

(1995) 04 OHC CK 0040
In the Orissa High Court
Case No : Writ Petition No. 4348 of 1992

Kalinga Cement Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 04-04-1995

Acts Referred:

Central Excise Rules, 1944 — Rule 9(2)
Central Excises and Salt Act, 1944 — Section 11A(1), 2
Constitution of India, 1950 — Article 226

Citation : (1995) 52 ECC 10 : (1995) 79 ELT 5

Hon'ble Judges : G.B. Patnaik, J;D.M. Patnaik, J

Bench : Division Bench

Advocate : G. Rath and B.R. Sarangi, for the Appellant; A.B. Misra, Senior Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

G.B. Patnaik, J.—The order of the Additional Collector, Central Excise and Customs dated 31-3-1992 annexed as Annexure-1 levying duty on 16,143.138 MX of Limestone on a finding that the said limestones was crushed and made to small pieces and was thereafter used in the manufacture of cement and as such dutiable under Heading 25.05 of the Central Excise Tariff Act, 1985, is being impugned in this writ application essentially on the ground that the order in question has been passed on an obvious error of record which has vitiated the ultimate conclusion and as such is not sustainable in law.

2. During the period 20-3-1990 to 16-9-1990 admittedly duty is leviable on manufacture of limestone in terms of Section 2(f) of the Central Excises & Salt Act, 1944 read with Note 2 of Chapter 25 of the Central Excise Tariff Act. The competent authority issued notice to petitioner No. 1 - company alleging that the petitioner has manufactured limestone during the aforesaid period without obtaining Central Excise Licence and utilised the same in contravention of the provisions of the Central Excise Rules, 1944, and evaded payment of Central

Excise Duty and therefore, Central Excise Duty is recoverable under Rule 9(2) of the Central Excise Rules read with proviso to Section 11A(1) of the Central Excises and Salt Act. The petitioner filed its show cause stating therein that it has received Limestone from Mines after being crushed into small shapeless masses inside the mines which small pieces have been mixed with other inputs like Silica, Alumina and Iron Oxide for converting the same into Cement Clinker. It was also categorically averred in the show cause that limestone is neither crushed or manufactured by the petitioner inside the factory premises and consequently no manufacturing process is involved within the meaning of Section 2(f) of the Act and there has been no violation of the provisions of the Act as alleged. The Learned Additional Collector by the impugned order came to the conclusion that there has been crushing of limestone in the factory premises which amounts to manufacture in terms of Section 2(f) of the Act and this conclusion is based on the ground that M/s. Kalinga Cement Limited did not deny the allegation that limestone has been crushed in their factory. The petitioner therefore assails the conclusion of the learned Additional Collector on the ground that he has never applied his mind to the positive case of the petitioner which has been narrated by himself while narrating the facts and such non-application of mind vitiates the ultimate conclusion.

Mr. Rath appearing for the petitioners reiterates the stand taken in that writ application and contends that the conclusion of the Customs Authority being based upon an obvious error of record and total non-application of mind to the contentions raised by the petitioner in its show cause, the said conclusion cannot be sustained in law. He also contends that even though the order is appealable but since the authority has committed a patent error which does not require any elaborate argument to be found out, it will be meet and proper for this court to interfere with the same.

3. On behalf of the opposite parties a counter affidavit has been filed stating therein that against the said adjudication order, an appeal being maintainable this court should not interfere with the same in exercise of its extraordinary jurisdiction. The further stand taken is that in view of the definition of the expression "Manufacture" in Section 2(f) of the Central Excises and Salt Act and since cement clinker is produced by crushing the limestone the adjudicating authority rightly came to the conclusion that Central Excise Duty is leviable, as a process of manufacture is involved and therefore, the order does not constitute any error apparent on the face of it. Learned Senior Standing Counsel in course of his argument also vehemently reiterated the stand taken in the counter Affidavit.

4. In view of the rival stands of the parties two questions really arise for our consideration :-

(i) whether the impugned order contains any error of law apparent on the face of it which can be corrected by a writ of certiorari, and

(ii) whether in view of availability of an alternate remedy by way of appeal, this court would exercise jurisdiction under Article 226 of the Constitution and correct the error.

5. So far as the first question is concerned, it is the settled position or law that the conclusion of the inferior tribunal can be interfered with by the High Court in a writ of certiorari only when the High Court comes to the conclusion that there has been an error of jurisdiction or error of law apparent on the face of the order. An error of jurisdiction can be said to have been committed when the Tribunal exercises jurisdiction not vested in it or exceeds the jurisdiction vested in it. An error of law apparent on the face of the order can be said to be committed when the conclusion of the Tribunal is based upon consideration of inadmissible evidence or the Tribunal fails to admit admissible evidence or the finding on a question cannot be said to be the Finding of a reasonable man on the materials on record or the finding is based upon no evidence. Similarly, if the Tribunal bases its conclusion on an obvious error of record with regard to a plea whether taken or not taken by the aggrieved party, then also it would be a case of patent error on the face of the order. Further, if a Tribunal records a conclusion which on the face of it appears to the High Court to be the product of total non-application of mind, then also it can be said to be a case of patent error on the face of the order and can be interfered with by the High Court while exercising writ jurisdiction. It is also crystal clear that the jurisdiction of the High Court is a supervisory one and not an appellate one and, therefore, it is not permissible for the High Court to re-appreciate evidence on record to find out any error in the order impugned.

Bearing in mind the aforesaid principle and on examining the impugned order of the Additional Collector we have no difficulty in coming to the conclusion that the finding of the Additional Collector being based upon an obvious error of record and the said error being the basis of his conclusion, it constitutes an error of law apparent on the face of the order and as such can be corrected by a writ of certiorari. Notwithstanding the fact that the petitioner took the positive plea in its reply to the effect that no limestone is crushed in its factory and, on the other hand, it is brought to the factory after being crushed in the mines, the Additional Collector assumed that there has been no denial to the allegation that limestone has been crushed in the factory and on that basis he recorded the finding that crushing of limestone tantamounts to manufacture u/s 2(f) of the Central Excises and Salt Act and, therefore the same dutiable. The aforesaid basic error of record goes to the very root of the matter and the ultimate conclusion being based upon such error of record, the said conclusion must be held to be unsustainable in law which should be corrected by issuing a writ of certiorari by this Court. Further, the positive assertion of the petitioner not having been taken into account while recording the conclusion clearly indicates that non-application of mind by the adjudicating authority and an order which is the outcome of non-application of mind cannot be sustained in law. In the aforesaid premises, the conclusion of the Additional Collector that the petitioner has crushed limestone in its factory and

thereby incurred the liability of payment of Central Excise Duty cannot be sustained and is accordingly quashed.

6. Coming to the second question on which the learned Senior Standing Counsel for the Union of India laid great emphasis, we have no dispute with the proposition that ordinarily the High Court would not interfere with an order of an inferior Tribunal where an appeal lies under the statute. But the rule requiring exhaustion of statutory remedies before grant of writ of certiorari is a rule of policy, convenience and discretion rather than a rule of law. As has been laid down by the Supreme Court in a catena of cases that an alternative remedy is not an absolute bar to the maintainability, of a Writ Petition and when an authority acts without jurisdiction, the High Court should not refuse to exercise its jurisdiction under Article 226 of the Constitution on the ground of existence of an alternative remedy. [See Dr (Smt.) Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and Others,]. As is often said, the rule of exhaustion of statutory remedy before a Writ could be granted is a rule of self-imposed limitation rather than an embargo on the power of the Court for exercising jurisdiction and as early as in 1958, in the case of State of U.P. v. Mohammad Nooh AIR 1958 SC 86, their Lordships of the Supreme Court have laid down that the rule that the High Court will not interfere when there is an adequate, alternative remedy is only a rule of discretion and expediency and not one of jurisdiction or limitation of the power of the High Court. The adjudicating authority passed the order in 1992 and the writ application was filed in July, 1992 and has been pending in this Court for more than two years. In view of the patent error, as discussed earlier, the order cannot be sustained. In these circumstances, it would neither be in the interest of the revenue nor it is equitable to refuse the relief on the ground of availability of an alternative remedy. In the facts and circumstances of the present case, in our considered opinion, the argument of the learned Senior Standing Counsel for the Union Government that supervisory jurisdiction of this court should not be invoked on account of existence of an alternative remedy of appeal under the statute, therefore, cannot be accepted.

7. In the premises, aforesaid, the impugned order of the adjudicating authority under Annexure-I is quashed and the matter is remitted back to the Additional Collector of Central Excise for re-determination after giving an opportunity of hearing to the petitioner on the existing materials on record. The writ application is allowed. The petitioners through their counsel are directed to appear before the Additional Collector on 24th of May, 1995, who shall thereafter proceed with the matter in accordance with law bearing in mind the observations made by us in this judgment.

There will be no order as to costs.

D.M. Patnaik, J.

I agree.