

(2000) 09 MAD CK 0049

In the Madras High Court

Case No : Writ Miscellaneous Petition No's. 23542, 26946, 28306, 28607 to 28609, 28761 and 29620 of 1997, 226 and 5941 to 5946 of 1998 and 1840, 4596 and 4597 of 2000 in Writ Petition No's. 14672, 17001, 17899, 18118 to 18120, 18253, 18792 of 1997, 167/98 and 299

Madras Steel Re-rollers Association

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 29-09-2000

Acts Referred:

Central Excises and Salt Act, 1944 — Section 37, 3A, 3A(2)
Finance Act, 1997 — Section 81
Reserve Bank of India Act, 1934 — Section 45S

Citation : (2001) 129 ELT 316

Hon'ble Judges : P. Sathasivam, J

Bench : Single Bench

Advocate : A.L. Somayaji, C. Natarajan and Arvind P. Dattar, s and Pushpa Seetharaman, for the Appellant; K. Veeraraghavan, ACGSC, for the Respondent

Judgement

P. Sathasivam, J.—W.P. No. 14672/97 is filed by Madras Steel Re-rollers Association. Other writ petitions are filed by individual companies. Both the Steel Re-rollers Association and the individual companies have approached this Court to issue a writ of declaration to declare Rule 5 of Hot Re-rolling Steel Mills Annual Capacity Determination (Amendment) Rules, 1997, inserted by Notification No. 45/97-Central Excise (NT), dated 30-8-1997, as ultra vires and contrary to Section 3A of the Central Excise Act, 1944 and to Sub-rule (3) of the said Rules. Tamil Nadu Steel Re-rollers Council has filed similar writ petition, namely, W.P. 167 of 1998 seeking similar prayer. Petitioners in W.P. 18792 of 1997 and in W.P. No. 2992 of 2000 question the consequential orders passed by the authorities pursuant to Rule 5 of the Rules referred to above. The petitioners in W.P. No. 17899 of 1997 and 18253 of 1997 challenge the Notification Nos. 27/97 and 33/97, respectively.

2. On the basis of the various averments made in the affidavit as well as

contentions, this Court has granted interim injunction and stay as claimed by the petitioners. Aggrieved by the interim orders, the respondents have filed application for vacation of those interim orders. In view of the fact that presently this Court is concerned with the applications for stay, injunction and the other applications filed by the respondents for vacation of those interim orders, it is not necessary for this Court to go into the various contentions raised with regard to the validity of Rule 5 of the Hot Re-rolling Steel Mills Annual Capacity Determination (Amendment) Rules, 1997, inserted by Notification No. 45/97-Central Excise (NT), dated 30-8-1997. However, for the purpose of ascertaining prima facie case, it is but, proper to refer the rival contentions.

3. I have heard Mr. C. Natarajan, Senior Counsel, Mr. A.L. Somayaji, Senior Counsel, Mr. Arvind P. Dattar, Senior Counsel, Mrs. Pushpa Seetharaman, learned Counsel for the petitioners and Mr. K. Veeraraghavan, Additional Central Government Standing Counsel. The members of the petitioner association as well as the other petitioners, who are individual companies-Re-rolling Mills manufacture MS Rods, Tor Steel, Angles, Channels, Flats, Squares, etc., from ingots and billets. The product manufactured by the petitioners is an excisable commodity and therefore they took out registration under the Central Excise Act (hereinafter referred to as the Act). Excise is a duty on excisable goods manufactured or produced in India. The Act provides for charging of duty, valuation and the procedure for recovery etc. The Central Excise Rules framed under the powers vested u/s 37 of the Act prescribe the procedures, forms, etc. The rate of duty for each excisable goods is prescribed under the Central Excise Tariff Act. Notifications are issued from time to time reducing the rate of duty or granting exemption. The Central Government introduced a system of levying excise duty based on the annual production capacity. On 25-7-1997 the first Respondent introduced the system for levying excise duty on the production capacity of factories and thus introduced Section 3A in the Act. By introduction of the new system u/s 3A of the act read with Rules, an assessee has to pay excise duty on the annual production capacity so determined and arrived at basing on the formula prescribed under the said Rules read with Rule 5. The Government of India, the first respondent herein, by Notification No. 45/97, Central Excise (NT), dated 30-8-1997, inserted Rule 5 amending the said Rules. Rule 5 (inserted by Notification No. 45/97-C.E. (N.T.) dated 30-8-1997 :-

"In case the Annual capacity determined by the formula in Sub-Rule (5) of Rule 3 in respect of a Mill, is less than the actual production of the Mill during the financial year 1996-97, then the annual capacity so determined shall be deemed to be equal to the actual production of the Mill during the financial year 1996-1997".

4. I have already stated that with regard to the validity of Rule 5, several contentions have been raised. These aspects have to be considered only at the time of final hearing. However, the learned senior counsel appearing for the petitioners, after taking me through the newly inserted Rule 5, would contend

that it goes contrary to Section 3A of the Act. According to them, section of the Act prescribes levy of excise duty based on annual capacity of production, whereas Rule 5 prescribes levy of excise duty based on actual production of the Mill during 1996-97. It is stated that a rule cannot go contrary to the Act and it has to coincide Section 3A. It is stated that the Rule 5 is ultra vires and contrary to the provisions of the Central Excise Act. It is also contended that when the object is to get more revenue based on annual capacity and when such method is permissible, the first respondent cannot go back to make the levy by actual production by invoking Rule 5. It is also stated that the first respondent had failed to take into account the relevant factors like power cuts, shortage of raw materials, labour unrest, recession in the market, etc., and Rule 5 goes contrary to the mandatory formula prescribed u/s 3A. It is further stated that when the formula is prescribed for determination of the annual production capacity, Rule 5, by deeming the production of 1996-97, is not at all relevant and the basic concept itself is defeated.

5. On the other hand, on the side of the respondent, in the counter affidavit filed by the Assistant Commissioner of Central Excise, Chennai-1, it is stated that the legislature, in its wisdom while enacting the law, clearly stipulated in Section 3A of Central Excise Act, which is an amended provision inserted by Section 81 of the Finance Act, 1997, with effect from 14-5- 1997, that the above section was inserted only to prevent the evasion of duty pertaining to such goods. It is abundantly clear from Section 3A that the amended provision was inserted only to prevent evasion of duty in that particular category of goods. Rule 5 is made within the powers conferred u/s 3A of the parent Act. Rule 5 of the Rules is squarely come under the statutory concessions "such factor or factors relevant to the annual capacity of production" provided u/s 3A, Sub-clause (ii). It is further stated that in order to facilitate the manufacturer to pay the duty, the respondents have reduced the quantum of duty payable on the annual capacity of production. Such a concession to the manufacturer is legally sustainable and the respondents are to see that the manufacturer are paying their duties without evasion. It was for this purpose, Rule 5 was introduced to avoid possible evasion. Rules 3 and 5 of the Rules operate in such a manner that whenever an assessee produces goods he cannot escape from the levy of duty and there are clear and proper checks and balances found in both the rules. The aforesaid rules have been drafted on the basis of scientific formula and are based on proper facts and reasons. The present impugned Notification Nos. 45/97, 27/97 and 23/97 which was also under challenge before the Delhi High Court and against the order of stay of the said Notification by the Delhi High Court, in the Special Leave Appeal Nos. 22892-22903 of 1997, at the instance of Union of India, the Hon'ble Supreme Court was pleased to stay the order passed by the Delhi High Court, by order dated 9-1-1998. By pointing out the order of the Hon'ble Supreme Court, it is stated that the writ petitioners are also liable to pay the levy as per the law in force.

6. As stated earlier, though the three senior counsels exhaustively argued in

order to continue the interim injunction and stay till the disposal of the writ petitions, after going through the impugned rule as well as other provisions from the Act and the stay order granted by the Delhi High Court with regard to Notification No. 45/97 as well as other Notifications and the order of the Supreme Court staying the order passed by the Delhi High Court, I am not inclined to continue the interim orders as claimed by the petitioners. It is true that the scheme itself has been withdrawn with effect from 1-3-2000 and the levy relate to the period 1-9-1997 to 1-3-2000, prima facie I am satisfied that the amended provision was inserted only to prevent evasion of duty.

7. Further, the learned Additional Central Government Standing Counsel has brought to my notice the decision of Andhra Pradesh High Court, reported in Sarwotham Ispat Limited and Another Vs. Government of India, Ministry of Finance, (Department of Revenue) and Others, , which relates to steel making units. The division Bench of the Andhra Pradesh High Court in similar set of facts pertaining to steel making units dismissed all the writ petitions. The perusal of the said decision supports the contention raised by the learned Counsel for the respondents. Further, as stated earlier, prima facie I am of the view that the very idea of introducing Section 3A in the Central Excise Act and in order to fulfil the said object, Rule 5 of the Rules was introduced, I am not impressed with the factual details furnished by the learned Senior Counsel for the petitioners.

8. Apart from the above aspects, it is brought to my notice that Notification Nos. 45/97,27/97 and 33/97 which are impugned in these writ petitions as well as other Notifications were challenged before the Delhi High Court by various companies. The Hon"ble Delhi High Court in Supreme Steels and General Mills Vs. Union of India, CM. 8753/97 in CM. 3492/97 in the case of Supreme Steels and General Mills and Ors. v. Union of India and Ors., after holding that there is a prima facie case in favour of the petitioners granted stay of operation of various Notifications, including Notification No. 45/97, by its order, dated 27-10-1997. Aggrieved by the said stay order, the Union of India preferred Special Leave Appeal in 22892-22903 of 1997 in the Supreme Court and the Hon"ble Supreme Court by the order, dated 9-1-1998 1998 (98) E.L.T. A210 stayed the order passed by the Delhi High Court. There is no dispute with regard to the order of the Supreme Court staying the order passed by the Delhi High Court with regard to various Notifications including Notification Nos. 45/97,27/97 and 33/97. Based on the order of the Supreme Court, I am of the view that the present writ petitioners are also liable to pay the levy as per the law in force.

9. No doubt, the learned Senior Counsel appearing for the petitioners have brought to my notice the order passed by the Supreme Court in C.A. Nos. 52-63 of 1998, dated 21-4-1998, wherein Their Lordships have passed an order, namely, "while the matters are pending in this Court, the Union Government shall not take any penal or coercive measures under the Notification of 7/98-C.E. (N.T.), dated March, 10,1998. It will be open to the manufacturers to submit applications on the basis of actual production and if any such application is

submitted, the same shall be duly considered by the competent authority in accordance with the rules". However, on the side of the respondents it is clarified that as far as SLP No. 325/98 (C.A. 52-63/98) is concerned, it is totally a different matter altogether. According to them, it relates to mandatory penalty provisions found in Notification 7/98-C.E.(NT), dated 10-3-1998, issued under powers conferred u/s 37 of the Central Excise Act, 1944. It is further clarified that it is no way connected to the present case in which the challenge is only with regard to the constitutionality of Notification 45/97, dated 30-8-1997, issued in exercise of powers conferred by Sub-section 2 of Section 3A of Central Excise Act, 1944, along with other connected notifications. In the light of the clarification made by the respondents, the said contention of the petitioners is also liable to be rejected.

10. Under these circumstances, more particularly in the light of the order of the Hon"ble Supreme Court, dated 9-1-1990, staying the operation of the order passed by the Delhi High Court as referred above, I am of the view that the writ petitioners are liable to pay the levy as per the law in force. In this regard, it is worthwhile to refer the recent pronouncement of the Hon"ble Supreme Court, reported in Bhavesh D. Parish and Others Vs. Union of India and Another, . In the said decision, Their Lordships, after considering constitutionality of Section 45-S of the Reserve Bank of India Act, 1934 and grant of stay of provisions of Section 45-S by various High Courts, have held in paragraphs 30 and 31 thus :-

"30.....When considering the application for staying the operation of piece of legislation, and that too pertaining to economic reform or change, then the courts must bear in mind that unless the provision is manifestly unjust or glaringly unconstitutional, the courts must show judicial restraint in staying the applicability of the same. Merely because a statute comes up for examination and some arguable point is raised, which persuades the courts to consider the controversy, the legislative will should not normally be put under suspension pending such consideration. It is now well settled that there is always a presumption in favour of the constitutional validity of any legislation, unless the same is set aside after final hearing and, therefore, the tendency to grant stay of legislation relating to economic reform, at the interim stage, cannot be understood. The system of checks and balances has to be utilised in a balanced manner with the primary objective of accelerating economic growth rather than suspending its growth by doubting its constitutional efficacy at the threshold itself.

31. While the courts should not abrogate (sic abdicate) their duty of granting interim injunctions where necessary, equally important is the need to ensure that the judicial discretion does not abrogate from the function of weighing the overwhelming public interest in favour of the continuing operation of a fiscal statute or a piece of economic reform legislation, till on a mature consideration at the final hearing, it is found to be unconstitutional. It is, therefore, necessary to sound a word of caution against intervening at the interlocutory stage in

matters of economic reforms and fiscal statutes."

As observed by Their Lordships, there is a presumption in favour of the constitutional validity of any legislation and unless the same is set aside after final hearing, I am of the view that there cannot be any interim order nullifying the amendment made. By applying the ratio laid down by the Supreme Court in the above decision and also of the fact that the stay granted by the Delhi High Court with regard to the impugned Notifications 45/97, 27/97 and 33/97 and other notifications was stayed by the Supreme Court, I hold that the writ petitioners are liable to pay the levy as per the law in force.

11. In the light of what is stated above, the interim injunction and stay granted in all the writ petitions are vacated. Consequently, W.M.P. Nos. 23542, 26946, 23306, 28607 to 28609, 29781 and 29620 of 1997, 226 of 1998, 4596 and 4597 of 2000 are dismissed and W.M.P. Nos. 5941 to 5946 of 1998 and 1840 of 2000 are allowed.