

(1990) 09 MAD CK 0092

In the Madras High Court

Case No : Writ Appeal No's. 43 and 44 of 1987

Lakshmi Packaging Pvt. Ltd.

APPELLANT

Vs

Asstt. C.C.E., Salem Division

RESPONDENT

Date of Decision : 12-09-1990

Acts Referred:

Citation : (1997) 91 ELT 557

Hon'ble Judges : Raju, J;A.S. Anand, J

Bench : Division Bench

Advocate : Shri Sriram Panchu, for the Appellant; Shri K. Jayachandran, A.C.G.S.C., for the Respondent

Judgement

Raju, J.—The above writ appeals have been filed against the common order of the learned Single Judge dated 4-8-1986 passed in W.P. Nos. 49 and 50 of 1981 dismissing the writ petitions filed by the appellants. The appellants, before us have filed W.P. No. 49 of 1981 for a writ of prohibition, prohibiting the respondents from acting in any manner in pursuance of the Show Cause Notice OC No. 2454/80, dated 9-12-1980 issued by the second respondent, and W.P. No. 50 of 1981 for a writ of prohibition, prohibiting the respondents from acting in any manner in pursuance of the Demand Notice OC No. 2425/80, dated 4-12-1980 issued by the second respondent.

2. The appellants are carrying on business under the name and style of Lakshmi Packaging Private Ltd., at Salem. In the affidavit filed in support of the writ petitions before this Court, the appellants averred that the appellants carry on the job work of printing on base papers, as per customers' specifications and such printed materials are used by their customers for purposes of packing. The appellants also averred that they either buy the required duty paid base papers required for such printing purposes or the same has been supplied to them by their customers. It is not in dispute before us that the appellants were originally clearing the printed materials on payment of excise duty under Tariff Item No. 68 of the 1st Schedule to the Central Excises and Salt Act, 1944, hereinafter

referred to as the "Act". But, in view of the Exemption Notification issued by the Central Government, the appellants moved the first respondent by their letter dated 30-6-1977 contending that their products were exempt under Notification No. 122/75, dated 5-5-1975, since it answers the description "products of printing industry". On the advice of the appellants, the first respondent also obtained refund and consequently from 17-4-1978 they were clearing their products by availing the exemption under Notification No. 122/75, dated 5-5-1975.

3. While matters stood thus, aggrieved against the notices issued by the second respondent dated 4-12-1980 and 9-12-1980 the two writ petitions came to be filed in this Court. It will be necessary at this stage to refer to the impugned notices and their contents and purport. The communication dated 4-12-1980 does not appear to be a demand notice at all, as the appellant wants to claim it to be. In the said notice, the second respondent merely informed the appellant that the printing to cellophane film paper, cork tipping tissue paper, poster paper, polycoated kraft paper, glessine plain paper etc. are not products of printing industry but are classifiable under Tariff Item No. 68 and requested the appellant to clear the same on payment of excise duty of 8% ad valorem. This by no stretch of imagination can be characterised as a demand. A demand under the Act could be and ought to be in the form prescribed therefore and there is no justification for the appellant to call it a demand.

4. The show cause notice dated 9-12-1980 has been issued inviting the attention of the appellant to their clearance of printed cellophane film paper for Nutrine Confectionery, printed cork tipping tissue paper for cigarettes, printed [poster] paper for Charminar cigarettes, glassine plain paper for Asoka Betel nuts etc. which are classified under Tariff Item No. 68 as products of packaging industry and that the appellants have to pay [excise] duty at 8% ad valorem on the said goods, furnishing at the same time the value of the goods as well as the duty payable and called upon the appellant to show cause against the demand of the duty in a sum of Rs. 2,18,930.66 for the period from 10-6-1980 to 8-12-1980. The appellants were given 30 days time for the same and they were also called upon to produce all relevant materials in support of their claims and as to whether they require any personal hearing. The appellants by their letter dated 22-12-1980 called for certain further information from the second respondent and also prayed for further time after the receipt of his reply to them, to give their explanation to the show cause notice dated 9-12-1980. Again by a communication dated 29-12-1980, the second respondent reiterated his stand as contained in the earlier communication dated 4-12-1980. It is at this stage, the appellants filed the above two writ petitions for the reliefs referred to supra.

5. The learned Single Judge dismissed both the writ petitions by a common order dated 4-8-1986 on the view that the question as to how far the step taken by the Department is correct or not is a matter for agitation and adjudication before the authorities under the Act and the appellants cannot come to Court straightway

and seek a prohibition. The learned Single Judge also expressed the view that the rulings relied upon by the appellants related to the position of law in 1978 and it cannot be held that it continued to be the same in 1980 as well. The learned Judge while dismissing the writ petitions also clarified that till there is an adjudication of the issue, there was no question of demanding any excise duty under Tariff Item No. 68 from the appellants. The above appeals have been filed against the said order of dismissal.

6. Before us, Mr. Sriram Panchu, the learned Counsel appearing for the appellants contended as follows :-

(a) The impugned notices can be questioned before Court under Article 226 of the Constitution of India since according to the learned Counsel the notice dated 4-12-1980 being a demand preceded a determination of the issue raised in the show cause notice issued subsequent to the demand itself;

(b) So far as the show cause notice dated 9-12-1980 is concerned, it was submitted that since a demand has already been made on 4-12-1980, the show cause notice dated 9-12-1980 serves no purpose and therefore the same is liable to be set aside;

(c) Since there had been an order granting exemption to the appellants, the order may be changed or reviewed only on some material facts and not otherwise and that in this case no such material fact existed.

7. The learned Counsel for the respondents Mr. Jayachandran, in reply, submitted as follows :-

(a) The show cause notices have been issued by the authority competent to issue the same under the Act and is not violative of any provisions of the Act and the writ petition against the same is not maintainable;

(b) The notice dated 4-12-1980 is not a demand. A demand is to be made in the prescribed form only after adjudication and assessment for a specific sum to be payable within the time to be specified containing also a threat of recovery in default of payment and consequently the grounds of invalidity pleaded are without basis and substance.

(c) That in the adjudication to be made pursuant to the show cause notice dated 9-12-1980, the findings of the authorities will be rendered and it is only thereafter the appellants could challenge the findings and at this stage the writ petitions are not only premature but cannot be issued as prayed for to stifle the competent authorities from discharging their duties.

8. After a careful consideration of the submissions made by the Counsel for both parties, we are not persuaded to interfere with the order of the learned Single Judge dismissing the writ petitions. In our considered view, the writ petitions before this Court have been filed prematurely. Though the communication dated 4-12-1980 was claimed to be a demand, even a cursory perusal of the same

would show that it is not so and that does not have all or any of the characteristics of a demand which could be issued under the provisions of the Act and the rules made thereunder. In our view, it is only an intimation putting on notice that in future the appellants are requested to clear their products on payment of excise duty [at] 8% ad valorem under Tariff Item No. 68. Likewise, the communication dated 9-12-1980 is only a show cause notice. The contention to the contrary cannot be countenanced at all.

9. The learned Counsel for the appellants, in order to meet the objection from the counsel for the respondents that no writ lies at the stage of a mere show cause notice, relied upon the decision reported in *Union of India (UOI) and Others Vs. Madhumilan Syntex Pvt. Ltd. and Another*, *Madras Rubber Factory Ltd. Vs. Assistant Collector of Central Excise, Madras and Another*, and *J. K. Synthetics Ltd. and another Vs. Union of India and others*, . The Supreme Court had in the case referred to supra was concerned both with a demand issued under the Act without an earlier show cause notice and an adjudication as well as a further show cause notice issued. There was no decision on any question regarding the maintainability as such in that case. As far as the decision in *Madras Rubber Factory Ltd. Vs. Assistant Collector of Central Excise, Madras and Another*, is concerned, it appears that the learned Single Judge rejected the objection regarding the maintainability on the ground that the notice issued by a Tribunal or authority threatening to initiate proceedings which are prejudicial to a person on the admitted facts justified the exercise of jurisdiction under Article 226 of the Constitution of India and consequently a writ of prohibition can be issued. The case on hand cannot be said to be one of total lack of jurisdiction in the second respondent who has issued the notice, either on account of the competency of the authority or on the claim having become barred under any law of limitation. So far as the decision in *J. K. Synthetics Ltd. and another Vs. Union of India and others*, is concerned, no issue regarding the maintainability as such has been raised or decided. Factually also, the writ petition in the said case appears to have been filed to quash the order of the Assistant Collector as well as the two other notices issued and that was also not a case directed solely against a show cause notice. The writs that have been sought for in the case before us are in the nature of prohibition. It is by now well-accepted that a writ in the nature of prohibition can be issued to an authority at the preliminary stage from prohibiting that authority from proceeding further only when there is a patent and total want of jurisdiction and not otherwise. But want of jurisdiction in such a case should be equated to "corum non judice". In the case on hand, it could not be contended that the second respondent lacks jurisdiction. Further, it involves decision on questions of facts. This Court as well as the Supreme Court of India in matters similar to the one under consideration has consistently taken the view that it was well open to the authorities to have recourse to Section 11A (old Rule 10) to proceed to recover any duty of excise which had not been levied or short-levied within six months from the relevant date after serving the notice. The impugned show cause notice dated 9-12-1980 is only with reference to the

period of 6 months from June 1980. The exercise of such an undoubted power in the authorities to set in motion the process of law cannot be stalled at the initial stages. Consequently, we consider it to be not proper and as a matter of fact inappropriate to issue a writ of prohibition disabling the statutory authority entrusted with the task of securing public revenue from adjudicating the issue involving facts even at its threshold. The writ of prohibition is an extraordinary remedy which could be sought for only in cases where there is a total absence of jurisdiction in the authority to take action or where there is an open excessive exercise of such jurisdiction. Neither of these could be claimed to exist in this case which could be said to prevent the authorities from taking action in their undoubted exercise of statutory powers. Therefore, we see nothing wrong in the exercise of discretion by the learned Judge in declining to interfere in the matter at this stage and consequently the submission on behalf of the appellant is rejected.

10. Learned Counsel for the appellants sought to attack the impugned proceedings by using one to substantiate his grievance against the other. So far as the communication dated 4-12-1980 is concerned, learned Counsel contended that it amounted to a demand and is liable to be set aside having preceded the issue of a show cause notice and a formal adjudication. In this context too, learned Counsel referred to the decision in Union of India (UOI) and Others Vs. Madhumilan Syntex Pvt. Ltd. and Another, . In our view, the appellant cannot derive any support from the said decision to the case on hand. It could be seen from the said decision that the demand challenged there in the prescribed form and in law and substance was really a demand for a specific sum of money on threat of recovery proceedings in default of payment unlike the case before us. As observed by us, the communication dated 4-12-1980 cannot be equated to a demand in the manner known to law and consequently the same cannot be said to be vitiated for want of a prior show cause notice and adjudication. So far as the communication dated 9-12-1980 is concerned, the submission was that since already a demand has been issued, nothing remains to be decided pursuant to the show cause notice. On the face of it, the impugned proceedings dated 9-12-1980 is only a show cause notice and the respondents have expressed their readiness to adjudicate the issue on the appellants participating in the proceedings by submitting their explanation and/or making oral submissions. Consequently, there is no rhyme or reasons in the challenge made to the impugned proceedings on this aspect. The submission in this regard merits no serious consideration and is, therefore, rejected.

11. Learned Counsel for the appellants next contended that earlier the first respondent granted exemption in respect of the products of the appellants by virtue of the Exemption Notification No. 122/75, dated 5-5-1975 and ordered a refund of Rs. 1,02,674.25 for the period in between 12-3-1975 and 16-6-1977 and that the Collector of Central Excise in his proceedings dated 17-10-1980 called upon the appellants to show cause as to why a sum of Rs. 43,475.34 for the period between 12-3-1975 and 31-3-1976 be not disallowed and the amount

refunded should not be recovered. On the basis of the said proceedings, learned Counsel for the appellants contended that the Department cannot go behind the proceedings dated 17-4-1978 of the second respondent which, according to the Counsel for the appellants, in a sense had the approval of the Collector though for a portion of the total period. Further, elaborating this submission learned Counsel placed reliance upon the decision reported in J.K. Synthetics Ltd. and Another v. Union of India and Others - 1961 (8) E.L.T. 328 and contended that the respondents can depart from their earlier stand only for cogent reasons, such as fresh facts or change in the process of manufacture of the relevant Tariff Entry or any subsequent judgment of any Tribunal or Court and not otherwise. In asserting the said submission, learned Counsel for the respondents submitted that it is premature at this stage for the appellants to expect the respondents to disclose all those details or reasons and while considering the explanation and adjudicating upon the matter, the reasons justifying the stand of the Department will be duly furnished. On going through the judgment of the Division Bench of the Delhi High Court referred to by the learned Counsel for the appellants, with respect to the learned Judges, we are unable to concur with the propositions laid down therein.

12. We consider the principles laid down therein to be rather wide. Whatever may be the justification or otherwise to countenance such a proposition at the final stage of the proceedings in considering the legality or validity of the orders ultimately passed adjudicating the claims, we consider it to be most inappropriate and unwarranted to even interdict the authorities at the threshold from going into the matter and rendering a finding on the respective claims of the assessee as well as the stand of the Department. A Division Bench of this Court consisting of M.N. Chandurkar, C.J. and Venkataswami, J., in a case reported in Madras Rubber Factory Ltd. v. Superintendent of Central Excise - 1985 (24) E.L.T. 273 had to consider a plea of the nature raised by the Department before those learned Judges. The Division Bench repelled the same in the following manner :-

"It is true that it was argued before us by the learned Counsel for the department that a similar case of the appellant has been rejected on an earlier occasion when the revision application of the appellant was rejected by the Government of India on 5th October, 1972. The principles of res judicata do not apply in matters relating to taxation and in any case when the matter has come to this Court for the first time the appellant cannot be prevented from canvassing what according to the appellant should be the correct construction of the Notification dated 1st April, 1968."

The question that requires to be considered would be, where the competent authority has undisputed jurisdiction to initiate proceedings to recover the revenue due to the State and the exercise of power is not shown to offend any rule of limitation, can the competent authority be restrained from so doing on considerations of rule of natural justice or inconvenience and possible

harassment. In our view, if the Courts were to interpose themselves even at that stage of initiation, it will amount to Courts substituting their views even before the competent authority renders its findings on the issue. The decision of a Division Bench of this Court dated 15-11-1989 in W.A. Nos. 803 of 1983 and 484 of 1984 to which one of us (Hon"ble Chief Justice Dr. A. S. Anand) was a party will be of considerable assistance to decide the issue before us.

13. The facts and the proposition of law laid down in the decision of the Division Bench in W.A. Nos. 803 of 1983 and 484 of 1984 are as follows :- The assessee in the said case was engaged in the manufacture of cycle lamps which fell under Item 68 of the I Schedule to the Act. As required under Rule 173D of the Rules, the Company was filing classification lists for the goods manufactured and cleared by them. They were being approved from time to time, and treating the cycle lamps as part of cycle, exemption was granted for cycles and parts thereof. But on 24-10-1980, the Assistant Collector concerned issued a show cause notice proposing to deny the exemption granted and for recovery of the differential duty for the clearance made in the last six months prior to the show cause notice under Rule 10. On the assessee submitting a reply therein, a final order was passed, which was the subject matter of the challenge in the writ petition before this Court. The learned Single Judge in the said case held that the show cause notice issued amounted to prejudging the matters in that case and set aside the proceedings with liberty to the Department to proceed afresh if permissible in law. As against this, both the assessee as well as the Revenue preferred writ appeals. The Division Bench, placing reliance upon the decision of the Supreme Court reported in Tata Iron and Steel Co. Ltd. Vs. Union of India (UOI) and Others, came to the conclusion that in respect of the period of 6 months which could be covered u/s 11A, the existence of approved classification list would not be a bar to impose and collect appropriate duty. In arriving at such a conclusion, the learned Judges referred to the decision of the Supreme Court in AIR 1989 617 (SC) wherein the Supreme Court declared the position in the following terms :-

"The next submission on behalf of the appellant is that the Classification Lists had been approved earlier and the Excise authority was estopped from taking a different view. Plainly there can be no estoppel against the law. The claim raised before us is a claim based on the legal effect of a provision of law, and, therefore, this contention must be rejected."

14. In the light of such a categorical pronouncement of the Apex Court, we are unable to subscribe our acceptance to the ratio of the Division Bench of the Delhi High Court rendered in such wide terms. In matters of levy and recovery of any tax, each year or period or unit of assessment has been always held to constitute distinct and separate units rendering the principles of either *res judicata* or estoppel inapplicable. When that be the position, we are not persuaded to accept the proposition that the Revenue could be prevented from even going into the consideration of the levy or otherwise in respect of a subsequent or different

period merely because for an earlier period a particular stand was taken by the Revenue in levying or collecting duty. Importing such limitations on grounds of principles of natural justice or inconvenience or possible harassment will seriously prejudice the cause of the State in effectively recovering the lawful revenue due, the necessity and importance of which could never be overlooked.

15. We are of the further view that in any event the decision in *J. K. Synthetics Ltd. and another Vs. Union of India and others*, cannot be straightway applied to the facts of the present case. From the judgment, it could be seen that that was a case where the Department was taking a particular stand on the liability of the assessee concerned and having been unsuccessful before the original and the appellate authorities, the assessee took up the matter to the revisional authority, namely, the Central Government. The Central Government ultimately passed an order in exercise of its revisional power u/s 36 of the Act then in force, rejecting the stand of the authorities and granting relief to the assessees. It was only when the original authority, though for a period not connected with the subject matter of revision before the Government of India, chose to take a different stand than the one as finally adjudicated upon by the Central Government, the Delhi High Court came to the conclusion that it should not be open to the Department to change the pattern of assessments at its whim and put an assessee to avoidable inconvenience and harassment. The ratio of the said decision has to be restricted only to the context of a total absence of any controversy on facts and an existing and binding decision of the Central Government in exercise of statutory revisional powers or of the Judicial Tribunal or Court proclaiming a particular position which became final and conclusive qua the authorities. The said principles, at any rate, cannot be extended to the present case.

16. We consider that the factual position in the case on hand requires investigation by the adjudicating authority. As could be seen from the proceedings dated 17-4-1978, the exemption appears to have been allowed on the footing that the appellant was doing the process of printing on the products "mostly out of the duty paid base paper supplied by the customers". But even in affidavit filed in support of the writ petitions in this case, the appellants admit that "the petitioner either buys these duty paid based papers or has been supplied to it by its customers". Further, the business activity of the appellant in a particular year only becomes relevant for determining the liability of the assessee concerned for that particular period. Originally, the exemption in the case of the appellants appears to have been granted under the impression that the printed papers produced by the appellants are the products of printing industry. On the other hand, the show cause notice gives sufficient indication that the product that the appellants, who carry on their business under the name and style of *M/s. Lakshmi Packaging Industry (P) Ltd., Salem*, have cleared during the relevant period, are liable to be classified as products of packaging industry under Tariff Item No. 68 and consequently they will not be eligible to the exemption granted under the Notification in respect of the products of printing

industry. The question as to what is the real nature of the product and the character of the activity involved which brought about the end-product which was cleared is a pure question of fact which requires proper adjudication initially by the Departmental authorities. It cannot be said that on any earlier occasion even in the proceedings relied upon by the appellants there was any objective consideration and adjudication of this issue. Therefore, we consider it to be not an appropriate case wherein the authorities should be precluded from going into the question and adjudicating the issue objectively. Further, the balance of convenience and exigencies of situation also mandates us to reject the plea of the appellants and relegate them to the authorities to face an enquiry any have the issue adjudicated in an appropriate manner. It will be always open to them to work out their remedies thereafter and the appellants will not be put to any disadvantage. The appellants already successfully dragged on the matter for almost a decade and we find no justification to come to their rescue.

17. For all these reasons, we dismiss the writ appeals with costs of Rs. 1,000/- (one set).