitation laid down under the relevant provisions of the rules only.

No other contention is raised. For the aforesaid reasons, the petition is rejected. Rule discharged.