

(1989) 09 GUJ CK 0001

In the Gujarat High Court

Case No : Special Civil Application No. 6149 of 1989

Gujarat Heavy Chemicals Ltd.

APPELLANT

Vs

Assistant Collector of Customs

RESPONDENT

Date of Decision : 12-09-1989

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35
Civil Procedure Code, 1908 (CPC) — Section 115
Coal Mines (Conservation and Development) Act, 1974 — Section 6, 7
Constitution of India, 1950 — Article 226, 227, 32
Customs Act, 1962 — Section 28

Citation : (1990) 27 ECC 197 : (1993) 66 ELT 162 : (1990) 1 GLR 346

Hon'ble Judges : J.U. Mehta, J;A.P. Ravani, J

Bench : Division Bench

Judgement

Ravani, J.—Is there no dividing line between "can" and should" ? If there is, are we (i.e., the High Court) not under Constitutional obligation to maintain the same ? As we also "can" should we ? Or, because other can, we should not ? Such are the questions which have surfaced in this petition invoking exercise of powers under Art. 226/227 of the Constitution of India.

2. The petitioner-Company is manufacturing soda ash and certain other articles. It imported coking coal from Australia. As per the relevant provisions of the statute and the notifications governing import of coking coal, if the ash content in coking coal is below 12%, the importer would be entitled to exemption from payment of import duty. The petitioner had imported coking coal by five different consignments. In four consignments the ash content of the coking coal was within the permissible limit, i.e., below 12%. However, in one of the consignments, the ash content of coking coal was 12%. Hence the Department issued show cause notice calling upon the petitioner as to why duty of Rs. 1,48,33,959/- should not be recovered from the petitioner. By the same show cause notice the petitioner was also called upon to show cause as to why customs duty equivalent to Rs. 10/- (Rs. ten only) per metric ton as prescribed u/

s 6 of the Coal Mines (Conservation and Development) Act, 1974 leviable on the goods in question u/s 7 of the Coal Mines (Conservation and Development) Act, 1974 be not recovered. The notice was issued u/s 28 of the Customs Act, 1962. The petitioner appeared before the Assistant Collector of Customs, Porbandar. It raised several defence, inter alia contending that the sample of imported goods received by the Central Fuel Research Institute, Dhanbad was in broken condition. Therefore there was a possibility of extraneous mater having been mixed up with the same. The petitioner also requested the department to send another sample to an independent testing laboratory for retesting the ash content. After hearing the petitioner on the aforesaid point and also on other points raised by the petitioner, the Assistant Collector of Customs, Porbandar, negatived all the contentions raised by the petitioner and passed order dated June 15, 1989. By this order the Assistant Collector dropped the demand based on the provisions of Section 6 read with Section 7 of the Coal Mines (Conservation and Development) Act, 1974. He relied upon a decision of this High Court in the case of Saurashtra Chemicals v. Union of India, decided on April 11, 1989 (the case number or the petition number is not cited) and held that there was no notification supporting the demand of additional customs duty. Therefore, the demand of Rs. 2,42,750/- as and by way of additional duty, was dropped. However, demand of customs duty of Rs. 1,45,91,209/- was confirmed. The petitioner has challenged the legality and validity of this order.

3. The impugned order itself shows that an appeal against the same is maintainable before the Collector (Appeals), Custom Appellate Office, Bombay. The liability to pay import duty is a creation of statute. The duty to import certain goods in conformity with the provisions of the Customs Act, 1962 and the notifications issued and rules framed thereunder is also an obligation imposed by the statute. This very statute has provided remedy for redressal of the grievance. Whenever, a statute creates liability and the very statute provides for the redressal of the grievances, it would not be proper for this High Court to exercise powers under Art. 226/227 of the Constitution of India and entertain petition by which the legality and validity of an order passed by the original authority exercising powers under the relevant provisions of the statute is challenged.

4. It must be realised that exercise of powers by the High Court under the provisions of Art. 226/227 of the Constitution of India is not a matter of exercise of ordinary jurisdiction of the Court. Whenever the High Court exercise powers under Art. 226/227 of the Constitution of India, it exercises its power conferred upon it in extraordinary jurisdiction. This power should normally be invoked in a situation where a party has no remedy under the ordinary provisions of law. The remedy under Art. 226/227 of the Constitution of India is extraordinary remedy and it is not to be resorted to lightly. As observed by the Supreme Court in the case of State of Uttar Pradesh Vs. Dr. Vijay Anand Maharaj, , jurisdiction under Art. 226 of the Constitution of India is EXTRAORDINARY. As a necessary corollary, it means, ordinarily these powers are not to be exercised by the High Court and especially when statute provides remedy for redressal of the

grievances. Otherwise this jurisdiction also would lose its distinctive character of being EXTRAORDINARY. Simply because the remedy provided for under the ordinary law is little more onerous it is no ground for not directing the petitioner to exhaust the remedy provided for by the statute (see Sales Tax Officer, Jodhpur and Another Vs. Shiv Ratan G. Mohatta, .

5. In this connection reference may be made to a decision of the Supreme Court in the case of Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, . In that case the petitioner had right to prefer an appeal before the prescribed authority and a further appeal before the Tribunal. Thereafter, the petitioner could also ask for a case to be stated upon a question of law for the opinion of the High Court. In certain cases the matter could be carried to the Supreme Court also. By referring to several decisions and after analysing the provisions of the Orissa Sales Tax Act, the Supreme Court has in terms held as under :

"The Act provides for a complete machinery to challenge the order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Art. 226 of the Constitution. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of."

A Division Bench of this High Court consisting of P. R. Gokulakrishnan, C.J. and R. A. Mehta, J. has also followed the aforesaid decision of the Supreme Court in the case of Ambalal Sarabhai Enterprises Pvt. Ltd. Vs. Union of India and Others, . Therein it is held that the remedy of appeal provided under the relevant provisions of the Central Excises and Salt Act, 1944 is alternative and efficacious remedy, and when such remedy is available to the petitioner, petition under Art. 226 of the Constitution should not be entertained.

6. There is an imperative need to adopt this course from the pragmatic point of view and for other reasons also. The Collector (Appeals) while exercising powers under the relevant provisions of the Customs Act, 1962 can determine the legality and validity of the order passed by the Assistant Collector by examining the facts as well as the law points. This High Court will not normally examine the questions of facts and interfere with an order passed by a statutory authority unless the same is passed on extraneous considerations or that it is perverse in the sense that no reasonable person would have come to that conclusion or that there was no evidence to arrive at the impugned decision. Thus the party will have a larger scope before the appellate authority.

7. In a similar situation in the case of Kanubhai Brahmbhatt Vs. State of Gujarat, , the Supreme Court has conveyed a message. Under Art. 32 of the Constitution of India, a petition is maintainable before the Supreme Court for enforcement of fundamental rights. Such petitions can also be filed under Art. 226 of the Constitution of India before a High Court. In relation to such type of

cases, the Supreme Court observed, there exist reasons, good and substantial, for directing the petitioner to approach the concerned High court in first instance instead of permitting him to file petition before the Supreme Court under Art. 32 of the Constitution of India. In para 2 of the judgment the Supreme Court has given the simile of national hospital for the treatment of cardiac problems; and that of regional hospitals for treatment of other major and minor diseases. If the patients suffering from all major and minor diseases are also admitted in national hospital, where they "can" be, but should ordinarily be not treated, there would be a chaos. Thereafter, in para 3 of the judgment the Supreme Court observed as follows :

"There is no reason to assume that the concerned High Court will not do justice. Or that this Court alone can do justice. If this Court entertains writ petitions at the instance of parties who approach this Court directly instead of approaching the concerned High Court in the first instance, tens of thousands of writ petitions would in course of time be instituted in this Court directly.

The inevitable result will be that the arrears pertaining to matters in respect of which this Court exercises exclusive jurisdiction under the Constitution will assume more alarming proportions."

8. As observed by the Supreme Court in the very same judgment, the time for imposing self-discipline has already come, even if it involves shedding of some amount of institutional ego, or raising of some eyebrows. Again, it is as important to do justice at this level, as to inspire confidence in the litigants that justice will be meted out to them at the level of appellate authority exercising powers under the relevant provisions of a statute. Way back in the year 1965 in the case of Aluminium Corporation of India v. Union of India, Civil Appeal No. 635 of 1964, decided on 20-9-1965 [1978 (2) E. L. T. (320) (SC)], the Supreme Court observed that the power exercised by the appellate authority, i.e., the Collector u/s 35 of the Central Excises and Salt Act, 1944 is also qua judicial power. The aforesaid view is reiterated by the Supreme Court in the case of Orient Paper Mills Ltd. Vs. Union of India (UOI), . Recent amendments in Central Excises and Salt Act, 1944 and in the Customs Act, 1962, which inter alia provides for appeal to the Supreme Court in certain cases from the decision of CEGAT, and for making of reference to this High Court on a question of law in respect of certain matters leaves no room for doubt that these authorities are created by the legislature with a view to see that power under Art. 226/227 of the Constitution of India are not required to be exercised by this High court in all the matters arising under these statutes. There is no reason to presume that these authorities will act otherwise than in accordance with law or arbitrarily.

9. Look at the approach adopted by the Supreme Court in yet another case. P.N. Kumar and Another Vs. Municipal Corporation of Delhi, . It was a petition under Art. 32 of the Constitution of India. In this case a petition under Art. 226 of the Constitution of India could also be filed before the High Court. Therefore the Supreme Court declined to exercise its power under Art. 32 of the Constitution of

India for ten different reasons. All of them are important and relevant. But only two of them (Nos. 7 and 10) be mentioned here to emphasise the point :

"(7). This Court has no time today even to dispose of cases, which have to be decided by it alone and by no other authority. Large number of cases are pending from 10 to 15 years. Even if no new case is filed in this court hereafter, with the present strength of judges it may take more than 15 years to dispose of all the pending cases.

(10). Lastly, the time saved by this Court by not entertaining the cases which may be filed before the High Court can be utilised to disposed of old matters in which parties are crying for relief."

In the context, if read with suitable modifications, message conveyed equally applies to the High Courts.

10. It needs to be realised, and emphasised too that the powers conferred on this High Court under Art. 226/227 of the Constitution of India are in the nature of extraordinary jurisdiction. Therefore, whenever any other statutory authority can exercise power in a particular subject matter, ordinarily this High Court should not exercise this extraordinary power. The ambit of the power under Art. 226 of the Constitution of India is very wide and that is the reason why this Court should exercise utmost restraint in exercising the same. If such restraint is not exercised, the result would be (and in fact it has been) very much disturbing. This High Court has been, and will continue to be flooded with all types of work which can be done by almost all other statutory authorities, over and above the work which this High Court alone can do. The result is that the work which this High Court alone can do is suffering. Matters like :

- (i) Appeals from Orders;
- (ii) Civil Revision Applications u/s 115 of C. P. Code and under other relevant provisions of different statutes;
- (iii) First Appeals and Second Appeals under C. P. Code and under the provisions of different statutes;
- (iv) Criminal Appeals;
- (v) Criminal Revision Applications and Criminal Misc. Applications;
- (vi) Petitions for writ of habeas corpus, in preventive detention matters and other cases;
- (vii) Petitions for initiating contempt of Court alleging that the orders passed by appropriate Tribunal/Authority have not been complied with; and
- (viii) Other petitions affecting the fundamental rights and other civil rights of citizens;
- (ix) Company matters; and

(x) References under Income Tax Act and Sales Tax Act and other taxation laws can be decided by this High Court and only by this High Court and not by other statutory authorities.

11. Hundreds of accused are languishing in jail and awaiting their turn for their matters being heard for last about four to five years. Several persons detained under the preventive detention laws run out their period of detention without their matters being heard on merits. Even applications for taking action for contempt are awaiting their turn for a period of about two to three years, if not more. Many first appeals and second appeals and other civil matters are awaiting in queue for a period of five to ten years. The litigants who are directly involved or affected in these matters or who have direct or indirect interest or concern in such matters may legitimately claim and request that unless the High Court decides the cases which the High Court alone can decide, it is the constitutional obligation of the High Court to refrain itself from entertaining other matters which can be decided by other statutory authorities.

12. Accused languishing in jail and detenus who run out their period of detention without their matters being heard, may even legitimately raise a question - Can the High Court give priority to any other matter than the matters involving personal liberty of citizens ? If not, should the High Court entertain matters which can also be decided by other statutory authorities so as to adversely affect the expeditious disposal of the matters involving individual liberty of citizens ? It may further be asked by them, if the High Court is not in a position to protect the individual liberty of citizens and if the citizens have to run out the period of sentence of imprisonment or the period of detention without their matters being heard on merits, has the existence of the Court any relevance for them ?" We would rather refrain from answering these questions. But at the same time we would certainly like everyone concerned to ponder over the questions and decide the further course of action for themselves. On our part we would like to act with restraint and would not entertain the petition. In our discretion which we think accords with the Constitutional provisions, we would like to direct the petitioner to avail of the alternative remedy provided under the statute.

13. Before we part with this judgment and order, it is necessary to refer to the apprehension raised by the learned Advocate General appearing for the petitioner. It is apprehended that the appellate authority will not take into consideration the request that may be made by the petitioner for sending another sample for retesting. There is no basis for such apprehension. There is no presumption that the appellate authority will act arbitrarily and otherwise than in accordance with law. Without expressing firm opinion on the question of sending another sample for retesting, we would like to observe that prima facie the request made by the petitioner before the Assistant Collector for retesting another sample was just and proper. Unless it could be shown that the rules governing such testing prohibits retesting of a second sample by an independent agency. Ordinarily it would not be so provided in any rule because the very fact

that three sample are drawn and one sample is permitted to be kept by the consignee and one sample is kept by the department and the third sample is sent for testing, shows that in case of difficulty or genuine doubt, another sample can be sent for retesting.

14. There is no justifiable ground for the petitioner to harbour an apprehension that the appellate authority would act arbitrarily and would not consider the request of the petitioner for retesting another sample by an independent agency in just and proper manner. In short, on the basis of such apprehension we would not like to entertain the petition. On the contrary we would like to presume that the appellate authority will act reasonably and will try to see that no party goes with a feeling that it has been deprived of its right to put up its case by leading proper evidence.

15. In view of the aforesaid findings, discussion and observations the learned Counsel for the petitioner seeks permission to withdraw the petition. Permission granted. Disposed of as withdrawn. Notice discharged.