

(2007) 12 MAD CK 0161
In the Madras High Court
Case No : Writ Appeal No. 421 of 2005

Madura Coats Limited

APPELLANT

Vs

The Commissioner of Central Excise

RESPONDENT

Date of Decision : 20-12-2007

Acts Referred:

Central Excise Rules, 1944 — Rule 173B, 173F, 173G, 173Q, 49(1)
Central Excises and Salt Act, 1944 — Section 11A, 11AB, 11AC, 2, 3
Constitution of India, 1950 — Article 226

Citation : (2007) 12 MAD CK 0161

Hon'ble Judges : K. Raviraja Pandian, J; Chitra Venkataraman, J

Bench : Division Bench

Advocate : Sriram Panchu for T. Mohan, for the Appellant; V.T. Gopalan, Addl. Solicitor General for T.S. Sivagnanam, SCCG, for the Respondent

Final Decision : Dismissed

Judgement

K. Raviraja Pandian, J.—In this writ appeal, the appellant assailed the order of the learned single Judge dated 29.1.2005 made in

W.P.No.17263 of 2001.

2. The appellant filed the said writ petition seeking for the relief of writ of prohibition prohibiting the respondent from proceeding further in relation

to show cause notice No.13/2001 dated 3.7.2001.

3. The learned single Judge by reason of the impugned order dismissed the writ petition with liberty to file detailed reply within a period of two

weeks from the date of receipt of copy of that order and further directed the respondent to proceed further on receipt of such reply in accordance

with law. The correctness of the said order is put in issue in this appeal.

4. Mr. Sriram Panchu, learned Senior Counsel appearing for the appellant has

contended that whether the process of cropping of grey fabrics would amount to manufacture for the purpose of Section 2(f) of the Central Excise Act, 1944 was settled by the Supreme Court in the case of Mafatlal Fine Spinning And Manufacturing Co. Ltd. Vs. Collector of Central Excise, Bombay, to the effect that "calendering" and "shearing" did not cease to be unprocessed fabric and thereby did not amount to manufacture. When the issue has been thus settled by the Supreme Court, the learned Judge was not correct in relegating the appellant to go before the authorities concerned by way of filing reply to the show cause notice. He further contended that the notification issued u/s 5A of the Central Excise Act, 1944 could never govern the charging Section - Section 3 and in the light of the categoric exposition of law by the Supreme Court as aforesaid in Mafatlal Fine Spinning And Manufacturing Co. Ltd. Vs. Collector of Central Excise, Bombay, and 2006 (203) E.L.T. 179 (S.C), the single Judge should have prohibited the respondents from proceeding further.

5. Per contra, the learned Additional Solicitor General Mr. V.T. Gopalan inter alia contended that the learned single Judge was perfectly right in directing the appellant to resume the jurisdiction of the respondent by giving reply to the show cause notice. The issue in this case involved adjudication of disputed questions of fact. The appellant, being a manufacturer of both grey and processed variety of cotton and man made fabrics, falling under Headings 52 and 55 of the Central Excise Tariff Act, 1985, having facilities including plant and equipment, for carrying out bleaching and dyeing process within the factory, and also clearing woven fabrics, both for home consumption and exports and the appellant in the guise of notification dated 8.11.1992 as amended and notification dated 24.11.1979 cleared the grey fabric, it is for the authorities to consider whether the contention of the appellant is correct on the basis of the materials. Without the necessary material, this Court while exercising the jurisdiction under Article 226 cannot, rather need not venture to resolve the issue. He further contended that under the Finance Act, 1975, substantial changes were incorporated in the Tariff Headings by substituting them with new notification attaching certain conditions thereto. In terms of the notification dated 16.3.1995, the appellants are disentitled from availing the exemption benefit in respect of the cropped grey fabrics. The exemption has been made

available only in those cases where the manufacturer did not have the facilities for carrying out bleaching, dyeing or printing with the aid of power

or steam. The appellant in order to avoid payment of duty and to avail exemption cleared the fabrics subjected to the process of cropping, by mis-

declaring the same as grey fabrics and not subjected to any process. If the contention of the appellant is right that they are entitled to the benefit of

the notification, it is open to the appellant to clear the cloud cast upon them before the authorities concerned.

6. We heard the argument of the learned Counsel on either side and perused the materials on record.

7. The appellant, being manufacturer of threads and textiles, unprocessed and processed varieties of cotton fabrics, and man made fabrics for

home consumption and export, is coming within the purview of Central Excise Act. While that being so, the appellant was visited with a show

cause notice NO.13/2001 dated 3.7.2001 issued by the Deputy Commissioner of Central Excise, Madurai. The show cause notice proceeded

that the appellant have contravened the provisions of Central Excise Act, 1944, and the Central Excise Rules, 1944, and the contraventions were

stated as follows:

i) Rule 173B of the Central Excise Rules in as much as the appellant have mis-declared the cropped fabrics as unprocessed fabrics in order to

avail exemption from payment of Central Excise Duties;

ii) Rule 53 of Central Excise Rules in as much as the appellant have not kept the daily stock account of dutiable cropped fabrics in their RG1

records properly;

iii) Rule 54 of Central Excise Rules in as much as the appellant have not furnished the details of the manufacture of cropped fabrics in the RT-12

returns submitted;

iv) Rule 9(1) of Central Excise Rules with Rule 49(1) *ibid*, in as much as the excisable goods were cleared without payment of appropriate duty;

v) Rule 173F of Central Excise Rules in as much as duty liability was not determined and paid on the excisable goods removed and

vi) Rule 173 G of Central Excise Rules in as much as the appellant have not followed the procedures prescribed therein and not produced the

statutory records for verification.

In respect of those violations, the appellant was directed to show cause to the Commissioner of Central Excise as to why

i) the fabrics as detailed in Annexure VI to the Statement of Facts in question should not be classified as cropped fabrics under appropriate tariff

entries for the purpose of levy of Central Excise duties as applicable,

ii) the duty of excise of Rs.8,2261,848/- (Rs.4,46,77,977/- as BED and Rs.3,75,83,871/- as AED (GSI) payable on the clearances of the said

excisable goods treating them as cropped fabrics (as detailed in Annexure ? VI to the Statement of Facts) during the period between June '96 to

Oct'2000 should not be demanded under proviso to Section 11A of the Central Excise Act, 1944,

iii) a penalty should not be imposed on them u/s 11AC of the Central Excise Act,

iv) an interest should not be levied u/s 11AB of the Central Excise Act, and

v) a penalty should not be imposed on them under Rule 173Q of the Rules.

The appellant was further required to produce at the time of showing cause all the evidence upon which they intend to rely in support of their

defence. The appellant was also required to file the reply within thirty days from the date of receipt of the notice.

8. The above said notice is put in issue in the writ petition on the premise that the entire issue as stated in the show cause notice has been settled in

favour of the appellant in the decision of the Supreme Court in Mafatlal Fine Spinning And Manufacturing Co. Ltd. Vs. Collector of Central

Excise, Bombay, and Indore Wire Company Limited v. Union of India reported in 2006 (203) E.L.T. 179 (S.C)

9. The decision on which much reliance has been placed by the appellant i.e., Mafatlal Fine Spinning And Manufacturing Co. Ltd. Vs. Collector of

Central Excise, Bombay, to contend that the respondent has no jurisdiction to issue the show cause notice was one that was filed before the

Supreme Court u/s 35L of the Central Excise and Salt Act, 1944 against the common appellate order of the Customs, Excise & Gold (Control)

Appellate Tribunal made in properly laid appeal in which it was found that in respect of the deferred duty on yarn, the appellant therein was liable

to pay interest at 3 percent of the duty under Rule 49A (2) of the Central Excise and Salt Rules, 1944, as according to the Tribunal, the cotton-

fabric cleared is not "Grey" (unprocessed) cotton-fabric. From that, it is evident

that as against an adjudicated order, by placing all factual matters before the adjudicating authority, an appeal was filed before the Customs, Excise & Gold (Control) Appellate Tribunal and the Customs, Excise & Gold (Control) Appellate tribunal has passed an order on the basis of the material against the assessee therein, which was taken on appeal u/s 35L of the Central Excise and Salt Act to the Supreme Court. Likewise, the case of Indore Wire Company Limited v. Union of India reported in 2006 (203) E.L.T. 179 (S.C) was also one arising out of the original order passed by the authorities and the ultimate order of the Customs, Excise & Gold (Control) Appellate Tribunal on the applicability of the Tariff Item Nos.26AA(1a) or 33B of the Central Excise and Salt Act, 1944 in regard to the goods manufactured by appellant, the correctness of which has been questioned before High Court by way of writ.

10. It is not the case, rather it cannot be the case of the appellant that the respondent, who is exercising the power under the Central Excise Act, has denuded of his jurisdiction or he has no jurisdiction to issue the show cause notice on the view that the assessee contravened the provisions of the Act and Rules on the basis of the material gathered by him. On the other hand, the respondent is vested the power to issue the show cause notice in cases where on the basis of the material available before him or gathered by him, he is of the view that the assessee has violated the provisions of the Central Excise Act or the Rules, as the case may be. Even the reasons stated in the show cause notice are not sustainable on the face of the facts and as well as in law. It is well open to the appellant to place all the materials including the decision of the Supreme Court, which the appellant relied on in his favour before the respondent and satisfy the respondent and get an order in his favour. On the other hand, if the respondent even on the material placed by the appellant is not satisfied and passed ultimate order with which he has jurisdiction, the appellant can very well agitate the matter before the appellate authority.

11. On receipt of the show cause notice, rushing up to the High Court by invoking Article 226 without facing the charges has been dealt with by the Apex; Court in several cases and in all those cases, the appellant was directed to go before the authorities and place the facts. The Supreme Court in the case of Union of India and Ors. v. Tata Engineering & Locomotive Co.

Ltd. etc. AIR 1998 SCC 287 in more or less comparable

facts, to the defence that the issue is decided in favour of the appellant therein, held as follows: ""4. In our view, this writ petition should not have

been entertained by the High Court at all. The Assistant Collector is entitled to complete the assessment as he thinks fit in exercise of his judgment

and according to his understanding of the law and facts. For this purpose, he can call for and examine whatever documents he considers relevant.

If the Assistant Collector fails to follow any judgment of the High Court or this Court, the assessee had adequate statutory remedies by way of an

appeal and revision against the assessment order. The Court should not try to control the mode and manner in which an assessment should be

made. If the Assistant Collector is of the view that enquiries are necessary to be made as to the price at which trucks were sold at the Regional

Sales Offices, the Court cannot stop him from making such enquiries.

5. Mr. Sorabjee, appearing on behalf of the respondents, has complained that the assessments are going on endlessly and without due regard to an

earlier judgment of the Patna High Court in respect of an earlier assessment year on the very same issues. Whether the controversy raised in this

case is covered by an earlier judgment of the High Court is a matter to be decided by the Assistant Collector, He will have to decide all questions

of fact and law. He has to make whatever enquiries he thinks necessary for determination of the value of excisable goods. The High Court in

exercise of its jurisdiction cannot give guidance to Assistant Collector about the manner and mode in which the assessment should be made.

6. We are of the view that the High Court was in error in entertaining this writ petition. Therefore, the appeal is allowed and the judgment of the

High Court under appeal is set aside. There will be no order as to costs.

12. In the show cause notice dated 3.7.2001, number of violations have been catalogued to the effect that the appellant has violated the same.

These are the factual issues and they could very well be settled with the authorities. In a somewhat similar facts of the case, the Supreme Court in

the case of Union of India v. Hindalco Industries reported in (2004) 135 STC 281, has held that

There could be no doubt that in matters of taxation, it is inappropriate for the High Court to interfere in exercise of jurisdiction under article 226 of

the Constitution of India either at the stage of show cause notice or at the stage of assessment where alternative remedy by way of filing a reply or

appeal, as the case may be, is available but these are limitations imposed by the Courts themselves in the exercise of their jurisdiction.

The Supreme Court in the said judgment has further observed that:

Had the High Court declined to interfere at the stage of show cause notice, perhaps this Court would not have been inclined to entertain the special

leave petition

The said case is also a pointer that the High Court normally should decline to entertain and interfere at the stage of show cause notice.

13. The Apex Court in the case of Siemens Limited v. State of Maharashtra and Ors. reported in (2006) 12 SCC 33 has held that ordinarily a writ

court may not exercise its discretionary jurisdiction in entertaining a writ petition questioning a show cause notice unless the same inter alia appears

to have been without jurisdiction. In the case on hand, the jurisdiction of the authority, who issued the notice, as already stated, cannot be

questioned, as he is very much vested with the power to issue the show cause notice. But in the Siemens case, the writ petition was maintained on

the ground that the parties have pre-determined the issue.

14. In the case of State of H.P. and Others Vs. Gujarat Ambuja Cement Ltd. and Another, also, the Supreme Court in unequivocal terms has held

that when a person approaches the High Court without availing the alternative remedy, the Court ought to ensure that he has made out a strong

case or there exist good grounds to invoke the extraordinary jurisdiction, where under a statute, there was an allegation of infringement of

fundamental rights or when on the undisputed facts the taxing authorities were shown to have assumed jurisdiction which they did not possess.

15. The Division Bench of this Court in the case of Tamilnadu State Transport Corporation v. C. Durai and Anr. 2005 W.L.R. 136 has held that

no writ petition should ordinarily be entertained when there was an alternative remedy except in very rare cases if there is some compelling reason

to do so. Even if there was violation of natural justice or the order was without jurisdiction, the writ petition could still be dismissed if there was an

alternative remedy. In the said judgment, the decision of the Supreme Court in U.P. State Bridge Corporation Limited v. U.P. Rajya Setu Nigam

Karmachari Sangh (1998) 4 SCC 268 was relied on wherein the Supreme Court has held that if there was a specific remedy available under a statute a writ petition should not be entertained.

16. In L.K. Verma Vs. H.M.T. Ltd. and Another, the Supreme Court held that except in cases, where the Court or Tribunal lacks inherent jurisdiction or for enforcement of a fundamental right or if there has been a violation of a principle of natural justice or where vires of the act was in question, the Court shall not exercise its jurisdiction under Article 226 to test the correctness of the show cause notice, particularly, when factual issues are involved.

17. In this case, as already stated, so many violations, which are factual in issue, have been alleged against the appellant and the appellant was only required to submit his explanation to the alleged violations, it is not expected a writ Court on the basis of an affidavit and counter affidavit, resolve the disputed questions of fact. Furthermore, what is impugned is only a show cause notice calling upon the petitioner to submit its reply. It is not a final determination. The respondent would have very well dropped the proceedings, if the cause to be shown by the petitioner are well founded. Hence, we are not able to appreciate the argument of the learned Counsel Mr. Sriram Panchu that the appellant need not undergo the ordeal of replying to the show cause notice.

18. For the foregoing reasons, we are of the view that there is no point merit consideration in the writ appeal and the writ appeal is dismissed. However, the appellant is hereby given time upto 21.1.2008 to file their objections if any to the impugned show cause notice with relevant supporting materials, if they are so advised and thereupon it is for the respondent to proceed further in accordance with law.