
(1990) 01 MAD CK 0094
In the Madras High Court

Madeira Coats Ltd.

APPELLANT

Vs

Asstt. Collector of C. Ex.

RESPONDENT

Date of Decision : 01-01-1990

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 3, 33A, 35, 6
Constitution of India, 1950 — Article 226

Citation : (1990) 01 MAD CK 0094

Hon'ble Judges : Kanakaraj, J

Bench : Single Bench

Judgement

1. This writ petition is for the issue of a writ of certiorari to quash the order of the first respondent made in C. No. V/15A/3/65/79 dated 20-5-1981. Though the that it is sufficient to set out the sequence of events from 1977 onwards, blame if the opinion issued in C. No. V/15A/3/65/77. In and by the said show cause notice, the first respondent has called upon the petitioner to show case as to why the petitioner-company should not take out a license under Rule 174 of the Central Excise Rules 1944 for the list/Price list approved before effecting further clearance. In the show - cause notice, it is under Tariff Item 15A(i) of Central Excise Tariff Item 15 and get a Classification list/Price list approved before effecting further clearance. In the show-cause notice, it is stated that the petitioner - company have been manufacturing rising master classifiable under Tariff Item "15A(i) of Central Excise Tariff Schedule and have been using the same in the manufacture of dipping solution falling under Tariff Item 68 and clearing both for captive consumption within the Mills without getting a proper licence and without filling binding a classification and price lists as required under Rule 174 read with Section 6 of the Central Excise and Salt Act, 1944. It is also stated in the show cause notice that the duty payable as required under Rule 173-Fread with Rule 9(1) of the Central Excise Rules, 1944 had not been paid. A reply to this show cause notice was sent on 28-11-1079 stating that the goods in question are not liable to duty because they do not fall u/s 3 of the Central Excise Act. On 19-1-1980 a personal hearing was afforded to the petitioner-

company It was also stated by a letter dated 23-98- 1980 that the resin mixture is not quantified or removed as such and the process being a continuous one, there is no possibility of maintaining any accounts for the same. Having heard the matter on 19-1-1980, the first respondent passed final orders only as late as 20-5-1981. The impugned order dated 20-5- 1981 practically confirms the proposals made in the show-cause notice. While passing the final order the first respondent observed as follows:

Marketability of the product may not have any relevance to this issue as 'excise duty is levied on manufacture/production of goods and not on the sale and it is not out of place to mention here that resin master is marketed and is also bought by a factory manufacturing types.'" The first respondent has also relied on the advice of the Board of Excise and Customs on the very same issue. The first respondent has also concluded that the petitioner-company had been manufacturing the resin master from 1-3-1975 onwards and duty is therefore payable from that date under Rule 9(2) of the Central Excise Rules. He has also held that the petitioner-company is liable for penal action under Rule 9(2) read with Rule 173-Q of the Central Excise Rules and has actually imposed a penalty of Rs. 250/-

2 The respondents have not filed a counter-affidavit and Mr. N. Joshi, learned additional Central Government Standing Counsel, appearing for the respondents says that he will argue the case without a counter - affidavit.

3. Mr. S. Govind Swaminathan, learned Senior Counsel, appearing for the petitioners has put forward two contentions: (i) that the goods are not marketable commodities and therefore excise duty is not payable u/s 3 of the Act; (ii) that the first respondent has no jurisdiction to issue the show-cause notice under Rule 10 and Rule 173-J of the Central Excise Rules.

4. Mr. N. Joshi, learned additional Central Government Standing Counsel appearing for the respondents has sought to meet the argument as follows:- According to Mr. N. Joshi, learned counsel, the impugned order itself says that a person aggrieved by the order may appeal against the same to the appellate Collector of Central Excise, Madras- 34. Therefore the petitioner should not be permitted to invoke the jurisdiction of their court under Article 226 of the Constitution of India. In other words the availability of a statutory remedy not having been exhausted, the writ petition is not maintainable. I am afraid that this contention cannot be countenanced on the alternative amount to mockery of justice. It has been held that the existence of an alternative remedy is no ground for refusing the relief of writ of certiorari where it appears on the face of the proceedings or on undisputed facts that the authority had acted without jurisdiction or in excess of jurisdiction. Similarly, the pendency of the proceedings for several years should also be taken into consideration at the time of final disposal of the case, as to whether the petitioner should be relegated to the statutory alternative remedy. There are several decisions on this aspect also. In *P. K. Mutrhuvelappa Goundar v. The Deputy Registrar of Co-operative*

Societies, Combatore and Others 1960 (ii) M. L. J. 392. It is held as follows:-

"The availability of either remedies to the aggrieved party may weigh with the court in refusing a writ under Article 226 of the Constitution but cannot disentitle him to get the relief or preclude the Court from issuing the writ. I am of opinion that however convenient or expedient it may be to dismiss a writ petition before issuing *nisi* on the ground of a subsisting alternative remedy, it may not always be just to do so at the final stage, when the parties have incurred all the expenses and the Court has gone into the matter fully" In *G. Thangavel Nadar v. the deputy commercial Tax Officer, Nanilam* 1963 (ii) M. L. J. 309. *SRINIVASAN, J* has followed the above decision, agreeing with the observation that however convenient or expedient it may be to dismiss a writ petition before issuing a rule *nisi* on the ground of a subsisting alternative remedy it may not always be just to do so at the final stage when the parties have incurred all the expenses and the Court has gone into the matter fully. In *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, , the Supreme Court of India has held as follows:-

"It is true that a petition to revise the order could be moved before the commissioner of Income Tax, But *Hirday Narain* mover a petition. in the High Court of Allahabad and the High Court entertained that petition. If the High Court had not entertained his petition, *Hirday Narain* could have moved the Commissioner in revision, because at the date on which the petition was moved the period prescribed by S. 33A of the Act had not expired. We are unable to hold that because a revision application could have been moved for an order correcting the order of the Income tax Officer under S. 35, but was not moved, the High Court would be justified in dismissing as not maintainable the petition which was entertained and was heard on the merits."

The argument of the counsel for respondents, that the writ petition has to be dismissed on the ground that there is an adequate alternative remedy, cannot therefore be countenanced.

5 In support of the first contention, reliance is placed by counsel for the petitioner on the decision in *Cegat Tyres Of India and others* 1987(30) E. L. T. 857 (Bombay). The solution that is used in the Tyre Industry was the subject matter of discussion in the said judgment. The solution is described as Resurrection, Formaldehyde, latex mix or dip solution which is a mixture of six substances known as resurrection, formaldehyde, caustic soda, styrene butadiene latex, vinyl pyridine latex and water. The question that was decided in that case was whether this said solution becomes liable for any excise duty and whether this item comes under Item No. 15-A of the Tariff Schedule. The Bombay High Court after elaborately considering several decisions and books on Rubber Technology and Manufacture, Encyclopaedia of Chemical Technology and Encyclopaedia Britannica, came to the conclusion that the dip solution is not salable at all. There is no market for such a solution and the material being used for captive consumption does not attract liability under Item No. 15-A of the Tariff Schedule. The Bombay High Court relied on the judgment of the Supreme Court

in Union of India Vs. Ceat Tyres of India Ltd., The Division Bench referred to a subsequent judgment of the Supreme Court in Bhore Industries Ltd. v. Collector of Central Excise 198 (40) E. L. T. 280 (S. C.).

6. The above judgments apply to the facts of the instant case squarely and conclusively. In the affidavit of the petitioner, the process of manufacture is set out. It is also explained that the preparation of resin master and dipping solution and the treatment of rayon cord with the said solution is a continuous process within the premises of the petitioner-company. The entire factory of the petitioner-company has been licensed as premises under Rule 9-E of the Central Excise Rules. It is contended that there is no removal of the said goods within the meaning of Rules 9 and 49 which is a condition precedent for the levy and collection of duty. It is clearly alleged that the resin master and dipping solution are not sold or consumed in the market and that they are not capable of being sold or purchased. They are neither marketed nor marketable and have no distinctive name, use, character or serviceability. The resin master and the dipping solution get hardened within a few hours of its preparation. They have to be consumed immediately and cannot be stored. These facts have not been disputed by the respondent and as already stated, they have not filed a counter-affidavit. I am therefore compelled to hold that the resin master and the dipping solution are not liable to duty under Tariff Items 15-A and 68 of the Tariff Schedule and the order of the first respondent to the contrary liable to be set aside.

7. The second contention urged by the counsel for the petitioners is that on that date from 17-11-1980 Rules 10 and 173-J have been deleted from the rules and instead, Section 11A has been introduced in the Central Excise and Salt Act. The order of the first respondent having been passed on 20-5-1981, long after the introduction of Section 11A of the Act, it is submitted that the impugned order sins totally without jurisdiction. Further, Section 11A of the Act makes it clear that a short-levy or short payment can be rectified only within a period of six months from the relevant date. The circumstances referred to in the proviso do not apply because no such claim is made on behalf of the respondents.

8. On the question of jurisdiction, Mr. N. Joshi, learned Additional Central Government Standing Counsel appearing for the respondents, contends that the show-cause notice was issued on 6-10-1979 itself and therefore, the introduction of Section 11A of the Act and the deletion of Rules 10 and 173-J will not affect the validity of the proceedings. Here again, I am of the opinion that the date of the order is more relevant on the facts of this case. There being no saving clause enabling the continuance of the show-cause notice issued before the deletion of the relevant Rules, it has to be held that the order passed after the deletion of the Rules is without jurisdiction.

9. For all the above reasons, I allow the Writ Petition and quash the order of the first respondent in C. No. V/15A/3/65/79 dated 20-5-1981. There will be, however, no order as to costs.