(1986) 03 BOM CK 0014

In the Bombay High Court

Case No : Writ Petition No. 101 of 1984

Garware Plastics and Polyster Ltd. and another APPELLANT

Vs

Union of India and others RESPONDENT

Date of Decision : 14-03-1986

Acts Referred:

Central Excise Rules, 1944 — Rule 8
Central Excises and Salt Act, 1944 — Section 12, 3, 37, 6
Customs Act, 1962 — Section 25(1)

Citation : (1986) 2 BomCR 721 : (1986) 24 ELT 449

Hon'ble Judges : Vaz, J;Salve, J

Bench : Division Bench

Judgement

Vaz, J.—"We do not have a developed system of Administrative law", said Lord Reid in Ridge v. Baldwin, (1964) A.C. 40, years ago, but qualified it by saying wistfully : "perhaps because until fairly recently we did not need it". That was in 1964, but the Petitioner before us who has been asked to shell out a tidy sum of 86 lacs by way of excise duties probably does not share the optimism of Lord Reid.

2. Garware Plastics & Polyester Limited, of New Industrial Area, Chikalthana, Aurangabad (Petitioner) are engaged in the manufacture of polyester films upto and including a thickness of 0.25 mm. and use polyester chips as the basic material which has to be imported. Section 3 of the Central Excises and Salt Act, 1944 (No. 1 of 1944), ("the Excise Act"), is the charging section which provides that there shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods at the rates set forth in the First Schedule. "Artificial or synthetic resins and plastic materials", which in common parlance are called "polyester chips", appear at Item No. 15A of the First Schedule and attract 50 per cent ad valorem as the rate of duty. Sections 6, 12 and 37 of the Excise Act empower the Central Government to frame rules and Rule 8 of the Central Excise Rules, 1944, framed thereunder empowers the Central Government to exempt by Notification in the Official Gazette and subject to such

conditions as may be specified in the Notification any excisable goods from the whole or any part of duty leviable on such goods. In exercise of this power, the Central Government issued a Notification No. 38/73-Cus., dated 1-3-1973 exempting "polyester polymer chips" from the whole of the duty of excise leviable thereon unconditionally. The Notification contains three more items like Cellulose acetate, Polyamide chips, Acrylic sheets and acrylic plastic bangle tubles, etc., for which unlike the item of polyester polymer chips the exemption is not unconditional but subject to certain conditions of use of that material in manufacture. The combined result of this Notification read with Item 15A of the First Schedule was that polyester polymer chips which are the basic material for the manufacture of polyester films or sheets were totally and unconditionally exempted from the levy of excise duty.

3. A second Notification No. 231/82-Cus., dated 23-10-1982 was issued in exercise of similar powers whereby the Central Government exempted "films or sheets upto and including thickness of 0.25mm". However, unlike the earlier Notification dated 1-3-1973, the present one contained a proviso that the exemption will be applicable provided such articles are produced out of polyester chips upon which duty of excise or the additional duty u/s 3 of the Customs Tariff Act, 1975 (No. 51 of 1975), has already been paid. The effect of this Notification was that the finished product, namely, "films or sheets" manufactured out of "Polyester chips", were exempted from excise duty provided the excise duty or the additional duty has been already paid on polyester chips, the basic raw material.

4. Then followed a third Notification No. 171/83, dated 25-6-1983. This Notification purported to amend the earlier Notification No. 231/82-Cus., dated 23-10-1982. The text of the earlier Notification was retained including the proviso contained therein. But by the amendment, an additional proviso was added. This second proviso, being the subject-matter of the present petition, is reproduced below -

"Provided further that the exemption contained in this Notification shall not apply to such films or sheets referred to above as are produced out of such artificial resins or plastic materials or cellulose esters or cellulose ethers referred to above as are exempt from the whole of duty of Excise under the said Central Excises and Salt Act, or from the whole of the Additional Duty u/s 3 of the said Customs Tariff Act, as the case may be, and such exemption has been availed of."

5. After this amendment was effected on 25-6-1983 to the earlier Notification, the Petitioner company lost no time in writing on 7th July, 1983 to the Chairman, Central Board of Excise and Customs, narrating the chronological history of the Notification and bringing it to the notice of the Government that polyester chips, which are used by them in the manufacture of polyester films, were enjoying exemption from duty vide Notification dated 1-3-1973 and the film manufactured by them was enjoying the exemption available to it under the Notification dated 23-10-1982 before the amendment of 25th June, 1983. The Petitioner company

made a grievance that in view of the amending Notification dated 25-6-1983, the exemption which they were enjoying will no longer be available to their film. The Petitioner company requested the Government that they may either be given the option of not availing of the exemption from excise duty notified under the Notification dated 1-3-1973 or that polyester chips used in manufacture of polyester films should be excluded from the purview of the second Notification to enable the film manufactured by the company from such polyester chips to continue to avail of the exemption. This was followed by another letter of 21st July, 1983 to the Assistant Collector, Central Excise, Aurangabad, in which the Petitioner company referred to the amended Notification No. 171/83 dated 25-6-1983, and informed the Assistant Collector that the said Notification "obviously gives an option to avail of or not to avail of the exemption on raw material so as to qualify for the exemption on the films manufactured therefrom upto and including the thickness of 0.25mm". The company thereafter purported to intimate the Assistant Collector that "to avail of the exemption on polyester films upto and including the thickness of 0.25mm, we do not want to avail of the exemption on polyester chips under Notification No. 38/73-Cus., and we shall with effect from today, i.e., 21st July, 1983, pay C.V.D. on polyester chips which are used in the manufacture of Polyester Films only."

6. Reverting to the earlier letter of 7th July, 1983, which the company had written to the Chairman of the Central Board of Excise and Customs, it appears that the Under Secretary in the Ministry of Finance, Department of Revenue, informed the Petitioner company on 19-11-1983 that the company should contact the concerned Collector of Central Excise in the matter to whom the necessary instructions had been issued. As directed by the Under Secretary of the Ministry of Finance, the company wrote to the Collector of Central Excise, Aurangabad Collectorate on 23rd December, 1983 informing him that they have exercised an option of not availing the exemption on imported polyester chips and are thus paying the additional duty on imported polyester chips so as to avail the exemption on polyester films manufactured therefrom. However, the Additional Collector had informed the company that the exercise of this option was "not in order". Before this letter, a show cause notice dated 17th December, 1983 was received by the company asking them to show cause to the Assistant Collector of Central Excise, Aurangabad, as to why an amount of basic duty of Rs. 58,50,387.55, a special duty of Rs. 2,92,519.45, totalling to Rs. 61,42,907.00, should not be recovered from them for the period 1-7-1983 to 30-9-1983 as respects polyester film produced out of C.V.D. paid imported raw material. The Petitioner company replied on 23rd January, 1984 questioning the demand of Rs. 61 lacs and odd of duty pointing out that they had decided not to avail of exemption under Notification No. 38/73 in respect of polyester chips imported by them and during the period 21st July, 1973 to 30-9-1983 had paid an amount of Rs. 25,44,350.91 towards the additional duty. A second show cause notice styled as Demand-cum-show cause notice was issued on 19th January, 1984 in which a demand of Rs. 43,61,769.68 was made against the

company as respects polyester film manufactured during the period 1-10-1983 to 16-11-1983 out of C.V.D. paid imported raw material. Immediately after receipt of the second show cause notice, the Petitioner company filed the present writ petition on 1-2-1984.

7. On 4-2-1984, an interim stay in terms of prayer Clause (d), that is to say, from taking any steps in furtherance to the show cause notices dated 17th December, 1983 and 19th January, 1984, was granted. On 27-2-1985, the Petitioner company furnished a bank guarantee for Rs. 80,00,000.00.

8. The Excise Act is a complete code relating to the central duties of excise on goods manufactured or produced in the country and separate Chapters in the Act deal with adjudication, confiscations, penalties and appeals to the Departmental Collector as well as to the Appellate Tribunal. By the present writ petition filed immediately after receipt of the two show cause notices but without showing cause as required by the notices, the Petitioner seeks writ of prohibition and certiorari to quash and set aside the two show cause notices.

9. A writ of prohibition restrains a Tribunal from proceeding further in excess of jurisdiction; while certiorari requires that the record of the order of the Court to be sent up to the higher Court to have its legality inquired into and, if necessary, to have the order quashed. Both these writs deal with questions of excessive jurisdiction and, doubtless, in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of these writs is extended to control the proceedings of bodies which do not claim to be, and would not be recognised as, Courts of Justice but have the duty to act judicially. Except the writ of habeas corpus, all other prerogative writs fall in the realm of discretionary remedies. It was said way back in 1927 [R.V. North, (1927) 1 Q.B. 491 that a statutory appeal will not bar a writ of prohibition if the error alleged constituted the breach of "a fundamental principle of justice" or was "contrary to the general law of the land". Our Supreme Court in Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, after referring to its earlier case if Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, , repeated the admonition that Article 226 is not meant to short circuit or circumvent statutory procedures. Exceptions have been carved out, namely, that where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance, where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. The Court went on to caution that in bypassing the alternative remedy provided by statute, good and sufficient reason must be shown and that matters involving the revenue where statutory remedies are available ar not such matters.

10. According to Mr. Ashok Desai, learned Counsel for the Petitioner, the present case falls within the exception carved out by the Supreme Court itself, because

even on the admitted facts as appearing from the record, the officers of the Collectorate did not have jurisdiction to take any action as has been done by issuing the two show cause notices. The wording of the second proviso of the Notification dated 25th June, 1983, namely, "and such exemption has been availed of" - argued Counsel - shows that this Notification itself gives an option to the assessee as to whether he should or should not avail of the exemption granted by the earlier Notification on polyester chips the second alternative entitling him to avail of the exemption on the finished products, namely, polyester films. According to Revenue, no such right of election has been given by the second Notification. Section 3 of the Customs Tariff Act is the charging section regarding additional duty on an article which is imported into India, namely, which will be equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. The Explanation to section 3 of the Customs Tariff Act makes it clear that if the article is not so manufactured in India, then the duty would be leviable on the class or description of articles to which the imported article belongs. After making a reference to the Notification dated 1-3-1973, Revenue argues that when polyester polymer chips have been exempted from the whole of duty of excise leviable without any conditions, no additional duty u/s 3 of the Customs Tariff Act could be leviable, because the additional duty is equal to the excise duty u/s 3 of the Excise Act.

11. In Re : Energy Conversion Devices Incorporated, The times, 2nd July, 1982 (quoted in Administrative Law : Cases and Materials, by J. Beatson and M. H. Matthews, p. 61), Lord Diplock, with whom other Members of the House agreed, reaffirmed his view that there is an "important constitutional principle that questions of construction of all legislation, primary or secondary, are questions of law to be determined authoritatively by courts of law; that errors in construing primary or secondary legislation made by inferior tribunals that are not courts of law, however specialised and prestigious they may be, are subject to correction by judicial review." A breakthrough made by the Anismincs case - (1969) 2 A.C. 147 (approved by our Supreme Court in Shri M.L. Sethi Vs. Shri R.P. Kapur, was that as respects the administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not, was for practical purposes abolished. Any error of law that could be shown to have been made by these tribunals in the course of reaching their decision on matters of facts would result in their having asked themselves a wrong question with the result that the decision they reached would be nullity. Consequently, it is possible to argue as has been done in Act Construction v. Customs & Excise, (1981) 1 W.L.R. 49 : "Once you have the primary facts established, then..... the question is a question of law for the judges to decide.

12. The three exempting Notifications adumbrated above are an exercise of delegated legislation and there is no gainsaying the fact that the final interpretation of the Notifications and the application thereof to the facts of a particular case would belong to the courts by way of judicial review. However, what we find in the present petition is that the Petitioner has come too early to

this Court; to wit, post-haste after the show cause notices were received by it, without even caring to reply to the same. What the Petitioner should have done, in the words of the Supreme Court in Pooran Mal Vs. The Director of Inspection (Investigation), New Delhi and Others, , is "to tell the true facts to the officer" and it will then be for that officer to ascertain the true nature of the transactions.

13. The Petitioner has not been able to canvass at the Bar that the show cause notices ex facie or read in the context of the other plethora of admitted facts point out to one and only one conclusion, namely, that the Petitioner has been granted a right to avail of or not to avail of the exemption granted by the earlier Notifications and hence the show cause notices should be quashed. The matter will have to be gone into in depth : the details of the goods manufactured, the correspondence entered into by the Petitioner with the Government and the Collectorate, the practice of issuing exemptions u/s 25(1) of the Customs Act and the propriety of conferring an option by delegated legislation on an assessee to elect between two rates of taxes needs a detailed examination. Writ jurisdiction would hardly be a substitute for the hierarchical statutory remedies provided in the Act - more so when there is not even a first determination about the liability of the Petitioner by the officer in the lowest category. If the Petitioner is allowed to invoke the writ jurisdiction in such a case, will not another competitor seek a writ of mandamus against the Revenue - as was done in Inland Revenue Commissioners v. National Federation of Self-employed and Small Business Ltd. (1982) A.C. 617 alleging that Revenue is granting a sort of concession to Garwares by allowing them to choose between a higher and a lower rate of taxation ? They may argue that this in effect is no election at all as any man of business will choose to pay a lesser tax. As observed by the Supreme Court in Dunlop''s case (supra), allowing the present writ petition would be short circuiting the procedure established by law, namely, that of statutory appeals. Nor is the Petitioner able to show that an extraordinary situation has presented itself in this particular case, or what the officers of the Collectorate have done by issuing the show cause notices is in breach of "a fundamental principle of justice" or "contrary to the general law of the land" as observed in North''s case (supra).

14. A collateral attack was made on the letter dated 19-11-1983 by which the Under Secretary in the Department of Revenue had, after referring to its communication dated 7th July, 1983, informed the Petitioner that it should contract the concerned Collector of Central Excise in the matter "to whom the necessary instructions have been issued". This phrase of instructions has been made a peg on which to hang an argument that the Collectorate have been given some secret supervening instructions to decide the matter in a particular way. This insinuation has been stoutly denied by the Revenue. It is true that the nucleus of an administrative structure like the Central Excise will be a planning and controlling body like the Central Board of Direct Taxes for the Income Tax Department and Central Board of Excise and Customs for the indirect taxes, who, on a periodical review of the situation, would issue instructions to thousands of officers spread all over the length and breadth of India in the matter of execution

of their duties in the best possible manner. The Petitioner has not been able to show that any secret instructions were given to the conferred officials, but we would leave this question open to be reagitated before the concerned officer.

15. It has also urged at the Bar that the classification of the goods was made by the Assistant Collector on 2nd August, 1983 and that if the same person hears the case being the subject-matter of the two show cause notices, it would be an infraction of the principles of natural justice as it is likely that he may be based against the Petitioner. We were also informed that the said Assistant Collector has since been transferred and that the proceedings would not be heard by him. Hence this argument does not avail counsel.

16. In view of the aforesaid, the petition fails and is dismissed. Rule is discharged. No order as to costs.