
(1982) 11 DEL CK 0038

In the Delhi High Court

Case No : Civil Miscellaneous Appeal No. 4020 of 1982 and Civil Writ Appeal No. 2925 of 1982

I.T.C. Limited and Another

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 02-11-1982

Acts Referred:

Citation : (1983) 12 ELT 1 : (1983) ILR Delhi 352

Hon'ble Judges : Prakash Narain, C.J;B.N. Kirpal, J

Bench : Division Bench

Advocate : Ravnder Narain and M.C. Sekharan, for the Appellant;

Judgement

B.N. Kirpal, J.

(1) In the writ petition the challenge is to the levy of excise duty on the outer shell (in which a slide has been inserted) which is being regarded by the Excise Authorities as a container within the meaning of Tariff Item No. 17(4) of the First Schedule to the Central Excises and Salt Act. 1944.

(2) In the petition it was, inter alia, contended that the said levy is being made by the Excise Authorities in pursuance of a directive contained in a letter dated 7th April 1982 issued by the Central Board of Excise and Customs to all the Collectors of Central Excise. In the said letter it was stated that the aforesaid printed shells are in the nature of printed boxes and were classifiable under Triff Item 17(4) and would not be entitled to any exception under Notification No. 66182-CE. At the time of preliminary hearing, it had been contended that in view of the said directive it will be futile for the petitioners to avail of the alternative remedy under the Act as the appellate authorities would be bound by the directive.

(3) On 25th August, 1982 rule nisi was issued and it was directed that the petition be heard by a Division Bench. On that day in C.M. No. 4020 of 1972 interim orders were passed in favor of the petitioners.

(4) Reply affidavit to the stay application has been filed by the respondents. It is contended by the respondents that alternative remedy is available to the petitioners under the Act, and this Court should not exercise its jurisdiction under Article, 226 of the Constitution. It is stated that, with effect from 11th October, 1982 Customs, Excise and Gold (Control) Appellate Tribunal (hereinafter to be referred to as "the Tribunal") has been constituted, and amendments have also been made in Central Excises and Salt Act with effect from 11th October, 1982. According to the respondents, the result of the aforesaid amendments is that two appellate authorities, entirely independent of the Board and of the Central Government, have been set-up. These authorities are Collector (Appeals) and the Appellate Tribunal. According to the respondents the said appellate authorities are in no way bound by the directive issued by the Central Board of Excise and Customs.

(5) The amendments to the Excises and Customs Act were brought about by Finance No. 2 Act of 1982, which were enforced with effect from 11th October, 1982. prior to the amendments appeals could be filed, against the levy of excise duty, to the Appellate Collector and thereafter to the Central Board of Excise and Customs. A further opportunity was granted whereby revision could be filed to the Central Government against the order of the Central Board. Though it was expected that the quasi-judicial authorities would be acting in disregard of any directives which are issued by the Central Board of Excise and Custom. as vertheless, when such directives were issued, some of the aggrieved persons did challenge those directives by filing petitions under Article 226 of the Constitution. Depending upon the facts of each case, Courts used to interfere in appropriate cases, notwithstanding an alternative remedy being open. The reason why the writ Court did not insist on the petitioner availing of the alternative remedy used to be that the appeal ultimately lay to that very authority who had issued the directive. It was, observed that such appeal from "Caesar to Caesar" could not be regarded as an adequate alternative remedy which was available to an aggrieved party.

(6) As a result of the amendment to the Excise Act first appeals can be filed to the Collector (Appeals) within three months from the date of the communication of the impugned order. u/s 35B a further appeal is provided against the order of the Collector (Appeals) to the Appellate Tribunal. According to the learned counsel turn the petitioners, notwithstanding the amendment of the Act, the Collector (Appeals) is still under the administrative control of the Central Board of Excise and Customs. It is admitted that the directive issued by the Central Board on 7th April, 1982 is binding on the Collector (Appeals) and. relying upon a Division Bench Authority of this Court in the case of Poona Bottling Co. Ltd. and another v. Union of India and others 1981 E.L.T. 389. It is submitted that the alternative remedy, if any, is no bar to our. exercising jurisdiction under Article 226.

(7) It is now well settled that the existence of a" alternative remedy is no bar to

the exercise of jurisdiction under Article 226. Nevertheless, as a matter of practice and procedure the Courts do not normally permit aggrieved parties to abandon the normal remedies of appeal etc. under the Act in favor of a petition under Article 226 of the Constitution. If an equally effective and efficacious remedy is available under the Act, then the Court is hesitant in exercising its extra-ordinary jurisdiction of the issuance of a high prerogative writ. There are number of circumstances, however, where notwithstanding the availability of an alternative remedy Courts do exercise their jurisdiction under Article 226 of the Constitution. For example, if an action is taken by threatened to be taken without jurisdiction then it has been held that the existence of an alternative remedy is no bar to the exercise of writ jurisdiction. Similarly, if the Court comes to the conclusion that the alternative remedy provided under the Act is not adequate or cannot inspire confidence, inasmuch as it would amount to an appeal from Caesar to Caesar", then again a writ Court may entertain a petition.

(8) The present petition is sought to be brought under the later exception mentioned hereinabove. It is strasseously urged that before an appeal can be filed the amount of duty or penalty levied has to be first deposited and the right of appeal is, Therefore, in effect curtailed, for if a party does not have enough funds to pay the disputed amount of duty, no appeal can be filed. Furthermore, the Collector (Appeals) is bound to be influenced by the directive which is issued by the Central Board and, Therefore, no lustier can be expected from the Collector (Appeals).

(9) We are unable to agree with the aforesaid submissions. It is true that under the present section 35F, where the appeal relates to any duty which is demanded or penalty levied, then the person desirous of filing an appeal has to deposit the amount of duty demanded or penalty levied. This is the normal rule, but under the proviso to Section 35F, the Collector (Appeals) as well as the Appellate Tribunal have been given the power to dispense with the requirement of the deposit of the duty or the penalty, on such terms and conditions as they deem fit. Therefore, it is not in every case that duty or penalty will have to be deposited before the appeal can be entertained. If the conditions mentioned in the proviso are satisfied then the Collector (Appeals) or the Appellate Tribunal would entertain the appeals, on such terms and conditions as they may deem fit and proper to impose.

(10) It was then submitted that at times excise duty is a recurring liability and there will be no power with the Collector (Appeals) or the Tribunal to grant stay for future liability. In our opinion the power of the Collector (Appeals) and the Tribunal, contained in the proviso to section 35F, is of a wide amplitude. In appropriate cases the said appellate authorities will have the power to issue directions with regard to future levy which may be imposed or threatened. Apart from the proviso to section 35F, the appellate authority has inherent power of granting interim relief in the exercise of its appellate jurisdiction. This has been so recognised and explained by the Supreme Court in the case of M.K.

Mohammad Kunhi Vs. Commissioner of Income Tax, We must make it clear that it does not mean that in every case where appeal is filed the Collector (Appeals) or the Tribunal must, as a matter of course, grant interim relief. The guidelines for the grant of interim relief are contained in the proviso to section 35F, namely, relief will be granted only if there would be undue hardship to the person if he is asked to pay excise duty or penalty. Unless, Therefore, it can be shown by the appellant that undue hardship would be caused if he is required to pay the duty or penalty the appellate authorities would be entitled to refrain from granting any interim relief. What is undue hardship would depend upon the facts of each case. Where a manufacturer has collected excise duty from his customers, or continues to collect the same, it; will be extremely difficult for that person to plead hardship entitling him to the grant of interim orders.

(11) The respondents, in their affidavit", have stated that as a result of the amendment the Collectors (Appeals) do not have to discharge any executive duties or functions. In our opinion as a result of the amendment now made in the law the Collector (Appeals) cannot be regarded as being bound by any directive which may have been issued by the Central Board of Excise and Customs. The Collector (Appeals) is not expected to act according to the said directives. If he does so, it will be highly improper and his order may be questionable on that ground alone. The procedure and appeal before the Collector (Appeals) is laid down in Section 35A. There is no reason to presume that the Collector (Appeals) will not follow the said procedure. In *Orient Paper Mills Ltd. Vs. Union of India (UOI)*, it has been categorically held by the Supreme Court, even with regard to the position which entailed prior to the amendment in 1982, that the revisional power u/s 36 of the Act of the Central Government" was; a quasi-judicial power and the power which is exercised by the appellate Collector was also quasi-judicial power. This power is to be exercised independently and in disregard of any directives which are issued by the Central Government. We are sure that the Appellate Authorities under the Act would act independently in discharge of their judicial functions.

(12) Under what circumstances the Court would interfere in exercise of its jurisdiction under Article 226 also came up for consideration before a Division Bench of this Court in the case of *Gee Vee Enterprises v. Additional Commissioner of Income Tax, Delhi* 1. 99 T.T.R. 375*. The Court, inter alia, observed as under :

" THE rule established by the consistent decisions of the Supreme Court is that ordinarily a party aggrieved by the order of the statutory authority under the Income Tax Act (which principle also applies to the orders under other Acts) must avail himself of the hierarchy of statutory remedies under the said Act "such as an appeal or a revision or a reference to this Court through the Income Tax Appellant Tribunal. This vertical judicial review given to him by the statute is a matter or right of the assessed. If he wishes to abandon this right and seek a collateral review of an impugned order in this court under article 226-227, he

must make out a strong case why this court should entertain his writ petition and make an exception to the general rule."

The court also referred to various decisions cited before it and found that some of the grounds on which the jurisdiction under Article 226 has been exercised by various High Courts, were as follows :

"(1)that the impugned order was passed without jurisdiction; (.2) that it violated rules of natural justice; (3) that it disclosed an error of law apparent on the face of the record: (4) that it was based on extraneous or mala fide considerations; (5) that the statutory remedy was not adequate or was onerous; (6) that resort to the statutory remedy would -anse irreparable injury to the petitioner; (7) that the impugned order infringes on a fundamental right of the party; (8) that the provision of law under which the order was passed is itself unconstitutional."

(13) We hasten to add, that it is not in every case where any of the aforesaid grounds exist, that the Court would be bound to interfere under Article 226 of the Constitution. Even if one or more of the aforesaid grounds exist, the Court would still have to decide, on the facts of each case, whether to interfere or not. The discretion of the Court has to be exercised judiciously and not mechanically.

(14) In the present case we find that if the petitioner is asked to resort to the alternative remedy now open to it, it would cause irreparable injury to it. The reason is simple. By reason of the Central Board having issued a directive, and in view of the ratio of the decision of the Division Bench of this Court in Poona Bottling Co.'s case (supra), the petitioner rightly came to the conclusion that alternative remedy would be no bar to the writ petition being entertained. In view of the reasoning contained in the said Division Bench authority, the petitioner filed the present writ petition. We are informed at the Bar that the petitioner chose not to file any appeal under the Act against the impugned orders of levy of duty. The law has been amended with effect from 11th October, 1982, long after the period within which the appeal could be filed had expired. If we were now to dismiss the writ petition on the ground that alternative remedy is open to the petitioner then, we find, that in effect the petitioner has no adequate alternative remedy because its appeal has become time barred. To relegate the petitioner to the alternative remedy, at this stage, would, Therefore, cause it irreparable injury. It would be proper, Therefore, in such cases where a writ petition had already been filed prior to 11th October, 1982 to continue to hear them so that no such injustice is caused to the petitioners. Where, however, the period of limitation for filing an appeal had not expired or where appeals are pending before the Collector (Appeals) or before the Appellate Tribunal, as a result of fresh institution or on the same having been transferred, then the consideration which has weighed with us in the present case may not arise.

(15) For the aforesaid reasons we arc of the opinion that the interim orders should be confirmed. We order accordingly.