

(1977) 10 AP CK 0020

In the Andhra Pradesh High Court

Case No : Writ Petition No. 1809 of 1976

Hyderabad Allwyn Metal Works Ltd.

APPELLANT

Vs

Collector of Central Excise

RESPONDENT

Date of Decision : 25-10-1977

Acts Referred:

Central Excise Rules, 1944 — Rule 173Q, 226, 56A, 9(1)
Central Excises and Salt Act, 1944 — Section 40, 40(2)
Constitution of India, 1950 — Article 226, 226(3)

Citation : (1978) 2 ELT 556

Hon'ble Judges : Lakshmaiah, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Lakshmaiah, J.—This is an application filed under Article 226 of the Constitution of India for the issuance of a writ of certiorari seeking the quashing of the order passed by the Collector, Central Excise, Hyderabad, dated 5-7-1973 by which the petitioner was required to pay a penalty of Rs. 1,00,000/-under Rule 173-Q of the Central Excise Rules, 1944.

2. The petitioner M/s Hyderabad Allwyn Metal Works Limited is a company registered under the Companies Act carrying on among other things the business of manufacturing refrigerators. The company is under the management of the State Government which owns more than 50 per cent of the shares and it is a Government Company.

3. There was a stock taking by the Officers of the Central Excise Department in the petitioner's premises from 3-12-1969 to 23-12-1969, as a result of which it was alleged that the petitioner had not satisfactorily maintained the accounts of production, manufacture, storage delivery or disposal of the goods and that the petitioner had also cleared some dutiable parts of the refrigerators manufactured by them without making of a Gate Pass and without debiting duty payable on the goods in the Personal Ledger Account contravening thus Rule 9(1) and 226 of the

Central Excise Rules.

4. The Collector, Central Excise, held an inquiry into the allegations and by his order dated 20th Oct., 1971 held the petitioner guilty of the contravention of the said Rules and also Rule 56-A of the Central Excise Rules and levied duty as well as penalty. Aggrieved by the decision the petitioner took up the matter in appeal to the Central Board of Excise and Customs and that was rejected on 2-8-1973.

5. The matter was thereafter taken in revision before the Government of India and that revision was disposed of on 6-4-1976 virtually confirming the order sought to be revised. But the penalty was reduced from Rs. 6.000/- to Rs. 3.000/-.

6. That occasioned invoking the jurisdiction of this Court under Article 226 of the Constitution of India by the petitioner by filing W.P. No. 1496/76 by seeking the quashing of the order. I have been informed that writ petition was allowed by this Court on 8th Sept., 1977.

7. The Collector, Central Excise issued another show cause notice on 29-6-1972 calling upon the petitioner to show cause why penalty should not be levied under Rule 173-Q of the Central Excise Rules, 1944, with respect to the contraventions detected during inspection by the Department from 3rd Dec., 1969 to 23rd Dec., 1969. The petitioner submitted his explanation. But the Collector, Central Excise, over-ruled the contention of the petitioner and levied the penalty of Rupees 1,00,000/- by his order dated 5-7-1973, which is impugned in this proceedings.

8. Aggrieved by that decision, the petitioner took up the matter in appeal before the Central Board of Excise and Customs, New Delhi, u/s 35 of the Central Excises and Salt Act. The appeal was rejected by the Central Board of Excise and customs by their order dated 26th April, 1976 as, time barred observing further that there was no power vested in the Board to relax the time limit prescribed by the Act. There was therefore no occasion to consider the appeal on merits. It is under those circumstances, the jurisdiction of this Court is invoked under Article 226 of the Constitution of India seeking the quashing of the impugned order dated 5th July, 1973.

9. Shri Ramachandra Reddi, the learned Advocate General appearing for the petitioner, contended that the impugned order is passed without jurisdiction as the proceedings by way of issuance of show cause notice to the petitioner were initiated subsequent to the expiration of the period fixed under Sub-section (2) of Section 40 of the Central Excises and Salt Act, 1944 referred to hereinafter merely as "the Act". According to the learned counsel, the point raised in this case is practically covered by a Division Bench decision of this Court rendered in W.P. No. 2516 of 1974, D/- 1st April, 1976.

10 Sri Subrahmanya Reddy, the learned standing counsel for the Central Government, contended that that decision requires reconsideration and at any rate it has not become final. The Union of India filed a S.C.L.P. seeking leave of

this Court to appeal to the Supreme Court of India and that petition is pending. Even otherwise, the learned Counsel contended, in view of the alternative remedy available by way of revision, which was not availed of by the petitioner, this writ petition should be dismissed.

11. The point therefore that arises for the determination is whether the levy of penalty pursuant to the show cause notice issued after the expiration of six months from the accrual of cause of action is not void under Sub-section (2) Of Section 40 of the Central Excises and Salt Act, 1944.

12. As the controversy centres around the interpretation of Sub-section (2) of Section 40 of the Act, we shall read the same.

"40. Bar of suits and limitation of suits and other legal proceedings :

(1)

* * * * (2) No suit, prosecution or other legal proceeding shall be instituted or anything done or ordered to be done under this Act after the expiration of six months from the accrual of the cause of action or from the date of the act or order complained of."

13. In the present case the stock-taking took place from 3rd Dec., 1969 to 23rd Dec., 1969 and the cause of action for taking any proceedings against the petitioner arose on those dates. The show cause notice was issued to the petitioner long after the expiration of the six months period from the date of accrual of cause" of action, i.e., on 29th June, 1972. Therefore factually the issuance of show cause notice took place subsequent to the expiration of six months period from the date of the accrual of the cause of action within the meaning of that expression as occurring in Section 40(2). As per Sub-section (2) of Section 40 of the Act no legal proceeding shall be instituted for anything done or ordered to be done under the Act after the expiration of six months from the accrual of the cause of action or from the date of the act or order complained of. What is manifesto from a reading of the aforesaid law is that the assumption of jurisdiction by the statutorily constituted authorities is predicted on the assumption that there must have been in existence a proceeding including the one in the nature of issuance of show cause notice initiated within six months after the accrual of the cause of action.

14. As has been argued, the cause of action in this cause must be taken to have arisen between 3rd Dec.. 1969 to 23rd Dec., 1969. when the inspection of the Central Excise Department of the petitioner's stocks took place and the act complained of must have taken place long prior to that date. Therefore, the issuance of notice dated 29th June, 1972 is clearly beyond the period of six months contemplated by Section 40(2) of the Act. There is no difficulty in coming to the conclusion that the levy of penalty on the basis of illegal proceeding if any instituted after the expiration of six months from the accrual of cause of action or from the date of the act complained of is clearly without jurisdiction.

15. I am supported in this view of mine by a Division Bench decision of this Court in W.P. No-2516 of 1974 dated 1st April, 1976. In that case the petitioner was having Tobacco Business The preventive and Intelligence Inspector visited the premises of the petitioner on 30th and 31st Jan., 1970 and detected certain irregularities. On 17-9-1971 the Superintendent of Central Excise, Warangal Circle, issued a show cause notice to the petitioner, to which a reply was submitted by the petitioner. Ultimately the Superintendent of Central Excise, by his order dated 19-10-1971, levied and demanded a penalty of Rs. 100/-. After having exhausted all the remedies available to the petitioner invoked the jurisdiction of the High Court under Article 226 of the Constitution by filing a writ petition. The contention raised there was issued on 17th Sept., 1971 long after the period of limitation prescribed in Section 40(2) of the Central Excises and Salt Act, 1944 and as such the order levying the duty is illegal. Referring to the decision of the Supreme Court in Public Prosecutor, Madras v. R. Raju [1978 E.L.T. (410)], the Division Bench held this :

"So, in the instant case, show cause notice was issued beyond the period of six months, and in our view, the judgment of the Supreme Court applies on all fours to the facts of the case and the impugned order has to be quashed."

16. The contention raised by the Government that the expression "legal proceeding" occurring in Section 40(2) of the Act is referable only to a proceeding in a Court and not to the action of a department in levying Excise Duty was also repelled by the Division Bench in that case.

17. Following that decision, the impugned order, shall have to be set aside as void. Nevertheless, Sri Subrahmanya Reddy contended for the position that as the petitioner has an alternative remedy under Article 226(3), this Court should not interfere with the impugned order.

18. I have already held that the impugned order is bad because it is not in conformity with Sub-section (2) of Section 40 of the Act. The infirmity the impugned order suffers from is a jurisdictional one, in the sense that any order passed by the statutorily constituted authorities on the basis of a proceeding initiated subsequent to the expiration of six months" period from the date of the accrual of the cause of action suffers from want of jurisdiction. The authorities concerned are not competent to take any action by way of levying penalty on the basis of the show cause notice not issued within six months from the date of arising of the cause of action. In that case the question that arises for determination is whether the bar contemplated by Article 226(3) should be held applicable to the facts of the case preventing the petitioner from getting the relief to which he is otherwise entitled as per the decision of the Supreme Court mentioned by the Division Bench as well as the Division Bench decision referred to above.

19. A Full Bench of this Court ruled in Government of India v. National Tobacco Company Limited (1977) 1 APLJ 224 . Pra. explaining the implication of Sub-

article (3) of Article 226 thus :

"To refuse to entertain a writ petition on this ground would be opposed to the very spirit of the present Article 226 in general and Sub-clause (b) and (c) of Clause (1) and Clause (3) in particular. The words "any other remedy for such redress" are significant and meaningful and they clearly bring out the intention of the Parliament that only that other remedy which is truly and really capable of giving such redress as is postulated in sub-cls. (b) and (c) would be a bar to the maintainability of the writ petition. Needless to say that in order to find out whether there is such a bar to the entertainment of a writ petition, the Court will have to examine the facts and circumstances of each case and the redressal that is sought and the nature of the other remedy that may be available under any other law for the time being in force. It is impossible and undesirable to lay hard and fast rules in this behalf."

20. What is therefore manifest from the Full Bench decision is that it is not an inflexible rule of law that whenever there is any other alternative remedy made available, this Court should refuse to entertain writ application. Each case depends upon the facts and circumstances of that particular case. As we have already seen, the order that is now impugned, was held to be one passed without jurisdiction. That conclusion was supported by a Division Bench decision of this Court rendered in W.P. No. 2516/74, dated 1st April, 1976. The Division Bench relied upon the Supreme Court decision. When the matter is thus found to have been concluded both by the decision of the Supreme Court and by the decision of the Division Bench of this Court, no useful purpose is likely to be served by driving the petitioner to avail himself of the alternative remedy by way of revision, especially when it is held that the impugned order suffers from an inherent want of jurisdiction, and as such it is found to be void. I, therefore, consider that this writ petition is entertainable for the reason that the impugned order was void ab initio.

21. Yet another contention raised by Sri Subrahramanya Reddy was that the petitioner took up the matter in appeal and the appeal was rejected for whatever reason it be. Therefore, the order impugned must be taken to have merged in the appellate order that is sought to be impugned in this writ petition and therefore no relief can be granted to the petitioner. For attracting the doctrine of merger the order that can be said to have been merged in the appellate order must be shown to be either valid or at any rate avoidable order. The doctrine of merger has no application to orders which are void ab initio. The Supreme Court in *Baradakanta Mishra Vs. High Court of Orissa and Another*, speaking through Chief Justice A.N. Ray observed in para. 25 of the Judgment at page 1904 thus :

"The two orders of dismissal dated 3rd Dec., 1973 are based on the order of 8th December, 1972. The substratum of the orders of dismissal being unconstitutional the orders of dismissal cannot have any legal force-Further, the contention of the High Court that the orders of dismissal passed by the High Court merged in the orders passed by the Governor cannot be accepted. If the

order of the initial authority is void an order of the appellate authority cannot make it valid. The order of the Governor used the Word "confirm" The appellant filed appeals to the Government. The appeals were dismissed. The confirmation by the Governor cannot have any legal effect because that which is valid can be confirmed and not that which is void."

22. Judged by the criteria came to be laid down by the Supreme Court, there is no question of merger of the order passed by the original authority which is void. Therefore the doctrine of merger does not apply to a case where the order passed by the original authority is inherently void for want of jurisdiction. It is not out of place to refer in this connection to a decision rendered by the Supreme Court in the case of U.P. State v. Mohd. Nooh (AIR 1958 SC 86) where their Lordships of the Supreme Court held in para. 1 of the judgment thus:

"On the authorities referred to above it appears to us that there may conceivably be cases-and the instant case is in point-where the error, irregularity or illegality touching jurisdiction or procedure committed by an inferior court or tribunal of first instance is so patent and loudly obtrusive that it leaves on its decision an indelible stamp of infirmity or vice which cannot be obliterated or cured on appeal or revision. If an inferior Court or tribunal of first instance acts wholly without jurisdiction or manifestly conducts the proceedings before it in a manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the superior Court may, we think, quite properly exercise its power to issue the prerogative writ of certiorari to correct the error of the Court or tribunal of first instance, even if an appeal to another inferior Court or tribunal was available and recourse was not had to it or if recourse was had to it, it confirmed what ex facie was a nullity for reasons aforementioned."

I have already come to the conclusion placing reliance upon the decision of the Division Bench of this Court which in its turn relied upon the Supreme Court decision that the impugned order is afflicted with the infirmity of want of jurisdiction and therefore the order is void and bad in law. If such an order is void or bad in law, any procedure by way of taking an appeal and thereafter by revision will not have the effect of affecting its void character. Therefore no useful purpose will be served by driving the petitioner to exhaust the remedies available under the statute with respect to a void order, As the impugned order is afflicted with infirmity or vice, it need not have to be obliterated or cured on appeal or revision. For the aforesaid reasons, I am satisfied that there is no substance in the contention of the learned counsel for the respondent. 23. The learned counsel for the respondent drew my attention to certain decisions of the Supreme Court where the expression "anything done" occurring in various statutes was interpreted. In view of the pronouncement of the Supreme Court in the context of the interpretation of Section 40(2) in Public Prosecutor, Madras v. R. Raju 1978 E.L.T (J. 410) which was relied on by the Division Bench of this Court referred to already and in view of the decision of the Supreme Court in The Trustees of Port of Bombay Vs. The Premier Automobiles Ltd. and Another, where

the case of the Public Prosecutor, Madras v. R. Raju (1978 E.L.T. (410) was approvingly referred. I do not consider it necessary to refer to the decisions cited by the learned counsel decided prior to the aforesaid two decisions of the Supreme Court.

24. For the aforesaid reasons I am satisfied that the order of the Collector, Central Excise, Hyderabad, dated 5-7-1973 imposing the penalty of Rs. 1.00.000/- on the petitioner is liable to be quashed and it is hereby quashed. The writ petition is therefore allowed with costs. Advocate's fee Rs. 250/-.