
(1993) 02 KAR CK 0022
In the Karnataka High Court
Case No : W.A. No. 111 of 1993

Loharu Steel Industries Ltd.

APPELLANT

Vs

Collector of Central Excise

RESPONDENT

Date of Decision : 02-02-1993

Acts Referred:

Central Excise Act, 1944 — Section 11 A
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 131 (3), 131 (5)

Citation : (1993) 66 ELT 179 : (1993) ILR (Kar) 567 : (1993) 1 KarLJ 443

Hon'ble Judges : N.D.V. Bhat, J;K.A. Swami, J

Bench : Division Bench

Judgement

1. This appeal is preferred against the order dated 16-12- 1992 passed by the learned single Judge in W. P. No. 38259/92. The appellant is the petitioner in the writ petition has come up in the appeal.

2. In the writ petition the appellant sought for quashing the show cause notice dated 27-8-1992 bearing C. No. V/72/15/109/92 C. 1, produced as Annexure-F in the writ petition. The learned single Judge has taken a view that what is issued is a show-cause notice and it is certainly open to the petitioner to raise the questions raised in the writ petition before the authorities concerned and thereafter exhaust other remedies that may be available under the statute before approaching this Court. Accordingly the learned single Judge has declined to interfere.

3. The show-cause notice is issued u/s 11A of the Central Excises and Salt Act, 1944 (hereinafter called as "the Act"). It reads thus :

"WHEREAS it appears that M/s. Loharu Steel Industries, Rules 9(1), 52A, 53 read with Rule 226, Rules 173B, 173F, 173G and 174 of Central Excise Rules, 1944 inasmuch as they have manufactured and cleared excisable goods viz. CTD bard twisted after hot rolling (popularly known as "TOR STEEL" in Trade parlance) writing 14,796.490 Metric Tonnes classifiable under chapter sub-heading 7214.90

of the Central Excise Tariff Act, 1985, during the period from 1-3-1989 to 15-8-1989 as detailed in the Annexure-I enclosed to this notice, without obtaining a Central Excise Licence, without payment of Central Excise duty and without following Central Excise procedures and have suppressed the facts of production and clearance from the Department with an intention to evade payment of Central Excise duty.

2. M/s. Loharu Steel Industries, Bangalore, are therefore, required to show cause to the Collector of Central Excise, Central Revenue Building, Queen's Road, Bangalore-1 as to -

(i) Why Central Excise duty amounting to Rs. 77,68,157.25 (BED Rs. 73,98,245-00 and SED Rs. 3,69,912.25) on the said quantity of 14,796.490 metric tonnes of Tor Steel manufactured and cleared by them during the period from 1-3-1989 to 15-8-1989 without payment of duty should not be demanded from them under Rule 9(2) of Central Excise Rules, 1944 read with Section 11A of the Central Excises and Salt Act, 1944; and

(ii) Why penalty should not be imposed on them under Rule 173Q (1) /226 of Central Excise Rules, 1944.

3. M/s. Loharu Steel Industries Ltd., Bangalore are further directed to produce at the time of showing cause all the evidence upon which they intend to rely in support of their defence.

4. M/s. Loharu Steel Industries Ltd., Bangalore should also state in their written explanation as to whether they would like to be heard in person before the case is adjudicated, failing which it will be presumed that they do not desire any personal hearing.

5. If no cause is shown against the action proposed to be taken hereinabove, within 30 days of receipt of this notice or if they do not appear before the adjudicating authority when the case is posted for personal hearing, the case will be adjudicated ex parte."

4. The contention of Shri P. S. Deva Das, learned counsel for the appellant, is that the Collector of Central Excise has no jurisdiction to issue such a notice. Therefore it is unnecessary for the appellant to appear before him, file objections and produce the evidence, as the show cause notice itself is without jurisdiction. It is also contended that in similar circumstances, this Court has exercised the jurisdiction under Article 226 of the Constitution and, therefore, there is no reason why the appellant should be made to appear before the Collector and file his objections.

5. We shall now consider how far these submissions are tenable. It is not in dispute that the show-cause notice is issued u/s 11A of the Act, on the suppression of facts of production and clearance from the department with the intention to evade payment of Central Excise duty. The show cause notice also further states that it is open to the appellant to produce at the time of showing

cause all the evidence upon which it intends to rely in support of the defence. It is also further stated that the appellant should state in the written explanation as to whether it would like to be heard in person before the case is adjudicated, failing which it will be presumed that the appellant does not desire any personal hearing.

6. The appellant has been directed to show cause within 30 days. Therefore it is clear from the show cause notice that no decision has been taken ex parte. The adjudication is yet to take place after the written statement is filed by the appellant and the evidence, if any, adduced by it and also after hearing the appellant if the appellant desires to be heard personally. Whether in such a situation exercise of jurisdiction under Article 226 of the Constitution is called for is a question for determination.

7. The Supreme Court in Geep Flashlight Industries Ltd. Vs. Union of India (UOI) and Others, was called upon to decide as to whether certiorari jurisdiction 131(3) of the Customs Act as it stood. The Supreme Court, after 131(3) of the Customs Act as it stood. The Supreme Court, after considering the submissions made, held as follows :

"22. Once the provisions contained in Section 131(3) are attracted the Central Government may of its own motion annul or modify any order passed u/s 128 or Section 130. This provision is the power of Central Government to annul or modify any order. This power is exercised by the Central Government suo motu. Of course the power is to be exercised on giving notice to the person concerned.

23. The provisions contained in Section 131(5) of the Act speak of limitation only with regard to non-levy or short-levy. It is significant that Section 131(5) does not speak of any limitation in regard to revision by the Central Government of its motion to annul or modify any order of erroneous refund of duty. The provisions contained in Section 131(5) with regard to non-levy or short-levy cannot be equated with erroneous refund inasmuch as the three categories of errors in the levy are dealt with separately.

24. The appellant's prayers for writs of certiorari and mandamus are misconceived. There is no order either judicial or quasi-judicial which can attract certiorari. No mandamus can go because there is nothing which is required to be done or for-borne under the Act. The issue of the notice in the present case requires the parties to represent their case. There is no scope for mandamus to do any duty or act under the statute. A writ of prohibition cannot be issued for the obvious reason that the Central Government has jurisdiction to revise."

The the position laid down in para-24 in categorical terms states that no order, either judicial or quasi-judicial, which can attract certiorari, is said to have been passed when the show-cause notice is issued and, therefore, until the adjudication is made, the exercise of jurisdiction is not called for. In the instant case the show-cause notice is issued u/s 11A of the Act by the Collector of Central Excise, Bangalore on the grounds of suppression of facts of production

and clearance from the department with an intention to evade payment of Central Excise Duty. As per the proviso to Section 11A(1) of the Act, the Collector of Central Excise is competent to issue show-cause notice on the ground of suppression of facts. Therefore, the show-cause notice does not suffer from lack of jurisdiction. We may also point out that certiorari jurisdiction is not intended to by-pass the statutory provisions. In *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others*, while considering the scope of Article 226 of the Constitution, the Supreme Court has held as follows :

"3. In *Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others*, , A. P. Sen, E. S. Venkataramiah and R. B. Misra, JJ. held that where the statute itself provided the petitioners with an efficacious alternative remedy by way of an appeal to the Prescribed Authority, a second appeal to the Tribunal and thereafter to have the case stated to the High Court, it was not for the High Court to exercise its extraordinary jurisdiction under Art. 226 of the Constitution ignoring as it were, the complete statutory machinery. That it has become necessary, even now, for us to repeat this admonition is indeed a matter of tragic concern to us. Art. 226 is not meant to short circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Art. 226 of the Constitution. But then the Court must have good and sufficient reason to by-pass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under Art. 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged."

8.1 In addition to this, we may point out here that a Division Bench of this Court in *Karnataka State Road Transport Corporation, Bangalore and Another v. Karnataka State Transport Authority and Another* (A. I. R. 1984 Kar 4) had an occasion to consider as to under what circumstances the extraordinary jurisdiction of this Court under Art. 226 of the Constitution can be exercised when there exists an equally efficacious alternative remedy of appeal and it was held thus :

"Even where an equally efficacious alternative remedy exists, where, however, fundamental rights are affected where rules of natural justice are violated, or where there is a failure on the part of the authority concerned to confine itself within the bounds of its legitimate jurisdiction or where there is a failure to exercise a jurisdiction vested in it or where there is an error of law apparent on the face of the record, a person aggrieved can invoke the extraordinary

jurisdiction of this Court under Article 226 without reference to any remedy however equally efficacious it be. The existence of an alternative remedy does not oust the jurisdiction of the High Court under Article 226."

The case on hand does not fall in any one of the exceptions mentioned above. There is not even a determination made about the liability of the appellant. The facts stated in the show-cause notice are yet to be determined after the cause is shown and the evidence, if any, adduced by the appellant. As far as the jurisdiction is concerned, it has already been pointed out that the ground stated in the show-cause notice clearly falls within the jurisdiction of the Collector as per Section 11A of the Act.

9. We now take up for consideration three judgments of this Court on which reliance is placed. In Mysore Acetate and Chemical Co. Ltd. Vs. Assistant Collector, Central Excise, Mysore, the Superintendent of Central Excise, M. O. R. Mandya by his notice No. OC 2193/81 dated 13-10-1981 followed up show-cause notice No. OC 2741/81 dated 10-10-1981 and revised show-cause notice No. OC 27/82 dated 1-1-1982 called upon the petitioner therein to pay excise duty on "acetic anhydride" manufactured and supplied to drug manufacturers as a drug intermediate taking the view that it was a chemical and its supply as a drug intermediate did not entitle it for an exemption from excise duty under the Notification dated 1st March 1978. A contention was raised that as only a show-cause notice was issued, it would be open to the petitioner to put forth its case before the authority who had issued the show cause notice and that authority would be bound to decide the same and that thereafter the petitioner can work out his remedy under the statute by way of appeal. In para 7 of the judgment, the learned Single Judge appears to have agreed with this contention; but nevertheless interfered with the show-cause notice. The relevant portion of the judgment is as follows :

"7. What is challenged are show-cause notices and therefore, it is open to the petitioner to appear before the Superintendent and urge the very case pleaded before this Court who is bound to examine and decide the same and that decision can be challenged in appeals or other remedies can hardly be doubted.

8. The fact that the notices are show-cause notices and the petitioner has an opportunity to appear and urge its case does not touch on the jurisdiction of this Court to examine them and decide the question at the threshold itself.

9. But the excise duty is payable on manufactured goods by the manufacturer in the first instance though it may happen that he may pass on the same to the buyer of goods or consumer. On the very terms of the show cause notices, the petitioner is bound to pay the excise duty which it has not been paying from 1-3-1978. In all probability, the Superintendent is likely to stick to his view expressed in the show cause notices. In the circumstances, I consider it proper to examine the validity of the show cause notices and decide the questions finally.

Paras 10 to 16. xx xx xx

17. On the above discussions, it follows that the action of the Superintendent is manifestly illegal and the same justifies the interference by this Court."

We are of the view that the proposition of law stated by the learned single Judge is too wide to be approved. It cannot be presumed that the authority will stick to the view expressed in the show cause notice, and on that presumption consider it proper to examine the validity of the notice and decide the question finally. Show cause notice is only a proposition. It is not a determination of the facts stated therein. Such determination of adjudication has to be made after the cause is shown and evidence, if any, is adduced.

9.1 In the light of the judgments of the Supreme Court to which we have already adverted to and also in the light of a Division Bench decision in *Karnataka State Road Transport Corporation, Bangalore & Anr. v. Karnataka State Transport Authority & Anr.* (A. I. R. 1984 Kar 4) we find it very difficult to agree with the learned single Judge. We may also make it clear that if the adjudication of the question as to whether the authority who has issued the notice has jurisdiction to issue such a notice, depends upon the determination of certain facts, in other words, if it is mixed question of fact and law and not a pure question of law, it must be urged before the authority who has issued the notice. It is only in the case of apparent lack of jurisdiction not involving determination of facts and only depends upon interpretation of law, interference under Article 226 at the stage of show cause notice is justified. When a statute provides for making a representation against the show cause notice and hearing of the party to whom the show cause notice is issued and thereafter the decision has to be taken and that decision is subject to appeal and further appeals and when there is no apparent lack of jurisdiction or it is not a pure question of law, the exercise of jurisdiction would amount to by passing statutory remedies. Therefore, we find it difficult to agree with the view expressed in *Mysore Acetate and Chemical Company's* case. We accordingly, overrule it.

10. The second decision is of a Division Bench in *Alembic Glass Industries Limited Vs. Union of India and Others*, In this case, the validity of Section 4(4)(d)(i) of the Central Excises and Salt Act, 1944, was challenged. A show cause notice was issued in exercise of the power u/s 4(4)(d)(i) of the Act. Whenever the validity of the provision is challenged, this Court in exercise of its jurisdiction under Article 226 of the Constitution is required to examine such a case. It was for that purpose the writ petition was entertained but by the time the writ petition came up for hearing, the Supreme Court held in *Union of India (UOI) and Others Vs. Bombay Tyre International Ltd. and Others*, that the provisions of Section 4(4)(d)(i) of the Act were valid. By that time, the respondent had filed the statement of objections in which the facts stated in the petition by the petitioner were not disputed. Therefore, the Court decided on the basis of the undisputed facts. In that decision it has not been laid down that even at the stage of show cause notice the jurisdiction under Article 226 of the Constitution can be exercised as a matter of course. Further, the interference at the stage of show cause notice was

mainly due to the fact that it was pending for over a period of nine years. Therefore, the decision is confined to the special facts of the case. That it is so is clear from what is stated in para 11 of the judgment in Alembic Glass Industries Ltd. case. It reads :-

"11. Every one of the pleas or objections urged by Shri Bhat to contend that this Court should decline to interfere does not really touch on the jurisdiction of this Court to examine the impugned show cause notice and pronounce on its validity also. As seen earlier, there is no dispute on facts between the parties and therefore, the question of the original and appellate authorities determining facts, does not arise. As it is, this case for reasons that are not necessary to examine, has been pending before this Court for more than 9 years. If at this stage, this Court were to decline to interfere, though there is no dispute on facts, the final determination of the question that arises is likely to take another decade. The Assistant Collector and probably the first appellate authority under the Act are bound by the circular issued by the Collector. This is one other factor that justifies our examination of the question and deciding the same one way or the other. We are of the view that the principles enunciated in *British India Corporation's* case that deals with a case for enforcement of fundamental rights do not militate against the view we have expressed. We are of the view that all the facts and circumstances justifies the final determination of the questions raised in the case. We therefore, reject the preliminary objection urged by Shri Bhat and proceed to examine the merits."

Therefore, we are of the view that the aforesaid decision cannot be cited as a precedent to support the proposition that even at the stage of show cause notice, the exercise of powers under Article 226 of the Constitution is called for without any limitation.

11. The third decision is by a learned single Judge in *Victory Glass and Industries Ltd. Vs. Collector of C. Ex.*, In that case, there was a search of the premises of the Company. On the basis of the material collected during search, the Collector quantified Excise Duty payable and then issued the show cause notice accompanied by demand to pay the excise duty in a sum of Rs. 51,51,56.96. The facts as stated in the judgment were as follows :-

"The petitioner is a Company manufacturing glass bottles of various sizes in its factory situated in Bommansandra Industrial Estate near Bangalore. The petitioner is a licensee under the Central Excise Act ("the Act"), for the manufacture of Glass and Glass products falling under Chapter 70 of the Central Excise Tariff Act, 1985 ("the Tariff Act").

2. There was a search in the premise of the factory and the Registered Office of the Company and at the residence of the Executive Director of the Company by the Intelligence Wing of the Central Excise Department on the 15th, 17th and 22nd September 1987. Large number of documents, registers and other papers were seized at the three places referred to above.

3. Exhibit F1 to F5 are the copies of the Mahazars drawn by the Search Officers at the several places where the search was conducted.

4. Pursuant to the said search, a show cause notice dated 18-1-1988 was issued by the Collector of Central Excise to the 1st petitioner- Company and the 2nd petitioner, the Managing Director, besides the other seven persons connected with the Company and several other distributors of the products of the petitioner's Company referred to in the said show cause notice (Annexure-J). This show cause notice is challenged by the petitioners on several grounds which will be dealt with later in their order. On the basis of the material and the information gathered from the documents and other records seized from the petitioners' various premises and on the basis of the further investigation and statement recorded, the Collector has proposed to quantify the excise duty on the suppressed value of the glass bottles removed, excess stock found, suppression of actual production figures, clandestine removal without paying its duty etc. in a sum of Rs. 51,51,656.96 P."

Thus it is clear that it was not a pure and simple case of mere show cause notice. It was a case in which pursuant to search of the Company premises, excise duty payable was also determined by the Collector. The duty was also demanded. Consequently, the interference under Article 226 was on the special facts of that case. In addition to this, in that decision also, it has not been laid down as a general proposition that exercise of jurisdiction under Article 226 of the Constitution as against the issuance of the show cause notice is necessary. Therefore, we are of the view that the said decision turns upon the facts of the said case. Therefore, it cannot be of much use to the appellant.

12. The contention of Sri Deva Das, learned counsel for the appellant that the Collector has no jurisdiction to issue the show cause notice cannot at all be accepted. Section 11A (1) and (2) of the Act specifically provide thus :

"11A. RECOVERY OF DUTIES NOT LEVIED OR NOT PAID OR SHORT-LEVIED OR SHORT PAID OR ERRONEOUSLY REFUNDED. - (1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a Central Excise office may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder, with an intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect (as if for the words "Central Excise Officer", the words "Collector of Central Excise" and for the words "six months", the words "five years" were

substituted.

Explanation. - Where the service of the notice is stayed by an order of a Court, the period of such stay shall be excluded in computing the aforesaid period of six months or five years, as the case may be.

(2) The Assistant Collector of Central Excise or, as the case may be, the Collector of Central Excise, shall, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), determine the amount of duty of excise due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined."

In the case of suppression, within a period of five years, it is open to the Collector to issue a show cause notice. It is a different matter after a written statement is filed and evidence is produced, the Collector may come to a different conclusion that the suppression is not proved and may close the proceedings. But it is not possible to hold as per the contents of the show cause notice that the Collector has no jurisdiction to issue such a notice. That being so, we do not see any ground to admit this appeal. It is accordingly rejected.