
(1960) 09 MP CK 0030

In the Madhya Pradesh High Court

Case No : Letters Patent Appeal No. 95 of 1958

J. Harimal Oil Mills

APPELLANT

Vs

Assistant Collector, Central Excise and Another

RESPONDENT

Date of Decision : 07-09-1960

Acts Referred:

Central Excise Rules, 1944 — Rule 9(2)
Central Excises and Salt Act, 1944 — Section 35(1), 36
Constitution of India, 1950 — Article 226

Citation : AIR 1961 MP 148 : (1960) ILR (MP) 805 : (1961) 6 MPLJ 195

Hon'ble Judges : P.V. Dixit, C.J.; N.M. Golvalkar, J

Bench : Division Bench

Advocate : R.S. Dabir, for the Appellant; H.L. Khaskalam, A.G.A., for the Respondent

Final Decision : Allowed

Judgement

Dixit, C.J.

This is a Letters Patent appeal from an order, of Naik J. dismissing an application filed by the appellant under Articles 226 and 227 of the Constitution of India challenging the validity of a demand made on him under Rule 9(2) of the Central Excise Rules for payment of Rs. 1437/15/- as excise duty on about 20 tins of vegetable non-essential oils said to have been cleared by the appellant in the month of March 1956.

The excise duty was imposed on 2-5-1956 by the Inspector, Central Excise, in charge of Oil Mills at Raipur under the Central Excise and Salt Act, 1944, and the Rules made thereunder. It seems that after the levy of the duty when the appellant protested against it he was advised by the Assistant Collector, Central Excise, Jabalpur, to pay up the amount and appeal to the Collector, Central Excise, Nagpur.

Thereafter when the appellant preferred an appeal he was again asked to pay the

amount of the duty and informed that his appeal would be considered only after the payment of the amount. The appellant says that he made a "representation" to the Central Government against the imposition of the duty. On this representation the Government of India in the Ministry of Finance passed the following order on 31st October 1957:

"The Government of India have carefully considered all the points made by the applicant, but they regret that they do not see any justification for interfering with the Order in appeal. The revision application is, therefore, rejected".

The appellant then moved this Court under Articles 226 and 227 of the Constitution. The learned Single Judge held that in view of the Full Bench decision of this Court in *Surajmal Arjundas Vaidya Vs. State of Madhya Pradesh and Others*, the petition was not tenable as the appellant had approached the Central Government and the order of the Inspector, Central Excise, and of the Collector in appeal had merged in the order of the Central Government; that the Central Government in this matter was outside the jurisdiction of this Court; and that as the original order could not be set aside without setting aside the order of the Central Government which was outside the jurisdiction of this Court, the petition could not be entertained by this Court.

Shri Dabir, learned counsel for the appellant, conceded that if the order of the Central Government passed on 31-10-1957 were to be regarded as a final order in which the order of the Inspector, Central Excise, and of the Collector in appeal were merged, then no doubt according to the decision in *Surajmal Arjundas Vaidya Vs. State of Madhya Pradesh and Others*, the petition was not tenable. He, however, argued that the later decisions of the Supreme Court in *U. P. State v. Mohammad Nooh* AIR 1958 SC 86 and *Sita Ram Goel Vs. The Municipal Board, Kanpur and Others*, made it clear that the analogy of the decree of the trial Court merging into the decree of the appeal Court did not apply to orders passed by administrative tribunals exercising quasi-judicial Functions and that the original order in such proceedings would remain operative on its own strength even if an appeal or a revision against the order had been dismissed. Learned counsel urged that the authority of the decision in *Surajmal Arjundas Vaidya Vs. State of Madhya Pradesh and Others*, was considerably weakened by the two decisions of the Supreme Court mentioned earlier.

In our judgment this appeal must be allowed. In *Surajmal Arjundas Vaidya Vs. State of Madhya Pradesh and Others*, after a review of several decisions the Full Bench summarized its conclusion thus:

"To begin with, if an authority sought to be bound is permanently located or normally carries on its activities elsewhere, the High Court cannot possess Jurisdiction over it even though the parties to the case reside and the cause of action arises within the High Court's jurisdiction: *Election Commission, India Vs. Saka Venkata Subba Rao and, .* On the contrary, if the cause of action arises elsewhere and the parties also reside outside the jurisdiction of the High Court,

jurisdiction to bind the authority would be existing if the authority is permanently located or normally carrying on its activities within the jurisdiction of the High Court: *Rashid Ahmed v. Income Tax Investigation Commission* ILR (1951) P&h 165: (AIR 1951 P&h 73). The tribunal may not be existing; it may have finished its work and may have become *functus officio*; even then, if the record is legally within the custody of someone within the jurisdiction of the High Court, the record can be called up and *certiorari* can issue against the record: *Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others*, : ((S) *Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others*, . If an authority employs an agent within the jurisdiction of the High Court and the agent acts independently under law, though under the general supervision of the outside authority, the action of the agent can be interfered with by the High Court if it is opposed to fundamental rights or is contrary to law or the course of natural justice: *A. Thangal Kunju Musaliar Vs. M. Venkitachalam Potti and Another*, ((S) *A. Thangal Kunju Musaliar Vs. M. Venkitachalam Potti and Another*,). If a special tribunal situated outside the jurisdiction of the State deals with an order of an inferior tribunal within the jurisdiction of the State and the order of the inferior tribunal can be said to merge in that of the superior tribunal the High Court cannot of necessity deal with the order of the inferior tribunal, if it cannot deal with the order of the Superior tribunal: (Observations in *A. Thangal Kunju Musaliar Vs. M. Venkitachalam Potti and Another*, : ((S) *A. Thangal Kunju Musaliar Vs. M. Venkitachalam Potti and Another*, ").

Here it cannot be disputed that the Inspector, Central Excise, performs the various functions assigned to him under the Act and the Rules and imposes the excise duty on his own initiative and in exercise of his judgment. He may be under the control of the Central Government but he is not merely a mouthpiece or a conduit pipe transmitting the orders of the Central Government in the matter of levy of duty under the Act.

The action of the Inspector, Central Excise, Raipur, who functions within the jurisdiction of this Court can, therefore, be as laid down in *A. Thangal Kunju Musaliar Vs. M. Venkitachalam Potti and Another*, ((S) *A. Thangal Kunju Musaliar Vs. M. Venkitachalam Potti and Another*,) and *Surajmal Arjundas Vaidya Vs. State of Madhya Pradesh and Others*, , interfered with by the High Court if it is opposed to fundamental rights or is contrary to law or the course of natural justice. An order of the Inspector under the Act or the Rules made thereunder is appealable u/s 35(1) of the Act.

The appellate Authority is also located within the jurisdiction of this Court and being thus amenable to the jurisdiction of this Court its decisions can be examined by the High Court under Articles 226 and 227. Now Sub-section (2) of Section 35 provides that every order passed in appeal shall, subject to the power of revision conferred by Section 36, be final. Section 36 is as follows:

"The Central Government may on the application of any person aggrieved by any decision or order passed under this Act or the rules made thereunder by any

Central Excise officer or by the Central Board of Revenue, and from which no appeal lies, reverse or modify such decision or order".

In the present case the appellant did move the Central Government u/s 36. He says that he made a representation to the Central Government but the representation was actually treated as a revision by the Central Government and rejected as such. The question, therefore, arises whether the order of the Central Government rejecting the representation even if treated as a revision petition, is a final order under the Act in which the orders of the Inspector, Central Excise and of the appellate authority merged.

If the orders can be said to have merged in the order of the Central Government, then there can be no doubt, as observed by the Supreme Court in *A. Thangal Kunju Musaliar Vs. M. Venkitachalam Potti and Another*, ((S) *A. Thangal Kunju Musaliar Vs. M. Venkitachalam Potti and Another*,) (supra) and by this Court in *Surajmal's Case* AIR 1958 Madh Pra 103 (supra), that the High Court cannot deal with the Order of the Central Government situated outside the jurisdiction of the State and cannot, therefore, consequently deal with the order of the Inspector or of the appellate authority.

The short question, therefore, for consideration is whether there is any merger of the orders of the Inspector and of the appellate authority in the order dated 31-10-1957 of the Central Government. In *A. Thangal Kunju Musaliar Vs. M. Venkitachalam Potti and Another*, : ((S) *A. Thangal Kunju Musaliar Vs. M. Venkitachalam Potti and Another*,) (supra) no question of merger of an order of an inferior authority merging in the order of a superior authority arose. The decisions in AIR 1958 SC 86 (supra) and *Sita Ram Goel Vs. The Municipal Board, Kanpur and Others*, throw light directly on the question whether an order of an inferior authority functioning under an Act can be said to merge in the order of an administrative tribunal exercising quasi-judicial functions passed in an appeal or a revision. In AIR 1958 SC 86 the question arose with reference to an order dismissing a head constable and the orders passed by higher authorities in appeal and in revision against the order of dismissal. Dealing with this question the Supreme Court said:

"...an order of dismissal passed on a departmental enquiry by an officer in the department and an order passed by another officer next higher in rank dismissing an appeal therefrom and an order rejecting an application for revision by the head of the department can hardly be equated with any propriety with decrees made in a Civil Suit under the CPC by the Court of first instance and the decree dismissing the appeal therefrom by an appeal Court and the order dismissing the revision petition by a yet higher court, as has been sought to be done by the High Court in this case, because the departmental tribunals of the first instance or on appeal or revision are not regular courts manned by persons trained in law although they may have the trappings of the courts of law. The danger of so doing is evident from what has happened in the very case now before us. In the next place while it is true that a decree of a court of first

instance may be said to merge in the decree passed on appeal therefrom or even in the order passed in revision, it does so only for certain purposes namely, for the purposes of computing the period of limitation for execution of the decree as in *Batuk Nath v. Munni Dei* 41 IA 104: (AIR 1914 PC 65) or for computing the period of limitation for an application for final decree in a mortgage suit as in *Jowad Hussain v. Gendan Singh* 53 Ind App 197: (AIR 1926 PC 93). But as pointed out by Sir Lawrence Jenkins in delivering the judgment of the Privy Council in *Juscurn Boid v. Pirthichand Lal* 46 Ind App 52: (ILR Cal 670: AIR 1918 PC 151) whatever be the theory under other systems of law, under the Indian Law and procedure an original decree is not suspended by the presentation of an appeal nor is its operation interrupted where the decree on appeal is merely one of dismissal. There is nothing in the Indian Law to warrant the suggestion that the decree or order of the Court or tribunal of the first instance becomes final only on the termination of all proceedings by way of appeal or revision. The filing of the appeal or revision may put the decree or order in jeopardy but until it is reversed or modified it remains effective".

This principle was reaffirmed in *Sita Ram Goel Vs. The Municipal Board, Kanpur and Others*, where the legality of an order of the Municipal Board, Kanpur, dismissing an overseer was challenged. These authoritative pronouncements of the Supreme Court furnish a conclusive answer to the question whether the order of the Inspector, Central Excise, and of the appellate authority merged in the order of the Central Government passed on 31-10-1957.

The Supreme Court's decisions make it clear that the analogy of a trial Court's decree merging in the decree of the appellate Court cannot be extended to departmental appeals and that even if the analogy were to be applied and the order of the higher authority in appeal or revision affirmed the order of the interior authority, the original order would remain operative and would not gain any greater efficacy from the subsequent orders passed in appeal or revision except for the purpose of computing the period of limitation in certain cases.

Now it cannot be denied that the order passed by the Inspector, Central Excise, levying excise duty on the appellant is an administrative or executive order and the order passed by the appellate authority and the revisional authority are orders of administrative authorities exercising at the most quasi-judicial functions. The theory of merger of orders cannot, therefore, be applied to these orders and even if it were to be applied, they would not in any way affect the operation of the order of the original authority even if affirmed in appeal or revision.

It must be noted that under Sub-section (2) of Section 35 the order that is made final is of the original authority or of the appellate authority where there is an appeal. It is the order of the appellate authority which is final subject, of course, to the power of revision conferred by Section 36, u/s 36 the Central Government can in the exercise of its revisional powers reverse or modify the decision where a revision petition has been preferred. Section 36 does not give to the Central

Government the authority to confirm or affirm the order sought to be revised.

When, therefore, the Central Government sees no reason to reverse or modify any order of the appellate or of the original authority and rejects the revision petition, it cannot be contended with any degree of force that there is any merger of the order sought to be revised in the order rejecting the revision petition. The effect of the rejection of a revision petition is merely this, namely, that the Central Government declines to exercise the power conferred on it by Section 36 and allows the order of the appellate or the original authority to stand. Thus the order sought to be revised remains operative notwithstanding the rejection of the revision petition.

In our opinion the matter is really concluded by the decisions of the Supreme Court in AIR 1958 SC 86 (supra) and *Sita Ram Goel Vs. The Municipal Board, Kanpur and Others*, and in the present case it must be held that despite the rejection of the appellant's "representation" by the Government of India on 31-10-1957 the order of the Inspector, Central Excise, and of the appellate authority remained operative and that as these authorities are located within the jurisdiction of this Court, the petition filed by the appellant under Articles 226 and 227 of the Constitution can be entertained by this Court.

The decision of the Supreme Court in AIR 1958 SC 86 (supra) was applied by this Court in *Masalkhan v. Custodian of Evacuee Property* AIR 1959 M P 256 and it was held that an order passed by the Custodian General u/s 28 of the Administration of Evacuee Property Act in the exercise of his revisional powers was no bar to the entertainment of a petition by the High Court under Article 226 directed against inferior authorities functioning under the Act.

The Calcutta High Court also following the Supreme Court's decision in AIR 1958 SC 86 (supra) held in *East India Commercial Ltd. Vs. Collector of Customs and Another*, that it had jurisdiction to issue a writ to the Collector of Customs in respect of an order made by him even if that order had been appealed against to the Central Board of Revenue and the appeal had been dismissed. In *Kamtaprasad Nathoo-lal v. G. P. Bhatnagar*. Misc. Petn. No. 169 of 1958 D/-16-7-1959 an order of the Inspector, Central Excise, imposing duty on tobacco was varied in revision by the Central Government by reducing the amount of duty payable by the petitioner in that Case.

It was because of this variation in the order of the Inspector that it was held that the final order was of the Central Government which was outside the jurisdiction of this Court and, therefore, the petition under Article 226 of the Constitution against the order of the Central Government could not be filed in this Court. The position here is different in that the Central Government declined to interfere u/s 36 with the order of the Inspector, Central Excise, and the appellate authority.

It seems to us unnecessary to make a reference to a *larirer* Bench For a reconsideration of the decision in *Surajmal's* case AIR 1958 M P 103 (supra). The principles summarized in paragraph 31 of the judgment of the Court in that

case do not in any way run counter to the observations of the Supreme Court in AIR 1958 SC 86 (supra) about the merger of orders. The question whether in any particular case the order of the original authority has or has not merged in the order passed by the higher authority in appeal or in revision has to be decided with reference to the relevant provisions of the material Act and hearing in mind the observations of the Supreme Court in AIR 1958 SC 86 (supra).

In *Surajmal Arjundas Vaidya Vs. State of Madhya Pradesh and Others*, the question of merger was considered with reference to orders under the Mineral Concession Rules and it was held that under Rule 60 of the Rules the order of the State Government in that case merged in that of the Central Government. The question whether that conclusion can now be said to be right in view of the later pronouncements of the Supreme Court in AIR 1958 SC 86 (supra) and *Sita Ram Goel Vs. The Municipal Board, Kanpur and Others*, can properly be considered in a case dealing with orders under the Mineral Concession Rules.

For these reasons this appeal is allowed and the order of the learned Single Judge is set aside with a direction that the appellant's petition under Articles 226 and 227 of the Constitution shall now be disposed of by the appropriate Bench on merits. Parties shall bear their own costs of this appeal. The outstanding amount of the security deposit shall be refunded to the appellant.